MODERNIZING THE PRIVATE LAW. SOME KEY ISSUES IN THE RECENT DRAFT OF THE SPANISH COMMERCIAL CODE

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Abstract

The last decades were dominated by the idea that an authentic process to modernize the private law means generally the unification of it by renouncing the distinction between civil and commercial law. A few European countries and some American states or provinces followed this path of the unification.

However, beyond the will to change and improve the system one may reflect if this kind of modernization is actually really proper.

Of course, there are lots of reasons for unification and reasons against it. Is there a possible and real alternative to this wave of unification?

The draft of the Spanish commercial code could be a beginning point in order to settle this controversy.

For the first time, the lawmakers are trying to replace the actual code with a new modernized one without renouncing the above mentioned distinction.

Without claiming that we have entirely analyzed the topic, we propose a brief critical presentation of the major key issue of the draft.

Keywords: *commercial code, Spanish law, codification, entrepreneurship, specific contracts.*

1. Introduction

On 30 May 2014, the Council of Ministers of Spain approved the Commercial Code draft as it was proposed by the ministers of Justice and Economy.

The *anteproyecto* have been prepaired since 2006 by the General Codification Committee and has suffered some alterations, containing at that moment about 1,726 articles.

Its authors compiled and updated commercial laws in force today, and regulated other matters that lacked legal regulation up to now, beeing obvious that the Commercial Code from 1885 is not very up to our day.

As we may intuit the draft contains more institutions and rules as compared to the actual code and many of them were in fact improved and transfered from the special laws or were elaborated for the first time.

As time and space don't permit us to make an exhaustive analysis, we shall try to extract and comment on short some of the main institutions that are relevant, in our opinion, as modenization factors of the future Spanish commercial code.

That's why we have choose in the frame of a preliminary analysis the criteria of commerciality, the concept of entrepreneur and as a consequence the enterprise, the introduction of the concept of hardship – related to the well-known *theorie de la imprevision* – and, finally the regulation of some new specific contracts.

2. The criteria of commerciality

The actual *anteproyecto* maintains the same two criteria of commerciality of the actual Code[1].

Therefore, it maintains the principle that the commercial transactions are governed by the commercial code whether carried out by people having or not having the status of merchant[2].

What seems to be an innovative element consists in offering priority to the subjective criterion.

In that sense, the article 001-2 – which is entitled *Ámbito subjetivo* – states that the provisions of the code are generally applicable to all persons called "operadores del mercado".

Who are these "operadores del mercado"?

First of all, as the text clearly points, these are – as we may intuit – "los empresarios" in short, the entrepreneurs.

So, at this point, we have to retain that the traditional concept of "merchant" was substituted with the more economic one, that of the entrepreneur.

Secondly, "operadores del mercado" are also "las personas físicas que ejerzan profesionalmente y en nombre propio una actividad intelectual, sea científica, liberal o artística, de producción de bienes o de prestación de servicios para el mercado".

[1] See the articles 631 and 632 as traditional model in the Napoleonic *Code de commerce*, (Paris: Didot, 1807), 158. See also in the frame of the French doctrine George Ripert and René Roblot, *Traité elementaire de droit commercial*, I, (Paris: Librairie Generale de Droit, 1974), 32-33.

[2] Regarding the status of merchant see the actual article L121-1 of the French commercial code: Sont commerçants ceux qui exercent des actes de commerce et en font leur profession habituelle. See also René Rodière and Roger Houin, *Droit commercial*, I, (Paris: Dalloz, 1970), 51.

Practically, the rule includes in this large socio-professional sector every person who provides various products or services to the public.

Thirdly, in the same way, we have to add to both categories the non-lucrative organizations defined as "personas jurídicas que, aun no siendo empresarios y con independencia de su naturaleza y objeto, ejerzan alguna de las actividades expresadas en este artículo" together with the actors without juridical personality implied in the above mentioned activities on the market or "los entes no dotados de personalidad jurídica cuando por medio de ellos se ejerza alguna de esas actividades".

Regarding the concept of the "empresarios" the article in analysis defines these primarily as "personas físicas que ejerzan o en cuyo nombre se ejerza profesionalmente una actividad económica organizada de producción o cambio de bienes o de prestación de servicios para el mercado, incluidas las actividades agrarias y las artesanales".

Therefore, an entrepreneur could be considered any individual who works or in whose name somebody is professionally engaged in an organized economic activity regarding the production or change of goods or provision of services **offered on the market, including agricultural and artisanal activities**.

Obviously, all the juridical persons having one or more of the above mentioned activities as the commercial societies, no matter their activity, will be considered entrepreneurs.

Finally, as an exception, all societies which are not created according to the Spanish law, but are acting in Spain, in the same way, will be considered also entrepreneurs.

The objective criterion was retained by the article 001-3 entitled *Ámbito objetivo*.

According to this there are three hypothesis when the commercial relation is ruled by the commercial code even if that is carried out by people not having the status of "operador del mercado".

