Highways and Byways of NAFTA Commercial Law: The Challenge to Develop a Best Practice in North American Trade

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I. DEGREES OF UNIFORMITY; POSITIVE AND "LIVING" LAW

NAFTA has promulgated free and fair trade for the North American region. Free trade, especially among neighboring nations with high volumes of transactions, presupposes a high degree of commercial law uniformity and a standardization of business practice; as the volume of regional trade increases, so does the need for uniformity and standardization. If thousands of trucks, railroad cars and aircraft containers cross national boundaries daily, business practices and the respective legal systems must not only enable such crossings, but also keep them cost effective. NAFTA also requires that each member nation ensure that its trade practices are fair. Each nation's legal formulas of fairness must be guided by the NAFTA principles of national treatment and administrative transparency. NAFTA's principle of national treatment embodies a standard of fairness derived from the behavior of regular participants in economically developed marketplaces. According to this marketplace standard of fairness, each party to a contract must treat the other in the same manner in which a regular participant of the marketplace would want to be treated when viewing his own advantage. Except where expressly excluded or reserved by each member nation, NAFTA requires that foreign competitors be allowed to compete for local business with their local counterparts on an equal basis. As markets become increasingly interdependent and integrated, NAFTA's challenge is to provide the necessary legal and business uniformity without infringing upon what each nation regards as within its sovereign power.

Commercial legal uniformity is easier said than done. What each country understands by uniformity is not always the same. Consider, for example, the attempt by the Hague Convention to achieve uniformity of the law of damages in the ocean carriage of goods. The same Hague Convention text has led United States and Italian courts to award significantly different
amounts for damages to containerized cargo. The same is true with "model laws." The Negotiable Instruments Law of the United States was adopted as a model law (almost verbatim) by Colombia and Panama and was in force for almost two generations following the First World War. Despite the similarity of legislative language, the characterization of a holder in due course by Colombian courts differed sharply from that by courts in the United States. Colombian courts did not require payment of value from holders attempting to qualify as holders in due course. As a result, large numbers of holders who could not have qualified as holders in due course in the United States, qualified in Colombia. Similarly, the Panamanian banks' practice of not returning paid or canceled checks to their customer-drawers for their verification of authenticity (as contrasted with United States bankers' practice) rendered meaningless those NIL rules, or United States court decisions, which assumed such a practice. These disparate court interpretations and commercial practices of the same "positive" law (be it a treaty, a model statutory law or a judicial or administrative decision) are tolerable in the world trading system for two reasons: The transactional volume is low enough or the disparities in question are insignificant enough not to impede the handling of high volume, high speed transnational transactions. Thus, not many ocean crossings between the United States and Italy have been deterred by the differential in the recovery of damages. In contrast, the volume and speed of NAFTA truck crossings decrease appreciably as a result of the rejection of documents such as invoices, manifests, bills of lading or insurance policies by customs authorities, carriers, brokers, insurers or bankers. The same would be true, inter alia, with the ability to claim goods shipped transnationally by rail, truck or air, to purchase or cash insurance policies, securities or derivatives sold in foreign national or regional stock exchanges, or to obtain proceeds of bi-national or tri-national checks. These high volume, high speed transactions require rules that can be applied to each transaction as uniformly, quickly, mechanically or automatically as possible. I have referred to them as "living law" rules in the sense that they address the every day, normal, "healthy" functioning of transactions. Unlike the rules designed for court application, which address the "pathology" of transactions (i.e., aspects or types of transactions that are the subject of disputes and uncertainty), living law rules are designed for application primarily by non lawyers such as merchants, brokers, bankers, carriers and insurers.

4. See Fairness at 248.
5. Id.
7. See illustration in section II hereafter.
8. The references to problem areas in the principal text are derived from research projects and studies of the NLCIFT, as described in Toward Seamless Borders, Vol.1., Supra n.1
The question then is how best to attain the necessary level of uniformity of positive and living law, particularly when the disparities between the respective national versions of law and practice, including the attitudes toward the law and practice, are as sharp as they are between civil law Mexico on one side and common law Canada and the United States on the other. To illustrate the disparities which exist in one vital area of free trade, I will describe key features of a truck bill of lading law and practice in Canada, the United States and Mexico.

II. TYPICAL FEATURES OF NAFTA TRUCK BILLS OF LADING AND THEIR DISPARITIES.

Let us follow a shipment of merchandise that originates in Canada and ends in Mexico. Very frequently, the Canadian shipper-consignor fills out the truck bill himself, including the description and declared value of the merchandise. He will hand over this bill to the agent of the carrier who will sign it, retain his copy, and give the other copies to the consignor. The truck bill is normally issued in a set of three identical copies. Canadian, as well as United States practice, refers to one of these copies as the consignor or shipper's copy. One of the other two copies is referred to as the trucker's or carrier's copy and the third as the consignee's copy.

