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# THE INTERACTION OF CIVIL LAW AND COMMERCIAL LAW

*Enrique Lalaguna Domínguez\**

## DISTINCTION AND INTERACTION BETWEEN CIVIL LAW AND COMMERCIAL LAW

In the Spanish law, civil law and commercial law appear to be two distinct disciplines. Legislative autonomy permits one to define with clarity the norms, or rules, inherent in each, which justifies the separation of the study of these disciplines into the scientific and didactic orders. In reality, a vital interaction between civil law and commercial law can be perceived.

There are, certainly, legal relations that are subjected in an exclusive manner to the province of one body of legislation or the other. The basic juridical relations of the state, the condition and legal capacity of people, family relations, and relations within succession law are genuine juridical civil relations. Such relations that derive from the bill of exchange, those that exist in companies, and those that arise from financial transactions are typical commercial relations. In addition to these, which are clearly framed in the civil or commercial legislation, there are others whose effects are produced in an area where both bodies of legislation overlap. Those relations that are subject to the double incidence of civil and commercial law constitute the main subject of this work.

Among the principal considerations that link civil and commercial legislation, the following may be pointed out as being the most important:

1. An initial group of relations is produced when civil law and commercial law converge within the same juridical situation, in which case the effects are determined in part by civil law rules and in part by commercial law rules;
2. Another type of relationship may be perceived in the continuing incidence of civil legislation, either as private *ius commune* or general law, governing juridical relations of a commercial nature whenever a commercial law presents itself as a special private law;
3. There are other relationships derived from the changes that contemporary juridical experience, and particularly the economic and social reality of the business world, introduce into the classical limits of the interaction between both disciplines.

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In the analysis of these considerations, it is important to keep in mind the basic unity of the private law within the limits of which the civil law and commercial law are positioned.

#### UNITY OF PRIVATE LAW AS THE FOUNDATION OF THE DISTINCTION BETWEEN CIVIL AND COMMERCIAL LAW

##### *The Correspondence Between Civil Law and *Ius commune**

When speaking of the unity of private law as the point of departure for the study of the reciprocal influences between civil law and commercial law, it is helpful to point out that such unity should not be confused with the phenomenon of legislative unity, or unification, in the regulation of matters that formerly received separate legal treatment. This is the case, for example, of the recent Law 50 of October 8, 1980, which went into effect in 1981. That law abolished articles 1791 to 1799 of the Civil Code and articles 380 to 438 of the Commercial Code. While Law 50 constitutes the formal regulation of a matter, in speaking of the unity of the private law, I am referring to the internal systematic unity of private law as a whole, as distinguished from the ambit of public law.

Within the private law, civil law and commercial law are distinguished as two separate juridical branches, each being autonomous. The content and substance of civil law, as well as its significance and function as *ius commune*, are unquestionable. (This relationship between civil law and *ius commune* will be treated subsequently.) On the other hand, the precise significance of the autonomy that commercial law undeniably enjoys is arguable. For this reason, it seems necessary to explain, at least briefly, the framework in which commercial law will be examined in this work.

##### *Significance of Commercial Law as Special Private Law*

If there is a common factor in the appreciation of the commercial law autonomy, that factor is, without a doubt, that the unique characteristics of this discipline in contrast to the civil law is probably stressed too much. This overemphasis has obscured a less profound consideration of the reciprocal relationships and influences between both sectors of the law. Considering commercial law as special law (*ius speciale*) or particular law (*ius singulare*), doctrinal writers attempt to make evident those characteristics which in a most energetic way reflect the specific consistency of the discipline itself. On the other hand, the civil law doctrine, interested fundamentally in the problem of the unity of law, has tried to underscore the thematic and scientific continuity of special laws and private general law.

The subject of the autonomy of commercial law is positioned between two extremes. It has been said that jurists have vainly discussed whether commercial law is, in contrast to civil law, a special law or a law for a particular transaction, i.e., an "exceptional" law. Even though from the general point of view of the civil law, one position as well as the other may seem one-sided in emphasizing the unique nature of commercial law, thereby obscuring the fundamental fact of its involvement with general law, it nevertheless seems that the idea of specialization does not involve the tendency toward separation so often designated as the unique feature of the commercial law.

