A FEW NOTES ON THE EVOLUTION OF THE COMMERCIAL SALES CONTRACT REGULATION

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Abstract

Today, we think that the commercial sales has a long history as institution and therefore the relocation of its regulation from the commercial code to the civil code seems to be an authentic revolution inside the European or national private law.

In fact, the modern regulation of commercial sales emerged only in the nineteenth century and a proper regulation was strengthened in that very century.

The present paper aims to analyze if this kind of revolution is an useful and necessary and if, by relocation, the institution has really disappeared.

Keywords: *commercial sales contract, commercial law, comparative legal history, civil code, codification.*

1. Introduction

As we know the sales contract was and is the most useful contract in social material transactions.

For some centuries, during the Dark Ages, when the barter was the main transactional activity, the sales seemed to be only a variety of it. However, at the end of the Middle Age, when the monetized economy emerged and the necessities of coin were covered by the discovery of the gold in the Americas, the prevalence of the sales contract was assumed.

From that time up today, nothing proved to be a challenge to the sales contract and the barter became more and more a sign of backwardness, economic liability, peripheral region or economic crisis.

As we shall see, the commercial sales contract has acquired a specific profile and regulation during the nineteenth century, but can we consider it today – when most of the material changes suppose in fact a commercial sales contract – as a specific contract which needs a special regulation? If the special hipothesis turned into a general one, do we still need a special regulation contained in a commercial code?

Therefore, it seems not to be so bizarre to renounce to all these commercial codes which belong to the past and to the social stratification of the industrialization era.

On the contrary to this common opinion, I think that the distinction between civil and commercial law deserves, at least, a summary analisys, and the recent evolutions inside the private law suggest that reality has to prevail on the ideology or on the obsessive ideea to revolutionize the law.

2. The first phase: neglecting the commercial sales contract.

At the end of the eighteenth century or, at least at the beginning of the nineteenth century, the sales contract was accepted as the most complex contract which needed a specific, proper and extended regulation.

In this context, there was no surprise that the authors of the Napoleonic civil code put the regulation of the sales contract in the front of all other contracts. And, more, the regulation of the barter was regarded as a secondary institution.

Practically, from now on everybody agreed that the exception became basic or common rule and the basic rule became only an exception.

However, there were only two main issues to settle at that crucial moment.

Before the Napoleonic code of 1804, in France of the *Ancien Régime* there was an essential distinction inside the private law.

On one hand, the minor material transactions were regulated by local customs, which have been codified in the north of France, or by written rules which were conserved in Southern France.

On the other hand, the so called "commercial affairs" were uniformly regulated from the seventeenth century by the royal ordinances of Louis XIV.

Inspired by the principles of the 1789 revolution, the lawyers and the lawmakers of the republican France wanted to provide an unitary civil law in order to unify the law practice in the new society.

The long debates and, finally, the adoption of the civil code in 1804 seemed to settle that first issue.

The new code gave little or symbolic space to the local customs. All the citizens were subject to these uniform rules which, at least theoretically, permitted more safety and predictability in the social transactions and, finally, unified the French nation.

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However, it still remained the second issue to settle. What will happen to the commercial law inherited from the seventeenth century?

All these rules were also projected to unify the commercial customs in order to sustain the emergence of the national market and to grow the certitude and the predictability of the commercial transactions along the French kingdom.

In the post revolutionary age, the foreseeable option was to promulgate a new code – the *code de commerce* – which Napoleon did in 1807, at the climax of his imperial power.

It resulted that all the commercial law was in fact upgraded, modernized and set in the new code.

As the most of the energy was spent in order to elaborate a new civil code, a revolutionary one – and we know that Napoleon himself was more proud of it than of his military victories – in an historical era when the Enlightment movement had sustained the efforts towards codifications – the *Allgemeines Landrecht für die Preussischen Staaten* (ALR) was promulgated in 1794 and the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) in 1812 – the code of commerce of 1807 appeared not as a sophisticated code which is destined to all citizens as the civil code was, but as a sectoral law in order to be use by traders which were still perceived – even the guilds were dissolved in 1791– as a distinct professional class.