Neither the Canadian nor the United States bills are documents of title; they are mere receipts of shipment. Both bills set forth the terms and conditions of the shipment, usually on the reverse side of the bill, including liability for loss of the cargo. In Canada, the carrier's liability is approximately CAN$2.00 per pound and in the United States it is the value of the cargo. When covering Canadian-United States shipments, this bill is most often issued as a "through" bill, i.e., a bill that acknowledges the carrier's receipt of the goods and assumption of responsibility for their delivery in the neighboring nation's place of destination specified in the bill. Thus, with a through bill the entire shipment will be covered by one bill and no new bill will need to be issued at the moment when a national boundary is crossed. Through bills are made possible in Canadian-United States trade by the ability of Canadian and United States insurers to insure the cargo from its point of origin to destination for an amount satisfactory to all parties concerned.

Neither Canadian nor United States customs brokers find it necessary to inspect all truck shipments at their place of origin before processing their entry into the country of destination. Most border crossings, including customs inspections, between Canada and the United States take little time. Often the crossing time is measured in minutes and when the documentation is handled electronically (including the scanning of bar codes assigned to each truck), it can be done virtually in seconds. The insurance coverage for through shipments is enforceable throughout Canada and the United States. In the event of a loss of cargo, payment can be made by agents, branches or subsidiaries of the United States or Canadian insurer. Following payment, the Canadian and the United States
based insurers will be able to decide their respective rights and duties from pre-existent agreements on key terms and conditions and especially amounts of liability.

While it is true that the Canadian and United States truck bill of lading is only a receipt of shipment and not a document of title, the Canadian or United States shipper-consignor retains an important measure of control over the goods shipped. If the circumstances justify it, the consignor may order the trucker to stop delivery of the goods or to reroute the shipment to a different consignee. This may be necessary when the shipper-consignor learns shortly after shipment that the consignee of an unpaid shipment has become insolvent, or, that a solvent consignee wants the goods to be delivered to another buyer or location. Many contemporary electronic procedures of the Canadian and United States trucking industry are designed to effectuate the shipper’s right of control over the shipped goods before delivery to the original consignee.

Once the goods arrive at the United States side of the Mexican border, say in Nogales, Arizona, the preceding laws and practices begin to change dramatically. If the shipment is large or significantly valuable, it will be inspected by the Mexican customs broker prior to the entrance of the goods into Mexico. Mexican customs brokers have their forwarding agents on the U.S. side of the border inspect many shipments prior to their entry into Mexico because, as brokers, they are subject to heavy fines and loss of their professional licenses if the import documents incorrectly describe the goods or their customs status. In view of what is at stake, the customs broker’s inspection can be lengthy. Following the forwarding agent/custom broker’s inspection, the tractor and the trailer are often separated. The trailer is hitched, or interchanged, to a Mexican tractor and the United States tractor remains in the United States. This procedure is motivated by the prohibition against circulation of United States trucks in Mexico.

During the interchange process, the control over the goods and the liability for damages or loss of the cargo enters a zone best described as a legal “black hole” of a few blocks or kilometers in length and of a few hours to perhaps a few days in duration. In this zone, the darkest legal uncertainty prevails. The interlined or interchanged cab may be driven by an agent of the Mexican customs broker (or by his relative or friend), by a driver of the Mexican interlining or interchanging carrier (or by his relative or friend), by an independent contractor (or by his relative or friend). Often, the shipment is inspected by Mexican government officials at the border in the midst of the transition from control by Canadian or United States carriers to control by Mexican carriers. Under these circumstances, it would be foolhardy to generalize on who has lawful possession of the trailer or who is responsible for damage or loss of the goods during the interregnum.

The Mexican government’s inspection lasts an average of several hours and sometimes days. Frequently, documents are deemed to be improper or insufficient. Once the Mexican part of the truck journey is ready to start, the Mexican carrier fills out a bill of lading and issues it to the
consignor. This carrier's issuance however is not a true issuance. Since Canadian or United States shippers usually pay for truck freight only to the Mexican border, the remainder of the journey is paid by the Mexican consignee. Yet, the Mexican consignee usually insists on paying the freight only upon delivery of the goods, to insure that the goods are actually delivered to him. On his side, the Mexican carrier fears that delivery of the goods to the consignee without previous payment risks non-payment of the freight. This transactional distrust has inspired an idiosyncratic use of the truck bill of lading in Mexico. Despite the fact that the truck bill is not supposed to be a document of title, it is used by carriers and consignees as a freight invoice that is a document of title and a receipt of payment of the freight. The carrier issues an original truck bill but retains it until the moment of arrival of the merchandise at the consignee's place of business. At this time, the trucker offers to deliver the bill and the cargo upon payment of the freight. Once the freight is paid, he delivers the bill to the consignee. The consignee then redelivers the bill to the trucker and the trucker releases the shipped goods to the consignee.