With the question raised in these terms, to consider commercial law as "exceptional" law would indicate that it possesses an independent system of norms, or rules, endowed with its own principles that are contrary, or at least different from, those of the *ius commune*. In that case, to affirm its independence from civil law would be pointless. Furthermore, the system itself is referred to as both common and exceptional; thus, to think of commercial law as a whole as exceptional law is senseless. The concept of "special law," however, has a different meaning. As a normative reality it constitutes a set of provisions different from those of the *ius commune* but integrated into it, the two being bound in their genesis and development to the doctrinal tradition and to the order of principles and norms normally associated with the latter. In considering commercial law as special law linked to the system of civil law, it is helpful to speak of commercial norms, or rules, of exceptional character, rules that do not constitute a particular deviation from the general principles, but a deviation from the system itself.

Commercial law is special private law in respect to the civil law, just as it is in respect to the *ius commune*. This means that commercial law has its own *raison d'être* as a different discipline within the framework of private law, as much as if it were based on civil law principles and norms and linked scientifically to civil law doctrine. The application and interpretation of commercial norms is based on the constant application of the general rules of civil law in its function as *ius commune*.

It has been pointed out that to a certain extent commercial law has a genuine *raison d'être* separate from that of the civil law, in spite of the movement toward unification of the two branches of private law, and that its independence or autonomy has continued to exist, even when there has been unified legislative treatment of the two disciplines. Such unity of legislation has permitted one to define with greater precision the scope of the specialization of commercial law and to simplify the private law system, eliminating unnecessary duplications, such as those that still exist in the Spanish system.

The second aspect of the specialization of commercial law refers to its association with the system of rules and the doctrinal tradition of the civil law. The range of this association at the normative level is more comprehensive and profound than the formal data concerning the cross-references between the *ius commune* and the Commercial Code would suggest. In dealing with the notion of reciprocal influences between both disciplines, to admit that there is an involvement with the scientific order is more radical than what is customarily acknowledged in this area. In this sense, Garrigues's attitude is exemplary for its clarity and realism. Garrigues notes that in juridical science there is no method for appreciating or explaining patrimonial relationships among topics that do not fit within the categories preserved by the civil law.

This idea, a very accurate one, could be understood to have a double meaning. On the one hand, the characteristics that result from the heritage of the legal science of commerce should not be forgotten: its relationship with the civil law doctrine is vital and, for that reason, it is logical that commercial dogma finds in the civil law doctrine, which constantly refurbishes itself, the most prolific source of critical possibilities with which to confront its problems. On the other hand, that which is original in the commercial dogma as constructive criticism of the common body of doctrine should be emphasized: the most strictly specialized concepts enrich themselves from the perspective which the legal science of commerce has to offer.

#### *Cross-references Between the Commercial Code and the Ius commune*

These two fundamental aspects of the specialization of the commercial law—its uniqueness with respect to the civil law and its involvement with the civil law—seem to be reflected, with unequal force, in the various cross-references that the Commercial Code has made to the *ius commune*, sometimes in precepts having limited application in regard to specific matters and, at other times, in precepts having a more extensive systematic scope in broad norms, or rules, such as those of articles 2 and 50. Among the precepts having limited application to specified matters, those referring to the following can be noted: the contract of deposit (art. 310), the transfer of non-negotiable drafts that are past due or lack requirements (art. 466), promissory notes not made payable to order (art. 432(2)), the prescription of actions (art. 943), creditors' privileges in bankruptcy (art. 913, No. 3), proof of acts and contracts which were negotiated by non-licensed brokers (art. 89(2)). Occasionally, the Commercial Code refers to the "civil law" (arts. 51(1), 913, No. 6). A good number of precepts refer to the basic civil law as being suppletive to commercial law, as done very precisely in articles 310 and 943. In others, on the other hand, the *ius commune* is referred to, not in its suppletive quality vis-à-vis the Com-

mercial Code, but as a system distinct from the commercial law system, the *ius commune* being applicable only because of the civil nature of the juridical act involved, for example, as is explicitly done in articles 466 (concerning the difference between the endorsement and transfer of a bill of exchange) and article 532 (concerning the difference between promissory notes having a civil character and those having a commercial character).