Therefore, in this entire context, there is no reason to wonder that the sales contract was regulated in an extended and sophisticated way by the rules of the civil code of 1804.

Practically, the regulation of the contract was covered by 119 articles. In fact, that regulation was one of the most extensive in all the area of the specific contracts[1].

Anyway, the rules provided by the civil code which regarded the sales contract are common rules. They have to be applied in the material relations of the simple citizens but also in all other material relations which may imply the interference of a *commerçant*.

Hence, if the rules of the civil code were to be applied in this specific hypothesis – as was regarded the act of commerce – the authors of the code of commerce paid not much attention to the characteristic of the sales contract as an agreement which implies one or more traders and which can presume, on the whole, a specific regulation.

As a consequence, at that time seemed little to remain in order to regulate inside the code of commerce.

However, with the regard to the sales contract, there was an obvious exception to that conviction of the authors of the code of commerce. The code contains only one article which regulates a specific issue of the sales: the way to prove its existence.

The lawyers who elaborated the code were forced to recognize that despite the perfect and complete mechanisms of the civil code, there were some issues or at least one, that could be not regulated by the common law.

As we know by reading the civil code, in the frame of the title regarding the general regulation of the obligations, the sixth chapter – *De la preuve des Obligations et de celle du Paiement* – offered general rules regarding the modality of proving the contract and these rules were to be applied to the sales contract signed by the simple persons[2].

However, these rules couldn't be applied when the sales contract is a commercial one because it is obvious that the necessities of the trade are incompatible with the rigidity of the civil code.

Practically, the commercial activity can not develop respecting the formalities of the civil code.

Hence, if "public instruments of writing" or "instruments of writing under private signature" can be tools of proving, on one hand, there is no necessity to restrain the use of the "parole testimony", and on the other hand, there are a lot of ways to prove the existence of the duties that can not be use between simple persons as the notebook or memorandum of an exchange agent, an invoice or bill of parcels accepted, the correspondence of the parties or the books of the parties.

It seems that the obvious piece of the reality determined the authors of the code of commerce to impose specific rules on the matter.

As a consequence, the article 109 of the code, the single rule contained by the seventh title – *Des achats et ventes* –, disposed as follows: "Les achats et ventes se constatent:

- par actes publics,
- par actes sous signature privée,
- par le bordereau ou arrêté d'un agent de change ou courtier, dûment signé par les parties,
- par une facture acceptée,
- par la correspondance,
- par les livres des parties,
- par la preuve testimoniale, dans le cas où le tribunal croira devoir l'admettre".

In order to know if the contract was really a commercial sales the article 632 of the code emphasized the intermediary role of the buyer and the financial gain as main purpose of his action.

Hence, as a preliminary conclusion of our study, the French code of commerce of 1807 did not recognize in a visible manner the existence of a commercial sales as a variety of the sales contract between the commercial activities precised by the article 632.

[1] See art.1582-1701 and compare 1708-1831.
[2] See art. 1316.

3. The second phase: the emergence of the new concept – the commercial sales contract

Obviously, until 1815 the French private law was adopted in Rhineland, Belgium, and Holland or other provinces of the Napoleonic Empire, but also in other states like the Kingdom of Naples[3].

Not surprisingly the defeat of Napoleon didn't slow up the diffusion of the new codes.

In the postwar era, despite its origins, the French code of commerce served as a model and was adopted again in the frame of the new *Codice per lo regno delle Due Sicilie* (into force in 1819)[4] but also in Greece in 1835[5] and Wallachia in 1840, while in other countries it was upgraded and modified inside the process of modern codification.

During the same decades of the nineteenth century various reflections of the lawyers and other people involved in commercial transactions were taken in account and by 1830 the new projects couldn't be considered as simple reproductions.