The terms and conditions of the Mexican truck bill also differ from those in the Canadian and United States bill. Prominent among these terms is the amount of carrier liability for loss, damage or delay in the delivery of the cargo. Unlike Canada's two dollars per pound and the United States value of the cargo, the Mexican carrier's liability is two cents per pound.

III. LEGAL AND ECONOMIC CONSEQUENCES OF DISPARITIES.

What are the legal and economic effects of the previously described disparities? Not many significant consequences seem to flow from the disparities in the practice of creating the bill (filling out the bill by the shippers and/or carriers) except a battle of the forms when both parties complete a bill. It is true that the number of elements (or data fields in Electronic Data Interchange bills) differ. Since the Mexican carrier is not familiar with what is being shipped, his description may not be as accurate or detailed as that of a bona fide shipper. On the other hand, Mexican customs authorities require the insertion of certain tax data not found in Canadian or United States truck bills. These disparities can be eliminated by requiring that the necessary detail be added to the two bills.

What about the legal nature of the truck bill? You will recall that the Canadian and United States practice is that the bill be issued in several copies, one for each interested party. The original or shipper's copy is given to the consignor. In Mexico, the bill of lading is also issued in multiple copies or duplicates, but the original bill is retained by the carrier. The consignor will receive one of the duplicates. This disparity points to a different legal nature and business function of the truck bill North and South of the Rio Grande. The Canadian and United States
practice is to use the bill as a receipt of shipment whereas the Mexican bill serves both as a document of title and receipt of payment.

The legal consequences of the Mexican carrier retaining the original of the truck bill, whose possession is required to claim the goods, are many and significant. One is that the right to stop the shipment in transit and/or to reroute the shipment is, from a strictly legal standpoint, unavailable to shipper-consignors of Mexican truck bills. Another is the inability to issue "through" NAFTA bills as a result of the expiration of the Canadian or United States truck bills upon delivery of the goods at the Mexican border to the interlining or interchanging carrier. From this flows another equally important consequence: it is difficult for Canadian and United States shippers to obtain a NAFTA through cargo insurance policy. Since the new truck bill issued in Mexico names a new consignor and consignee, the Canadian or United States shippers may no longer have an insurable interest in a "through" cargo policy or even in a Mexican policy only covering the Mexican portion of the journey.

Finally, the fact that inspections prior to entry into Mexico are routinely performed by Mexican customs brokers (while no such inspections are routinely performed by Canadian or United States brokers for northward bound shipments) causes serious delays and costs to southward bound truck or rail shipments.

In sum, the described disparities act as serious impediments to NAFTA shipments by either discouraging some transactions altogether (such as those that require through bills and adequate cargo insurance) or by rendering others costlier than necessary (such as those where goods are detained at brokers' or customs inspection stations).

IV. HOW TO ELIMINATE DISPARITIES AND BRING ABOUT THE DESIRABLE LEVEL OF UNIFORMITY: THE TOP DOWN, BOTTOM UP AND THE BEST PRACTICE APPROACH.

Some of the disparities described earlier are purely textual or "mechanical" in nature, such as those that pertain to the formalities in the creation of the truck bill. As indicated earlier, they can be disposed of by agreeing on language that eliminates or harmonizes discrepant statutory, administrative or judicial language. Other disparities are the result of sharply contrasting attitudes toward the law and the method of doing business. Take, for example, the pre-customs' inspections by Mexican customs brokers, or the issuance of idiosyncratic truck bills by Mexican carriers. These practices are caused by distrust between some or all of the participants in the transaction, leading to living law presumptions of bad faith.

The practices engendered by distrust and bad faith presumptions are invariably costlier than those engendered by trust and presumptions of good faith behavior. Considerable time and money must be invested in order to overcome distrust and reassure the doubting customs brokers, customs officials, truck carriers or consignees. In addition, as with Gresham's law, practices resulting from distrust and bad faith presumptions,
if left undisturbed, impede the adoption of speedier and less expensive methods of doing business.

The experience with truck bills of lading is not peculiar to this instrument. *Mutatis mutandis*, similar disparities are found with respect to check deposits and collections, warehouse receipts, invoices, secured financing of raw materials, equipment, accounts receivable and proceeds, protection of computer software, etc. Given the widespread and dual nature of the disparities, the task of eliminating them and of instituting a modicum level of uniformity needed by a functional NAFTA, makes the use of a combined, "top down" and "bottom up" approach essential.