Articles 2 and 50 are more important for the broad terms with which the cross-referencial precept is formulated with respect to commercial acts and contracts. Especially in these two articles the unmistakable expression of the nature of commercial law as *ius speciale* can be seen. The doctrinal recognition, undoubtedly a valid one, results, nevertheless, in ambiguity if one does not point out, on the one hand, the peculiar significance that *ius commune* assumes in the area where commercial law norms, or rules, are applicable and, on the other hand, the diverse intensity and effectiveness with which the *ius commune* contributes to the refurbishment of commercial law in relation to the most important changes in the Spanish commercial world since the publication of the first commercial code in that country.

If these two considerations are not kept in mind, there is the risk that the cross-referencial precepts from the *ius commune* will be interpreted in an excessively formalistic sense and there is also the risk that the specialization of the commercial law, that which makes it a genuine discipline distinct from the civil law, will be reduced. As a result, there would be a tendency to separate completely both disciplines, because of the natural resistance to accepting commercial law as a simple enclave within the *ius commune*, or as a set of provisions isolated in the normative sphere of the civil law. With this in mind, which sometimes leads to the accusation that commercial legislation is "fragmentary," one could considerably diminish the content of commercial law by admitting that, when the commercial law ceases to be special and tends to become general, it is converted into *ius commune*, according to the historic function that Ascarelli attributed to special laws. The relationship between commercial law and *ius commune* has another significance—that relationship is not enriched at the expense of either the commercial law or the *ius commune*, but both gain magnitude and precision from the effect of their reciprocal influences.

The cross-referencial precepts of the *ius commune* represent for the commercial law, not so much a recognition of its limits, as the expression of a spirit of independence eager to find in the *ius commune* essential possibilities for its own development. In my opinion, the significance of the autonomy, or independence, of commercial law can be summarized as follows:

1. Civil law and commercial law are evidently different legal disciplines within the ambit of private law;
2. Two factors contribute to the characterization of commercial law—the commercial norms, or rules, that are of a special or exceptional nature and the systematic relationship between these norms and the norms of the civil law;
3. Civil law, which in its function as *ius commune* is the center of the so-called spécial laws, assumes a different significance in regard to each, and specifically in the realm of commercial law it acquires an entirely unique meaning that is determined in good measure by the nature and content of commercial law rules.

#### OVERLAP OF CIVIL LAW AND COMMERCIAL LAW LEGISLATION

##### *The Scope of the Application of Commercial Legislation*

The co-existence within the Spanish law of (1) specific legislation concerning commercial matters and (2) civil legislation as suppletive law applicable to the same matter necessitates the development of a criterion which will permit a definition of the field of application of each. It is not an easy task to delineate precisely the criterion for determining the applicability of commercial law. The *Exposé de motifs* of the present Commercial Code formerly stated, in reference to that criterion, that the definition of commerce "constitutes one of the most difficult problems in modern science." The Commercial Code of 1821, the first such code in Spain, contained as the criterion for establishing the scope of its application the classic concept of commercial law as a law having a professional character: the characterization of an act as being commercial was made to depend fundamentally on the merchant-like situation of the persons who engaged in the act. But this principle was advanced with some reservations, because the Code itself acknowledged the possibility that an act could be considered commercial even when some of the interested parties did not possess the requisite "merchant quality."

The present Code appears to have adopted an objective criterion. Article 2 establishes the principle that the "acts of commerce," whether or not those who execute them are merchants and whether or not such acts are specified in this Code, will be governed by the provisions contained in it; in its absence, by the uses of commerce generally observed in each locale, and if lacking both, by those of the general law. According to this, the scope of application of the Commercial Code appears to focus on "acts of commerce" considered as an objective reality, since such acts need not be expressly specified

in the code in order to qualify as "acts of commerce." But, to define this reality, one must turn to the second paragraph of the same article where the formal criterion is set out: "Those [facts] included in this code" are acts of commerce. The acts of commerce not specified in the Code are also defined, not on the basis of an objective reality, but according to a formal criterion, that is, on the basis of the act's being analogous to those specified in the Code. Strictly speaking, article 2 does not give a concept of the acts of commerce—it limits itself to affirming what those acts regulated by the Code are, and this is the only definite criterion for evaluation. From all this it can be deduced, regardless of the intent of the legislator, that the precept does not contain a definition of "acts of commerce," but instead presents an order of priority of the sources for the regulation of acts included in the series of articles in the Code. The application of the Code does not raise any doubt. The problem arises precisely in respect to acts that are presumed to be commercial but are not included in the Commercial Code and to those acts that have been designated as unilateral commercial acts or commercial acts in an improper sense.