The first hypothesis takes into account all the acts and contracts which involves an "operador del mercado", when the content of the act or fact supposes one of the above mentioned activities.

The second hypothesis regards the acts and contracts which are considered by the code as commercial because of their substance while the third hypothesis placed under the commercial law the acts related to the competition law.

However, all this rational mechanism in order to identify the applicable law is limited when the act or fact involves a person as consumer and the consumers' legislation will have priority on the commercial code.

Regarding the relation between the civil law and the commercial code the authors of the *anteproyecto* have maintained the traditional principles that the rules of the commercial code have suppletory function and the commercial code will be completed if necessary with the commercial customs.

3. The entrepreneur and the enterprise

Another concept to take into analysis is that of entrepreneurship. It is known that in the frame of modern civil codes the replacing of the traditional concept of "merchant" by the economic concept of "entrepreneur"[3] was followed by the introduction also of the key concept of the "enterprise"[4].

On this way, the article 131-1 of the draft states that "la empresa es el conjunto de elementos personales, materiales e inmateriales organizados por el empresario para el ejercicio de una actividad económica de producción de bienes o prestación de servicios para el mercado".

In other words, the "enterprise" supposes a set of elements – personal, tangible and intangible – organized by the entrepreneur in order to develop an economic activity which consists in producing goods or services destinated to the market.

Practically, in a redundant way, the authors of the draft considered the "enterprise" as the organization of the manpower and the means of production.

The following text, the article131-2 points that not only the goods as means of production or the inherent right on them but also the juridical relations or facts of the entrepreneur and the goodwill are part of the "enterprise": "Integran la empresa los bienes y derechos afectos a la actividad empresarial, las relaciones jurídicas y de hecho establecidas por el empresario para el desarrollo de dicha actividad y el fondo de comercio resultante de la organización de los elementos anteriores".

The article 131-3 defines the place of business or *establecimiento mercantil* which is formed by properties and facilities used by the entrepreneur.

Of course, the draft points also a normal distinction between the principal place of business and all other forms of representation (branch offices). According to the article 131-3 – *Establecimiento principal y sucursal* – "se considera establecimiento mercantil principal el lugar donde el empresario ejerce la dirección efectiva de su actividad económica, y centraliza la gestión administrativa". The same paragraph defines branch office as "el establecimiento secundario dotado por el empresario de representación permanente y de autonomía de gestión a través del cual se desarrollan total o parcialmente las actividades de la Empresa".

[3] See article 2082 of the Italian civil code.

[4] See Gustavo Minervini, *L'imprenditore. Fattispecie e statuti*, passim; Massimo Montanari, *Diritto Commerciale*, I, (Milan: Giuffrè, 2001), 7-40. Also the Italian supreme court explied recently the concept of entrepreneur. See decision no. 16612/19.06.2006 published in *La giurisprudenza sul Codice civile coordinata con la dottrina*, (Milan: Giuffrè, 2012) 21.

Obviously, the entrepreneur will assume all responsibility for the action of his employees deployed in anyone of his establishments (para. 2) and the headquarters as the branch offices have to be mentioned in the *Registro mercantil*.

4. The concept of hardship and its principal efects

As it is known the concept of hardship in common law or the theory of imprevision in the continental private law seems to take advantage on the principle *pacta sunt servanda* even if there are national systems - like the French one - which are refusing in accepting it.

The necessities and the volatility of the commercial relations on long terms determined the lawyers to reflect on the vivacity of the the clause known even in the public law of the Medieval Age as *rebus sic stantibus*[5].

The theory was received by the Italian civil code of 1942[6] and spread after the World War II also in Germany under the profile of the *Wegfall der Geschäftsgrundlage* and also in other countries or in the international commercial relations. Even the Convention on the International Sale of Goods (CSIG) didn't received it in 1980, the UNIDROIT principles 2003 version received it in the content of the article 6.2.2.

The Spanish courts received it but in a very restricted manner[7].

In the context of the last wave of globalization seems normal that the theory be received even in the comercial relations between national subjects.

As a consequence, there is no surprise that the authors of the draft received the theory and inserted in the chapter VI – *De la extinción y excesiva onerosidad* – rules regarding the effects of the hardship state.

According to the article 416-2. *Excesiva onerosidad del contrato* the person who suffered an event qualified as hardship has the traditional option between modifing the contract – if the counterpart agrees – or to provoke the extinction of the contract without any damages.

The first paragraph defines clearly the efects: En caso de excesiva onerosidad sobrevenida, la parte perjudicada no podrá suspender el cumplimiento de las obligaciones asumidas, pero **tendrá derecho a solicitar sin demora la renegociación del contrato, acreditando las razones en que se funde.**

Si no se alcanzara un acuerdo entre las partes dentro de un plazo razonable, cualquiera de ellas **podrá exigir la adaptación del contrato para restablecer el equilibrio de las prestaciones o la extinción del mismo** en una fecha determinada en los términos que al efecto señale.

