

LESSON 1: CONCEPT AND SOURCES OF COMMERCIAL LAW

SUMMARY:

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 - b) Origin and historical evolution of Commercial Law
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1.- Concept and historical evolution of Commercial Law

a) Problems in the definition of the concept of Commercial Law

Before trying to define the concept of Commercial Law we need to examine its content, which means the part of legal reality which it regulates. First we can say that Commercial Law has to deal with legal relationships between individuals and this is why it is included in Private Law. Taking this into account, the delimitation of commercial issues has an especial meaning in Spanish legislation because we have two different codes: the Commercial Code (Cco hereinafter) and the Civil Code (Cc hereinafter), which include rules concerning Private Law. This fact forces us to identify the scope of each one of them properly if we want to choose the right rule to be applied when dealing with relationships between individuals.

However, the distinction between civil and commercial issues is not easy, especially when we find that there are certain legal institutions and contracts such as purchase, society, deposit, etc. which are regulated in both codes. It means that the content of each code cannot be used to delimit what is civil and what is a commercial issue. In order to make this distinction we will have to study the historical evolution of Commercial Law so as to discover which part of legal reality it regulates nowadays.

b) Origin and historical evolution of Commercial Law

THE MIDDLE AGES. The birth of Commercial Law is closely related to the activity of guilds and corporations of merchants which arose in medieval towns in order to defend their common interests. These guilds and corporations were regulated by written statutes, which gathered traditional commercial uses, and even had their own courts

(*jurisdicción consular*) which solved legal cases between their members applying those commercial uses.

This way, Commercial Law in The Middle Ages can be defined by two main features: it was a customary and professional law. *It was the Law created by merchants in order to solve legal problems between them because of the development of their commercial activities.*

CODIFICATION: this medieval conception of Commercial Law lasted until the beginning of the XIX Century when the codification process took place under the influence of the rationalism and the main ideals of the French Revolution. Codification process had as a main goal to recollect and classify all the legal issues inside codes which should be complete and enduring, and this was something completely opposed to the dispersed and customary nature of Commercial Law in The Middle Ages. On the other hand, the main ideals of the French Revolution (liberty, equality and fraternity) had a deep impact on the commercial field. People began to be considered completely free to develop commercial activities and this ended up with the monopoly of medieval guilds and corporations. The ideal of being equal before the Law was considered incompatible with having a special law made by merchants, which could only be applied to solve problems between them.

As a result, codification process modified the concept of Commercial Law. Until then, it was considered as the law which regulated commercial activities developed by merchants organized under guilds or corporations. From then on, Commercial Law began to be defined using objective criteria. Commercial Law turned into the law which regulated certain activities, (which were called *actos de comercio*), without taking into account if that activity was carried out by a merchant or not. The article 2 of the Cco follows this objective conception of Commercial Law.

“Los actos de comercio, sean o no comerciantes quienes los ejecuten se regirán por las disposiciones del Cco”

Anyway, the main purpose of defining Commercial Law according to objective criteria has not been completely achieved. There are still many contracts (purchase, deposit etc.) in which the participation of a merchant is required in order to be regulated by Commercial Law.

20th CENTURY: in the beginning of the 20th Century, Commercial Law returned to its traditional subjective definition. It was again considered the Law which regulated activities which were developed by certain people. In The Middle Ages we talked about merchants, but in the 20th Century the idea of merchant was gradually replaced by the concept of enterprise (*empresa*) and entrepreneur (*empresario*).

c) *Concept of Commercial Law*

Taking into account its historical background, Commercial Law could be defined nowadays as the part of Private Law which regulates the Enterprise and/or the entrepreneur and the economic activity developed with other entrepreneur or consumers.

2.- Content of Commercial Law

Inside this general concept of Commercial Law we can distinguish different parts:

- The entrepreneur: rights, obligations and liabilities
- Company Law
- Contracts
- Trade securities
- Bankruptcy Law
- Competition Law and Industrial Property

3.-Sources of Commercial Law

According to art. 2 Cco: "*los actos de comercio se regirán por las disposiciones contenidas en él, en su defecto por los usos de comercio observados generalmente en cada plaza y a falta de ambas reglas, por las del Derecho común*". This article includes not only the list of sources of Spanish Commercial Law but also the hierarchy between them.