#### *Analogous Acts, Acts of Commerce, and Unilateral Commercial Acts*

The acts not specifically contemplated in commercial legislation and designated by article 2 of the Commercial Code as acts of commerce "of an analogous nature" give rise to some doubt as to which legislation will be applicable. The question does not resolve itself simply according to the express objective criterion set out in article 2. This is so because the value of the objective criterion enunciated by that article of the Commercial Code is relative, for the legislator himself occasionally abandons that criterion. If by principle it is affirmed that the Code regulates the acts of commerce "whether or not those who execute them are merchants," later the Code limits the scope of this principle by taking into account the "quality of merchant" as a decisive element classifying specific acts and contracts as commercial, as is done in regard to commission (art. 244), deposit (art. 303), loan (art. 311), transportation (art. 349), and the contract of sale (arts. 325, 236(4)).

In regard to the so-called unilateral commercial acts, the application of the Commercial Code will be limited in each case to those aspects of the legal relation that are regulated by the Code, precisely on the basis that, according to the general objective criterion in article 2, the "merchant quality" is in itself irrelevant in order to subject the legal relation to the province of the commercial law.

*The Concurrent Application of Civil and Commercial Legislation*

A consideration of all the principal categories of contracts regulated by the Commercial Code reveals that, in general, the commercial character of a juridical act could not be designated as being independent from a customary dedication to the exercise of commerce. Specifically, in the debatable presumption of the so-called unilateral commercial acts, the application of the Commercial Code normally cannot be defined with precise limits, if one pays attention only to the juridical *act*, for it is necessary to keep in mind the diverse aspects of the juridical *relation* that derive from that act.

The commercial character of a juridical act resides, in my judgment, in the profit-making purpose objectively expressed in the practice of a professional activity, which gives precise commercial sense to that purpose and permits it to be carried out. The material difference is not found so much in the simple "quality of merchant," nor in the mere objective consideration of the act, but in the professional character of the activity that is predicated on the basic profit-making motive of the juridical act which, as soon as it is dominated by such activity, reveals itself as an "act of commerce." As for the rest, the fact that a juridical act is classified as an act of commerce does not mean that the commercial nature of this act could govern or dictate all of the effects of the juridical relation derived from it.

A very clear example of this is found when a seller, whose store is open to the public, sells furniture bound for consumption by the buyer. This juridical act is not commercial (art. 326(1)), but civil in nature. The commercial dimension that it could have for the seller is found, not in the juridical act of sale because the seller is a merchant, but in the value that this juridical civil act has with respect to a prior juridical act—a purchase bound for resale. The commercial character of the juridical act of a contract for the purchase and sale of furniture for consumption does not flow from what the act is in itself—a civil "sale," but from the significance that the act acquires later as a singular expression of a commercial activity—commercial "resale" (art. 325). This commercial dimension of the civil juridical act, the fact that the object was acquired in the development of a commercial activity (in a store open to the public) explains the effect of the instant *usucapio* (Commercial Code art. 85) in favor of the buyer as opposed to the owner of the merchandise sold. This prescriptive period is a form of acquisition by the non-owner, who is protected more vigorously than if he had acquired the merchandise from a non-merchant (Civ. Code art. 464). This example is especially significant as an expression of the diversity of aspects (civil and commercial) that play a statistically dominant role in the field of commercial contract-

ing. For a long time there has been no evidence of the dogmatic nature of a pure "act of commerce."