From this point of view, the Spanish code of commerce – *el código de comercio* which was promulgated in 1829 and entered into force in 1830[6]– , emphasized really the frame of two concepts: the commercial contract and the commercial sales.

Its author, Pedro Sainz de Andino introduced a new title – *De compras e ventas comerciales* – which contains 26 articles.

Obviously, because the commercial law maintained its exceptional applicability, limited to specific commercial relations, the sales contract was to be regulated on principle by the civil law and if the civil law was unable to rule a specific hypothesis, the judges will apply if necessary the rules provided by the *código de comercio*.

Therefore, for the first time, at that moment we can consider that the frame of the commercial sales seemed to be complete.

First of all, the code establishes criteria to identify the commercial sales of goods: Pertenecen a la clase de mercantiles: las compras que se hacen de cosas muebles con ánimo de adquirir sobre ellas algún lucro, revendiéndolas bien sea en la misma forma que se compraron, o en otra diferente, y las reventas de estas mismas cosas (article 359).

On the contrary, according to article 360 it will be not considered commercial sales of goods:

"Las compras de bienes raíces y efectos accesorios a estos, aunque sean muebles.

Las de objetos destinados al consumo del comprador, o de la persona por cuyo encargo se haga la adquisición.

Las ventas que hagan los labradores y ganaderos de los frutos de sus cosechas y ganado.

Las que hagan los propietarios y cualquiera clase de persona de los frutos o efectos que perciban por razón de renta, dotación, salario, emolumento, u otro cualquiera titulo remuneratorio o gratuito.

Y finalmente la reventa que haga cualquiera persona que no profese habitualmente el comercio del residuo de acopios que hizo para su propio consumo. Siendo mayor cantidad la que estos tales ponen en venta que la que hayan consumido, se presume que obraron con ánimo de vender y, se reputarán mercantiles la compra y venta".

As many commercial sales are concluded in the absence of the goods the buyer's consent is under condition until the moment he can inspect the goods (article 361): En todas las compras que se hacen de géneros que no tienen a la vista, ni pueden clasificarse por una calidad determinada y conocida en el comercio, se presume la reserva en el comprador de examinarlos, y rescindir libremente al contrato, si los géneros no le convinieren.

More, "la misma facultad tendrá, si por condición expresa se hubiere reservado ensayar el género contratado".

On contrary, there is no such consent under condition if there is sample used as criteria and the goods are exactly as the sample: Cuando la venta se hubiere hecho sobre muestras, o determinando una calidad conocida en los usos de comercio, no puede el comprador rehusar el recibo de los géneros contratados siempre que sean conformes a la mismas muestras o a la calidad prefijada en el contrato (article 361).

As sometimes the time to delivery is crucial for buyer's business the last has the right to terminate the contract if the delivery is late: Cuando el vendedor no entregare los efectos vendidos al plazo que convino con el comprador podrá este pedir la rescisión del contrato, o exigir reparación de los perjuicios que se le sigan por la tardanza, aun cuando esta proceda de accidentes imprevistos (article 363).

If the parties did not establish a time to delivery, the seller will have to retain the goods at buyer's disposal at least 24 hours: Cuando los contratantes no hubieren estipulado plazo para la entrega de los géneros vendidos y el pago de su precio, estará obligado el vendedor a tener a disposición del comprador los efectos que le vendió dentro de las veinte y cuatro horas siguientes al contrato. El comprador gozará del termino de diez días para pagar el precio de los géneros; pero no podrá exigir su entrega sin dar al vendedor el precio en el acto de hacérsela (article 372).

Unfortunately, during the next decades the Spanish code did not influence the commercial codification in Europe except Portugal.

In Italy, for example the commercial code promoted by Charles Albert, king of Sardinia, remained under the influence of the French *code de*

[3] See Carnazza Puglisi, *Il diritto commerciale*, 45.
[4] See *ibidem*, 45.
[5] See *ibidem*, 73.
[6] See *ibidem*, 61.

commerce. As a consequence, there is only one rule regarding the commercial sales – the article 118 – which establishes the ways to prove the existence of the contract.