The top-down approach has been the traditional approach and has been employed by specialized international agencies such as the United Nations Commission on International Trade Law (UNCITRAL) or the International Institute for the Unification of Private Law (UNIDROIT), or closer to home, the Organization of American States Conference on Private International Law (CIDIP). This approach essentially relies on the wisdom of legal experts, acting independently or as national representatives. They may be familiar with customary law, but their product is intended to be either positive law or a guide to its interpretation.

The bottom-up approach relies on the hands on experience of the actual participants in the transaction, trade or profession involved. It yields not only a restatement of the various national or regional trade customs and practices but also a formulation of the best practice for the transaction in question. Thus, in the case of the truck bill, it will help determine its status as a receipt of shipment or document of title, the number of copies and their distinctive functions, if any, and its essential terms and conditions including the liability regime.

In the case of the NAFTA check, it will help determine its elements or data fields, including micro-encoding, place and manner of indorsement, time for honor and rejection, method and route of communication to the bank of first deposit, etc.

The task of selecting a best practice is far from easy. It will succeed only if the selected practice is, first of all, totally consistent with the purpose of the transaction. Thus, the purpose of the transaction must be clearly established from the very beginning of the negotiation and drafting effort. It may be as broad as the facilitation of the movement of goods quickly, safely and inexpensively by truck or rail or as narrow as expediting the return of unpaid checks to the banks of first deposit, but first and foremost, it must be clear. For unless all the participants agree on such a purpose, no consensus on a best practice can emerge.

A second component of a successful process of selection of practice is to secure the participation of a truly representative group of merchants (in the broadest sense of the term) and lawyers. Participation in the drafting effort must be as widespread or pluralistic as possible. Thus, the text of a truck bill must be drafted by all the parties with a clearly discernible interest in it, whether they are carriers, shippers, brokers or freight forwarders, insurers, government officials and their lawyers. A genuine pluralism may make it necessary to seek the representation of
subclasses within a class, such as large and small shippers, large and small carriers, or regional and seaboard banks. Genuine pluralism assures that the selected practice will benefit from considering the widest possible spectrum of transactional experience. A small shipper may have experienced problems with "less than truckload" shipping that may be totally unknown to the large shipper who usually contracts, much as a ship charterer, for the entire truckload. Conversely, an inland bank with little volume of check transactions may find it easier to live with a certain deadline for the return of checks than large banks with larger volumes of trade.

In the bottom-up approach, the role of government officials is much less prominent than in the top-down. It makes little sense for a government official to tell a carrier how best to document his carriage of goods or to tell a banker how best to handle a large volume of "return items." Government officials can best contribute to the bottom up approach as representatives of the public interest especially in areas where private parties may tend to overreach such as with exoneration or limitation of liability clauses. It should be remembered that the three signatory governments did agree on principles of fairness such as national treatment and administrative decision making transparency. These principles not only reflect preexisting models of commercial fairness (some of which inspire the respective national laws on local transactions), but also set the tone for the outside boundaries on unfair dealing.

The preceding description of the approaches to the selection of a best NAFTA trade practice also describes the function and the modus operandi of the National Law Center for Inter-American Free Trade (NLCIFT). The NLCIFT was created approximately three years ago with the financial support of the United States Congress, the United States Department of State, the State of Arizona and the University of Arizona as its principal academic affiliate and members of the United States, Mexican and Canadian private sectors. It is the United States counterpart to sister centers in Mexico (Instituto de Investigaciones Juridicas at UNAM), Canada (The University of Ottawa Faculte de Droit) and other Latin American countries such as Argentina (Fundacion Etcheverry). The NLCIFT's function is to bring about the desirable degree of legal uniformity and standardization of business practices in transactions covered by NAFTA and future accession agreements, including labor and environmental issues. The NLCIFT relies on a combination of the bottom-up, top-down approaches to help draft treaty law, uniform laws, trade association rules and


10. See, for example, the Draft of a Law for the Qualification of Real Estate Brokers (unnumbered Proyecto de Ley before the Congress of the State of Sonora) harmonized with Arizona Revised Statutes.

standardized documents. This work was done by tri-national committees whose modus operandi follows the principles of representative pluralism described earlier in this presentation.

12. For the most recent NLCIFT standardized document, see Uniform North American Powers of Attorney (Jan. 96, NLCIFT). Work has been completed on a draft of a uniform surface transportation bill of lading (paper based and EDI), NAFTA check and customs' invoice. On the NAFTA check and customs' invoice, see, Toward Seamless Borders 92-143, 340-480.