#### THE APPLICATION OF CIVIL LEGISLATION, AS IUS COMMUNE, TO COMMERCIAL RELATIONS

The application of civil laws to juridical relations of a commercial character is postulated, on the one hand, by the Commercial Code itself in articles 2 and 50 and, on the other hand, by the Civil Code in article 4(3), and in similar terms by former article 16. The application of civil law rules within the comprehensive field of juridical commercial relations is notably important when those relations are developed within the context of contracting. In this respect, one should pay special attention to the scope of application which may be attributed to article 50 of the Commercial Code. That article states: "Commercial contracts, in everything which relates to their requirements, modifications, exemptions, interpretation and extinction and to the capacity of the contracting parties, will be governed, in what is not specifically established in this Code or in special laws, by the general rules of the common law [*ius commune*]." The rule set forth in article 50 poses two main questions. The first consists of the need to determine which laws, within the Spanish legal system, constitute the sphere in which those "general rules of common law" are formulated. More precisely, what is it that should be understood as "common law" when it is time to complete the rules governing commercial contracts? The second question involves a definition of the incidence of "common law" within the area of commercial contracts.

##### *The Sphere of "Common Law"*

From the time of the promulgation of the first commercial code in 1829 until the present, the realm of *ius commune* has undergone an intense and profound process of renewal. Three stages can be distinguished in this process.

The present Commercial Code, promulgated by Law 22 of August 1885, did not reflect logically the significance with which the expression "common law" was later used in the Civil Code, as being the opposite of ancient local law. Nevertheless, the prevailing opinion within the current commercial doctrine considers that the general law invoked in the Commercial Code is the so-called Castilian civil law. This opinion, however, must be more precisely delinited. The significance of the expression "common law" in article 50 of the present Commercial Code could be linked to the significance attributed to the same expression in article 234(1) of the *Code of Sainz de Andino*. According to doctrinal interpretation at the time, that expression represented the legal consecration of "common law" as the

Spanish civil law of general application in the first quarter of the 19th century. This precept is linked in its historical genesis to the moment at which the Roman law definitively lost its authority in favor in the "royal law" of Spain, with the latter taking the name of "common law" which, until then, had been claimed by the former. It is interesting to point out along this line, and in reference to present article 50, that by the end of the 19th century jurisprudence considered it necessary to declare that in commercial contractual matters neither the *Institutes* nor the *Digest* could be considered as suppletive law.

The historical circumstances of this tension between Roman law and Castilian civil law permit one to define very clearly the limits of the expression "common law" in the Commercial Code. That expression refers certainly to the Castilian civil law, but only insofar as its ultimate application serves the function *ius commune* when the Roman law would otherwise have been applicable. In no way does this imply that on the level of commercial legislation there has been a expansive generalization of Castilian civil law so that it extends over the areas where the civil law proper or regional laws are applicable.

With the promulgation of the Civil Code, the expression "common law" has become synonymous with "codified civil law." When one speaks of "common law" or "general private law" it is customary to invoke former article 16 of the Civil Code, which states: "In matters that are governed by special laws, the deficiencies of those will be supplied by the provisions of the Code." In the appraisal of this rule, its own historical development must be kept in mind. In drafting article 16, our legislature was thinking more of the past than of the future. Actually the equation between general law, or *ius commune*, and the Civil Code, which in reality had never been exact, could be maintained. When one considers the mentality of the era in which the Code was promulgated, one sees that article 16 reflects the conviction that the Code inherited the position which Castilian law formerly held. The drafters of the Code realized the magnitude of their task and were aware of the Code's defects. The special laws of the past century historically imply that progress was made but, they represent, on the other hand, a period of lassitude and failure in the process of codification. Those special laws appear as minor accomplishments in view of the reality of the Civil Code, the most important legislative work of the 19th century. This is fundamentally the meaning of article 16, which is expressive of the conspicuous value of the code, with regard to the special laws that for practical reasons were never integrated into it.