Only in 1865, when the unity of the Italian state was achieved, in order to offer a new and modern an entire new regulation, the new king promoted a commercial code which was modernized.

Therefore, the commercial sales contract was, finally, regulated by a distinct text (article 95 to 105).

New institutions were added but, in fact, only the next commercial code of 1882 will offer an influential frame of the commercial sales contract.

Hence, the article 59 of the last code modifies the perspective of the French lawmakers by recognizing the validity of the *sale of other person's goods*: La vendita commerciale della cosa altrui é valida. Essa obbliga il venditore a farne l'acquisto e la consegna al compratore, sotto pena del risarcimento dei danni.

Secondly, the article 60 recognizes the validity of the sale without price if the parties have established a way to settle later the price: La vendita commerciale fatta per un prezzo non determinato nel contratto é valida, se la parti hanno convenuto un modo qualunque di determinarlo in apresso.

They can choose a third person to settle the price – "la determinazione del prezzo puo essere rimessa all'arbitrato di un terzo eletto nel contratto o da elleggersi posteriormente" – and also, "la vendita fatta per il giusto prezzo o a prezzo corrente é pur valida; il prezzo si determina secondo le disposizioni dell'articolo 38".

The articles 62 to 65 are regarding the sales of goods that are transported on maritime ships but most important seems to be the entire article 68 which settle the rules to apply when the goods must be delivered at a precise moment and space and one of the parties will not participate to the delivery act.

Therefore, "se il compratore di cosa mobile non adempie la sua obbligazione, il venditore ha facolta di depositare la cosa venduta in un luogo di pubblico deposito, o, in mancanza, presso un accreditata casa di commercio per conto e a spese del compratore, ovvero di farla vendere.

La vendita e fatta al pubblico incanto o anche al prezzo corrente se la cosa ha un prezzo di borsa o di mercato, col mezzo di un pubblico ufficiale autorizzato a tale specie di atti, salvo al venditore il diritto al pagamento della differenza tra il prezzo ricavato e il prezzo convenuto, e al risarcimento dei danni.

Se l'inadempimento ha luogo da parte del venditore, il compratore ha diritto di far comprare la cosa, col mezzo di un pubblico ufficiale autorizzato a tale specie di atti, per conto e a spese del venditore e di essere risarcito dei danni.

Anyway, "il contraente che usa delle facolta sudette deve in ogni caso darne pronta notizia all'altro contraente".

A special rule is offered regarding the sales with an essential time to fulfill the obligation. According to article 69 "se il termine convenuto nella vendita commerciale di cosa mobile é essenziale alla natura dell'operazione, la parte che ne vuole l'adempimento, non ostante la scadenza del termine stabilito nel suo interesse, deve darne avviso all'altra parte nelle ventiquattro ore successive alla scadenza del termine, salvi gli usi speciali del commercio.

Nel caso suddetto la vendita della cosa, permessa nell'articolo precedente, non puo farsi che entro il giorno successivo a quello dell'avviso, salvi gli usi commerciali".

More, as an exception to the rules regarding the visible defects of the goods, the article 70 intervens and settles the issue: Il compratore di merci o di derrate provenienti da altra piazza deve denunciarne al venditore i vizi apparenti entro due giorni dal ricevimento, ove maggior tempo non sia necessario per le condizioni particolari della cosa venduta o della persona del compratore.

Egli deve denunciare i vizi occulti entro due giorni dacché sono scoperti, ferme in ogni caso le disposizioni dell'articolo 1505 del codice civile.

The necessity of regulate the commercial sales of goods was, finally, accepted even in some states which had not an authentic commercial code in the first half of the nineteenth century as Prussia or Austria.