1-.Cdc and especial commercial laws

Nowadays we should take into account that commercial issues are not only regulated by our Cco. This was written in 1885 and it reflected the economic situation of those years. But many things have changed in the development of commercial activities since 1885. New contracts, institutions have appeared and the Cco has not been modified in order to introduce this new economic reality. Those new contracts and institutions have been regulated by special laws, laws which have emptied the contents of the Cco to the extent that nowadays our code only regulates certain commercial issues related to the concept of merchant, their main rights, obligations and responsibilities and some contracts.

Besides the Cco and the special commercial laws there are other rules to be borne in mind when talking about the regulation of commercial issues:

a) Spanish Constitution (CE)

The Spanish Constitution regulates in its Part I, Chapter III the principles which govern economic and social policy, which means the principles which must be followed when developing economic activities in Spain. This part of the Spanish Constitution, named economic constitution, admits a kind of economic model called social market economy. This model respects private property and private initiative but taking into account the requirements involved in a social and democratic State subject to the rule of Law.

b) Distribution of legislative competences between the State and Autonomous Regions.

Spanish Constitution has created a system of regional autonomy known as the "State of the Autonomies" and has granted the right of self-government to the 17 Autonomous Regions in which the State is divided. It is clear that each autonomous region can have their own legislation, but the question remains as to what extent they can legislate about commercial issues.

In order to answer this question it is necessary to take a look at articles 148 and 149 of the Spanish Constitution. Neither of them provides the Autonomous Regions with legislative competences in the commercial field. Only the State can regulate commercial issues.

- a) Finally, we also have to consider the European legislation about commercial issues. Such European legislation is composed of the Treaties of the European Union (EU primary legislation) and the EU secondary legislation in which we can find four categories:

1. *EU Regulations issued by the EU* are directly applicable and binding in all the member states, without the need for any legislation in the member states.
2. *Directives* state the objectives to be achieved and impose a requirement on member states to take domestic legislative action themselves to implement those objectives.
3. *Decisions* are binding directly in the same way as regulations, but they only apply to those to whom they are addressed, which may be member states, companies or individuals.
4. *Recommendations* and opinions are not binding.

2- Customs

Commercial Law has a clear consuetudinary origin. As we have exposed it was created by merchants who needed new rules and institutions in order to attend the special requirements of their profession. Taking this into account, a use or custom, as a source of Commercial Law, can be defined as a commercial practice which needs to be effective, which must be performed repeatedly, and which can be widely regarded as binding. The application of a certain custom must be pleaded and proved for those who want to use it in order to solve a case.

Nowadays, uses or customs have many disadvantages when being applied as a source of law. They are unwritten rules; they are only commercial practices which have been performed by merchants for years and years under the belief that they were mandatory. Because of that, there is a great uncertainty around the existence of a use or custom and this is something incompatible with the current trade in which legal relationships need to be entered and solved very fast and there is no time to stop and prove if a certain use or custom really exists. Anyway, customs have also advantages. We are talking about rules created by merchants and this fact make them more adapted to the special requirements of the profession. They are rules created by the ones who also have to follow them.

3-.Common Law.

Common Law can be used to regulate commercial issues when the Cco or any especial commercial law don't have a rule to apply, or when there is no custom. We can find only one exception to this hierarchy. According to the article 50 of the Cco all the questions related to the requirements, modifications, extinction, interpretation and ability of the parties of commercial contracts must be regulated by the Cco or special commercial laws. When there is no rule to be applied, they are regulated by Common Law. This is the only case in which the hierarchy is modified and Common law comes first to any use or custom.

5.- Vocabulary

Private Law- Derecho privado

Commercial Law- Derecho mercantil

Common Law- Derecho civil

Code- Código

Guilds- Gremios

Estatutes- Estatutos

Uses, costumes- Usos, costumbres

Court- Tribunal

Merchant- Comerciante

Enterprise- Empresa

Businessman- Empresario

Company Law- Derecho de sociedades

Bankruptcy Law- Derecho concursal

Competition Law and industrial property- Derecho de la competencia y propiedad industrial

Trade securities- Títulos-valor

EU Regulations- Reglamentos comunitarios

EU Directives- Directivas comunitarias

EU Decisions- Decisiones comunitarias

EU Recomendations- Recomendaciones

Sources of Commercial Law- Fuentes del Derecho mercantil