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Closing Remarks

SOIA MENTSCHIKOFF*

It gives me great pleasure to welcome you here today and to be here myself. Sitting here this morning listening to the discussions took me back twenty-five years or more to the discussions in the drafting of the Uniform Commercial Code, which were somewhat like these, yet different as well.

Since my arrival in Miami in 1974, it has seemed to me that the Miami area and Florida in general, would be a natural gateway for financing trade and investment in Latin America, and for helping the Latin American investor and trader in the United States. I think that this is becoming a more widely accepted perception than it was five years ago.

I view the program here today as the beginning of an educational effort to alert lawyers to the possibilities and the problems which are inherent in such a development process. Particularly in the area of trade are such problems evidenced, although there are also problems in the realm of investment which can hinder trade. These investment problems appear particularly where lenders are taking equity interests—as opposed to loan interests—in projects such as factories.

The nature of Latin American trade fascinates me. One thing that I noted with great particularity when examining letters of credit which had been issued under grants by the Agency for International Development (AID) was: who was buying what, from whom, and for what purposes. As it turns out, except in Brazil, a good portion of the AID funds were used for building factories and other similar projects in Latin America, and thus went from the U.S. parents to their subsidiaries. Brazil, in a sense, is different from any other Latin American nation as it is composed both of highly sophisticated European traders who have become Brazilian citizens, as well as the very poor who are not a part of the trading sector. Brazil, therefore, can be classified, for trading purposes, as a European nation rather than as a developing one, if I may use that kind of distinction in terms of utilization of all phases of international trade and finance.

The distinction still seems viable today, although other nations are beginning to follow the Brazilian pattern, as more Europeans and Japanese become citizens of various Latin American countries. In

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other words, it seems to me that the area of expertise and the knowledge of comparative law, which are the elements necessary to do financing according to the methods with which we are familiar, are becoming more prevalent throughout Latin America. When, for example, Professor Kozolchyk spoke about German law, my impression was that he was talking about the possibilities for changes in the Latin American legal structure that will bring principles of German law to bear on trade and finance, especially in the area of security.

I have also noted with great joy that everyone is still concerned with the Uniform Customs and Practice (UCP).¹ The UCP is not a law, not a code, and is not necessarily either custom or practice; it is merely a piece of paper which is incorporated by reference by some banks into some credits. It is especially important for lawyers to remember this aspect of the UCP so that they do not get confused about its significance. New York banks' counsel are subject to confusion in this area because an amendment to Article Five of the Uniform Commercial Code (UCC) was forced through, which amendment states that Article Five will not be applicable where the UCP is applicable.² This provision is built to lead to considerable problems and confusion.

Professor Kozolchyk's discussion of the case of *Dixon, Irmaus & Cia. v. Chase Manhattan Bank*³ is especially relevant here. The letter of credit involved in that case was one which was given by the Chase National Bank for goods which had landed in Belgium prior to May 10, 1940, the date of the German invasion of Belgium. Prior to May 10, 1940, there existed a general and uniform custom among New York banks, exporters and importers to the effect that in lieu of a missing bill or bills of lading, an issuing bank would accept the guaranty of another bank if the issuing bank determined the guaranty to be satisfactory in form, and if it was satisfied as to the responsibility of the bank issuing the guaranty. After May 10, 1940, there is testimony that this practice had changed so that honor was optional with the issuing bank. The guaranty issued in *Dixon* stated: "In consideration of your accepting the above described draft, we hereby

1. Uniform Customs and Practice for Documentary Credits, I.C.C. Publication No. 290 (1974 Revision). The provisions, definitions, and articles contained in the UCP are incorporated into many, if not most, of the international documentary credits issued today. The requirements of the UCP are binding on all parties to the letter of credit unless otherwise agreed.

2. N.Y. U.C.C. § 5-102(4) (McKinney).

3. 144 F.2d 759 (2d Cir. 1944), *cert. denied*, 324 U.S. 850 (1945).

agree to hold you harmless from any and all consequences which might arise due to the following discrepancy: Only one copy presented out of a set of two bills of lading issued." The bank was a leading New York bank. The court found that the existence of the custom was established beyond dispute, that the new "custom" could not become a custom by fiat, and that this ground for Chase's dishonor was invalid.

The notion that there can be an instant change in "customs and practices" does not fit the meaning of these words, for the basic idea of either a "custom or practice" involves commercial activities which have gained acceptance through use over a period of time.⁴ There have been many revisions of the UCP. There were changes, for example, in 1962 and in 1974. These changes have occurred not by way of custom, but rather as a result of "negotiation": attorneys have gotten together and asked each other what they ought to do to bring the UCP up to date. Unless things have changed dramatically in recent years, the UCP terms are drawn primarily by international bank counselors, many of whom do not understand much about trade since they represent virtually no traders or shippers. Thus, the result is not what one might call a truly negotiated document where buyers and sellers have conferred at the same table with the banks, and the buyers' local banks and the sellers' local banks were represented along with the international banks. When such changes are made, the results may be very good and indeed, very helpful, but they can also be very bad. The thing that is astonishing is that, on the whole, the resulting changes are not too bad.