Therefore, in 1861, the Diet of the German Confederation promulgated a General Code of commerce – *Allgemeine Deutsche Handelsgesetzbuch* – which entered into force the next years in the German states, including Austria in 1863 and retained an extended regulation of the commercial sales (articles 337 to 359).

Later, the new *Handelsgesetzbuch* (generally abbreviated as HGB) entered into force in 1900, by substituting the first, while in republican Austria it became compulsory after the *Anschluss* and was maintained from 1945 until now.

Thus, at the end of the nineteenth century the commercial sales – as a main institution inside the private law – was firmly consolidated.

4. The challenges of the twenty century

As it is obvious, the nineteenth century was in fact the century of the modern codification of the commercial law. Most of the states of the European continent had one or two successive codes and the intense scholar activity in this field contributed essentially to the improvements of the national regulations but also to the harmonization of the rules and principles despite the fact that at the beginning of the twenty century nobody could sustain there was an uniform commercial regulation even in the field of the sales contract.

A new trend in modernization seems to emerge on the eve of the World War One.

The Swiss lawmakers adopted two new codes: a civil one and a code of obligations.

For the first time in modern era, the distinction between civil law and commercial law disappeared and a real debate emerged between the lawyers in the interbellum period on the opportunity to follow this path.

Of course, Switzerland has non sea access so there was no need for a maritime commercial regulation, which is the most extended body of institutions in the commercial codes of the European nations, but the Swiss path appeared to be more adequate to our social relations simply by rejecting the exceptional characteristic of the commercial legislation.

In Italy, where the "fascist revolution" of the 1920' tried to be the vanguard of a new society, the debate produced finally a new civil code which entered into force in 1942. Most of the institutions of the commercial code – including the sales contract or the commercial societies – were literally absorbed by the new *codice civile* during the so called process of "commercialization of the civil law" – *commercializzazione del codice civile* – and were applied to all the subjects while the commercial maritime institutions were regrouped in the new *codice della navigazione*.

5. Conclusions

Up to now, it seems that there are two main streams in the process of modernization of the private law: one conservative, trying to preserve the existence of the Codes by adding new articles if necessary or new special laws –and France or Germany are perfect models – and another, innovative which integrate more or less in the new civil code the regulation removed from the commercial code by following the Swiss or Italian path.

At the end of the twenty century, or at the beginning of the twenty first century the Canadian province of Quebec and countries like the Netherlands, Brazil, and, recently, Romania embraced firmly that last tendency.

Despite the will to innovate and its real motivation, we must ask ourselves if this "commercialization of the civil law" does have real ground in our days.

It is not difficult, for instance, to remove the sales regulation from the commercial code and to place it inside the civil sales frame, but all this reform does change reality?

In fact, most of these rules – which are really the fruits of a long experience – will be applied only in commercial relations just because there were created for this very context and not for ordinary civil contracts.

Secondly, when the special rules are to be applied only to professionals – as the Romanian civil code imposes sometimes[7]– the judge will have now again as preliminary task to establish if one of the parties has to be considered a "professional" in order to apply that specific or exceptional rule.

Practically, the reform didn't change the system because the social reality opposed naturally to such a "legal revolution".

As a consequence, in our case, on one hand, the will to unify the private law failed just because commercial rules were only moved in the new code in a strange way, and the establishing of the status is needed again in order to apply the proper regulation.

On the other hand, the reform failed just because its model was outdated. There is no unification in the Romanian private law if the consumer's legislation has to be considered a special one, distinct from the civil code (and I shall not add the absence of a maritime code which will permit the predictable long survival of the commercial code, a meaningless reality which let us be witnesses of the most paradoxal reform in European legal history).

Nevertheless, I shall not say that the unification is an utopian choice for the moment. But, in my view, the unification inside the private law must regard especially the absorption of the consumer's law and not of the commercial contracts regulation.

Finally, I think that the commercial sales law survived inside the new civil code and, in fact, it is completed by the regulation of the consumer's sales law.

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[7] See for instance articles 2010 and 2043 from the New civil code.

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