The perception that the Civil Code included the *ius commune* has been maintained until recent times. When one speaks of *ius commune*

one still thinks of the Civil Code; but, the reality is that the Code, our fundamental civil law, is not longer the exclusive province of the *ius commune*. An important set of special laws, being strictly civil in nature, today share with the Code the status of *ius commune*. That the Civil Code is not the exclusive source of the *ius commune* can be maintained without serious opposition; the statutes regulating mortgages, which are not contained in the Civil Code, are a good example of this fact. In the same measure that those statutes are civil law, they are also *ius commune*, and the same should be attributed to all other laws that have an unmistakeable civil character and are promulgated subsequent to the effective date of the Code but are not incorporated into it, as for example those laws which have a more immediate continuity with commercial law: the laws governing chattel mortgages, the Usury Law of July 23, 1908, the Arbitration Law of December 22, 1953, the Cooperative Property Law of July 21, 1960, and the Law of the Sale of Furniture on Credit of July 17, 1965. The expression "special laws" should not be understood in a merely formal sense, because that would lead one to ignore the *ius commune* status of those laws which have a civil character. In another sense, such a view would prevent one from realizing that the "special" character of such laws is simply the result of the natural phenomenon of evolution. In this evolutionary process, the Code has maintained its importance as the basic civil law and, in this sense, retains its prestige as *ius commune*. But, since the refurbishing of the civil law has taken place in great measure apart from the normative framework of the Code, the Civil Code has departed from the *ius commune*, although it does remain the very best part of the basic law of Spain. On the other hand, in addition to the *ius commune* status of those civil laws that are called special because of the matter which they regulate, there is a group of civil laws that have been denominated special because they have a limited scope of application, laws which are also considered "common law," or *ius commune*. Those civil laws that are called special because of their application to a definite area are contained today in the regional law compilations, such as those of Aragon, Catalonia, Baleares, Galicia, Vizcaya y Alava, and Navarra. In view of the problems which could arise in commercial contracting because of the insufficiency of rule in the Commercial Code, the existence of those regional compilations determines that a rule from the local laws should be applied as the suppletive law in preference over a rule of the Civil Code. The following example will help to illustrate this point.

The law to be applied in Catalonia in regard to a married woman who acts as a surety for her husband, which is considered a commercial contract, is the "general rules of common law" under article 50 of the Commercial Code. The accommodation endorsement given by

the wife is a "commercial" contract under article 439 of the Commercial Code, but the validity of that contract with respect to the capacity of the surety depends upon the rules of civil law. Thus, the law to be applied in regard to the capacity of the Catalonian woman in this example is not the law of the Civil Code, but the law contained in the civil compilation of Catalonia, wherein the nullity of such a contract of suretyship is expressly declared in article 332(1). In the Decision of June 28, 1968, the Supreme Court declared that the "common law" to which article 50 of the Commercial Code refers "is the Catalonian law integrated into its compilation." The Supreme Court makes it definitely clear in that decision that the *ius commune* to which the Commercial Code refers is that contained in the body of regional laws, and not that contained in the Civil Code.

*The Scope of Application of "Common Law"  
to Commercial Contracts*

It is the view of some jurists that in commercial contracts the "common law," or *ius commune*, takes effect not only as suppletive law, but also as the law applicable *ab initio*, since the general principles that govern all contractual matters are contained within it. This opinion is reconciled with the literal meaning of article 50, which refers to the general rules of "common law," and with the fact that the Commercial Code itself is very frugal in the enunciation of general rules. On the other hand, the differences between those few general rules contained in Title IV of Book I of the Commercial Code and those of the *ius commune* were diminished considerably with the promulgation of the Civil Code. The most appreciable differences refer mainly to contracts executed by correspondence (Com. Code arts. 54, 1262(2)), nullity for the breach of an obligation (Com. Code arts. 61, 1124(3)), delay in payment (Com. Code art. 63; Civ. Code art. 1100), and the demand for performance of an obligation which contains no stipulated maturity date (Com. Code art. 62; Civ. Code arts. 113, 1128). These are only a few simple examples involving a literal comparison between the texts of the dispositions contained in the Commercial Code and those of the Civil Code; certainly, a more extensive and comprehensive comparison would reveal more significant differences in the rules contained in each. The concurrent application of *ius commune* and commercial law in matters involving commercial contracts leads to three major conclusions.