The same is true of authorities to pay, even though these may be contained in the UCP. Authorities to pay were used primarily in the Asiatic trade, and before that, in our Midwestern trade in the nineteenth century when people bought cattle and hogs for shipment East. These individuals carried authorities to pay with them; nobody really thought that one could buy cattle and issue a draft and then when the draft arrived, instruct the person authorized to pay to refuse to do so on the grounds that the cattle were lost.

If an authority is issued and payment is taken in reliance upon the document, the worst that can happen, of course, is that it will be revoked prior to the action being communicated. All offers are revocable, but all offers are also subject to acceptance and to consideration by action and reliance, and need communication to revoke.

4. See U.C.C. § 1-205.

Thus, if there is reliance, I would not be at all certain that calling an authority to pay an "offer" would make it revocable. In the famous contracts case of *Schnell v. Nell*,⁵ a fellow comes in with the money and the other party says, "I revoke." I do not think one can do that under modern law after there has been reliance.

When dealing with changes in customs and drafting credit agreements, lawyers should remember basic contract law as it applies to the underlying transaction and should not assume that the UCP contains the entire body of applicable law.

Another thing that I would like to mention regarding the discussions here this morning is that there are other methods of financing both buyers and sellers aside from what is being done by international banks. There are very few banks of "international repute" in the Florida area at the present time. Thus, local banks are being used here, and throughout other parts of the country, to do this type of financing. This works as follows: let us say that a manufacturer is located in an area where there is no international bank to issue a letter of credit, and he wants to buy goods from abroad to use in his manufacturing plant. He can go to his own local bank and request a letter of credit, which we will assume is required by the sales contract. While the local bank does not have the international reputation which is expected by the foreign seller, it will almost certainly be a correspondent of the type of bank that does: Citibank or First National of Chicago, for example. The international bank will then actually issue the credit at the request of the local bank, its immediate customer.

Now, the buyer is also the customer of the issuing bank because the credit is issued in its behalf, so that bank will have two customers: the buyer and the local requesting bank. Thus, when the documents covering the goods arrive and are presented with the drafts to the issuing bank, the issuing bank will then obtain reimbursement from the bank which is its direct customer and that bank will be paid by its customer.

The local bank's customer—the buyer—may not have the money to immediately reimburse its bank for payment. Despite this fact, the buyer should not have the slightest difficulty in financing the deal. He will be financed by his local bank if he has a good ongoing business reputation and the goods themselves have some value. The international bank will not be concerned with the buyer's financing

5. 17 Ind. 29 (1861)

arrangements in this case because it is not involved in the transaction except as the issuer of the credit, for which it will get its commission.

Such practices occur on the United States end of buyer financing. There are different problems on the other side, where a small European buyer or an underdeveloped nation needs to finance its purchase. These countries do not have Article Nine of the UCC, of course, which simplifies financing arrangements in the United States. In other countries, even where a security interest may be perfected, the underlying reality of the situation is that it is not adequate protection. The essence of secured financing is that the secured party can, upon default, get the goods back, dispose of them, and recoup a major part of his loan. In underdeveloped countries, however, there may be no real market for the resale of goods, particularly hard goods such as large equipment. In the event that you are dealing with this type of situation, you are going to have to use some other financing method. The United States government offers programs through the Export-Import Bank and other agencies (some of which have been discussed or mentioned here today) through which you can get your loan guaranteed. Apart from that, the bank can require a special account from its customer. The special account is cash collateral and is a sure way of saying, "Put up the cash and I will issue the credit." There are very few types of collateral that are better than cash, but you must convince a court that in the case of a customer declaring bankruptcy, the account is more than simply a deposit creating a debtor-creditor relationship.

In summary, I will say that the area of letters of credit and other international financing is really a fascinating one. The many possibilities for different transactions are causing lawyers and bankers to learn to put each deal together with a view toward recognizing the underlying realities of each situation. I am delighted that so many have shown an interest in this field.

Although at one time the general belief was that Atlanta would take over the southern end of financing Latin America, I continue to believe that the Miami area has a much stronger hold on it both now and in the future. What is clear, however, is that we need a sufficient number of lawyers educated in the legal aspects of international trade both in the Bar and on the Bench. This is important so that there will be intelligent law in the area from which to work and people who will be able to grasp all aspects of these transactions—the "hands and the feet"—and make them work properly. One of the nice things about this Conference is that it is a beautiful combination of the hands and the feet, and it is also theoretical, which is what legal education is all about.