In the first place, the meaning of the relation between both normative systems is determined not only by the literal meaning of article 50 of the Commercial Code, but also, and above all, by the reduced number of general rules contained in legislation governing contractual matters. While in theory the provisions of the Commercial Code

and those of special laws should be applied *ab initio*, in practice such contracts will be governed basically by the general rules of the *ius commune*. In this respect, one Spanish jurist points out that, although commercial law indicates when a contract of sale is commercial (art. 325), it does not indicate when a particular contract is a contract of sale and that, although article 345 imposes upon the seller the obligation of eviction and warranty, it does not specify what that obligation consists of—all of those concepts are to be found in the Civil Code. In the second place, one should keep in mind that the co-existence of the *ius commune* and commercial law is constantly modified as a result of the evolutions in both normative fields. From another point of view, laws subsequently added to the Civil Code modify the meaning of the relationship between *ius commune* and commercial law. In this manner, the Usury Law of July 23, 1908 is extended by legislation to the contract of commercial loan, amplifying the scope of the application of the *ius commune* to a matter governed by an exceptional rule, i.e., a rule governing a particular transaction, contained in the Commercial Code (art. 314(1)). If the Usury Law, as interpreted in this way, represents an approximation of the *ius commune*, the new law governing companies implies a withdrawal from the general rules of the Civil Code in this regard. Finally, it can be observed that the connection between *ius commune* and commercial law in matters of contract is not established only on the statutory level. A very clear example of how the general rules of the *ius commune* come to bear upon contracts dictated by commercial practice (the "uses" of commerce) is the contract involving accounts current that has been regulated jurisprudentially by the Supreme Court.

## BIBLIOGRAPHY

- Albaladejo, M. I *Derecho civil* (7th ed. Barcelona, 1980).
- Broseta Pont, M. "Concepto sustancial del Derecho mercantil," V *Studi in Memoria de T. Ascarelli* (Milano, 1969).
- \_\_\_\_\_. *La empresa, la unificación del Derecho de obligaciones y el Derecho mercantil* (Madrid, 1965).
- \_\_\_\_\_. *Manual de Derecho mercantil* (4th ed. Madrid, 1981).
- Castan Tobeñas, J. I *Derecho civil español, común y foral* (11th ed. Madrid, 1978).
- \_\_\_\_\_. *La ordenación sistemática del Derecho civil* (Madrid, 1954).
- Figa Faura, L. "Colisión intraestatal de Ordenamiento, Derecho civil y Derecho mercantil, Normas de conflicto," *Annuario de Derecho Civil* (1981).
- Garrigues, J. I *Curso de Derecho mercantil* (7th ed. Madrid, 1976).
- \_\_\_\_\_. "Derecho mercantil y Derecho civil," XV *Anales de la Academia Matritense del Notariado* (Madrid, 1967).

- Giron Tena, J. "El concepto de Derecho mercantil," *Annuario de Derecho civil* (1954).
- Jordano Barea, J. "Derecho civil y Derecho mercantil," *Revista de Derecho Privado* (1964).
- Lalaguna, E. "Ámbito territorial de aplicación del Código civil," *Revista de Derecho Privado* (1977).
- \_\_\_\_\_. "Aplicación del Código civil como Derecho supletorio de otras leyes," *Revista de Derecho Privado* (1976).
- \_\_\_\_\_. "La relación entre Derecho civil y Derecho mercantil," *Revista General de Legislación y Jurisprudencia* (1968).
- \_\_\_\_\_. "Valor del Código civil como Derecho común después de la reforma del Título Preliminar," *Documentación Jurídica* (1974).
- Langle, F. I. *Manual de Derecho mercantil español* (Madrid, 1950).
- Lasarte, C. *Antonomías y Derecho privado en la Constitución española* (Madrid, 1980).
- Olivencia, M. "Significado de la reforma del Código de comercio," *Conferencias sobre la reforma de los Códigos civil y de comercio* (Madrid, 1978).
- Polo Diez, A. "Concepto y problemas del Derecho mercantil," I *Leyes mercantiles y económicas* (Madrid, 1956).
- Puig Brutau, J. *Introducción al Derecho civil* (Barcelona, 1981).
- Rubio, J. *Sainz de Andino y la codificación mercantil* (Madrid, 1950).
- Sanchez Calero, F. *Instituciones de Derecho mercantil* (8th ed. Valladolid, 1981).
- Sancho Rebullida, F. de A. "El Derecho foral aragonés en la prelación de fuentes del Derecho mercantil," *Annuario de Derecho aragonés* (1946).
- Uria, R. *Derecho mercantil* (11th ed. Madrid, 1976).