The second paragraph defines the contexto or the state of hardship if we use the English legal concept: "Se considera que existe onerosidad sobrevenida cuando, **con posterioridad a la perfección del contrato**, ocurran o sean conocidos **sucesos que alteren fundamentalmente el equilibrio de las prestaciones, siempre que esos sucesos no hubieran podido preverse por la parte** a la que perjudiquen, escapen al control de la misma y ésta no hubiera asumido el riesgo de tales sucesos".

5. The option to terminate the contract as an exception case

Beyond the hipothesis of the act of God (or *force majeure*) or hardship the draft states another possibility to terminate the agreement without damages if there is an obvious risk that one party not fulfill its main obligation.

In the terms of article 417-1. *Conducta ante el temor fundado de incumplimiento*, "cuando exista un riesgo notorio de incumplimiento esencial del contrato por una de las partes y ésta no cumpla ni preste garantía adecuada de su cumplimiento, la otra parte podrá resolver el contrato".

6. New specific contracts

In the field of the specific contracts regulation, at first sight, three innovations seem to be relevant for a comparative scientific research.

First of all, some contracts which were traditionally considered as civil contracts were replaced in the frame of the draft.

A visible example is the contract for work on goods either the building contract.

The concept is promoted by the article 521 which states as follows: "Por el contrato mercantil de obra por empresa el contratista, que deberá ser un empresario o alguno de los sujetos contemplados en el artículo 001-2 de este Código, se obliga frente al comitente a ejecutar una obra determinada a cambio de la prestación convenida o, en su defecto, de la que resulte de los usos" (para.1).

The second paragraph explains that the "obra" – or work litteraly – means "la construcción,

[5] See in this sense the pioneer work of Giuseppe, Osti, "La cosi detta clausola rebus sic stantibus", *Rivista del diritto civile*, 4, (1912): 1-50, Candil, *La clausula rebus sic stantibus*, (Madrid, 1946) passim. To make distinction to other institutions see Manuel García Caracuel, *La alteración sobrevenida de las circunstancias contractuales,* 282.

[6] See article 1467.

[7] See Susana Quicios Molina, "La ineficacia contractual", in *Tratado de los contratos*, ed. Rodrigo Bercovitz Rodríguez-Cano et al. (Valencia: Tirant lo Blanch, 2009), 1376. The author gives as examples the several decisions of the supreme court: that of 15.11.2000 (Repertorio jurisprudencial Aranzadi, 9214) and that of 10.02.1997 (Repertorio jurisprudencial Aranzadi, 665).

reparación o transformación de una cosa, así como la consecución, por cualquier medio o actividad, de otro resultado convenido por las partes", that is to say the construction, repairement or conversion of one thing, and the achievement, by any means or activity, other outcome agreed by the parties.

We have to observe that, on one hand, in order to aplly the special rules, the contractor must have the status of the entrepreneur, and on the other hand, the definition does not suppose as compensation the payment of money.

In the same direction, the article 531 para. 1 defines the agreement in order to provide services as a contract which supposses that "el prestador, que deberá ser un empresario o alguno de los sujetos contemplados en el artículo 001-2 de este Código, se compromete a realizar, a cambio de una contraprestación en dinero, una determinada actividad destinada a satisfacer necesidades de la otra, el ordenante".

Secondly, the draft, as I have mentioned above, regulates new specific contracts.

As it is obvious, some of these contracts are in fact contracts world wide known as the license contract, the discount bank contract or the factoring.

On short, according to the article 536 para. 1, "por el contrato de licencia, el titular de un derecho sobre un bien inmaterial, denominado licenciante, autoriza a un tercero, denominado licenciatario, para utilizarlo o explotarlo durante un tiempo determinado a cambio de un precio, manteniendo el licenciante la titularidad del derecho".

The discount banking contract is regulated by the article 577 para. 4 as follows: "Por el contrato de descuento un empresario, el descontante, abona el importe de un crédito dinerario no vencido al operador de mercado titular del mismo, el descontatario, a cambio de los intereses y comisiones pactados y de la cesión salvo buen fin del crédito descontado".

We must emphasis that it is a very important choice to regulate the discount banking contract in order to make distinction to the traditional credit transfer but also the fact that the definition has retained the well known clause "salvo buen fin". This clause has as purpose the protection of the party who receive the credit – the transferee – when at the date of payment the debtor doesn't pay the money or is insolvent[8]. In that very case the receiver of the credit will have the right to ask the return of the money – and in our opinion with interest – from the initial creditor.

Unfortunately, as we have point in other occasion[9], the actual Romanian civil code failed to regulate such an important banking contract despite the extension of the special chapter which covers the banking contracts.

Finally, the article 577 para.10 defines the factoring agreement as a contract through which un "operador de mercado", "el proveedor, se obliga a ceder uno o varios créditos de los que sea o pueda ser titular en el futuro, a un empresario el factor, que, a cambio de los intereses y comisiones que se pacten, asume respecto de los créditos cedidos, la gestión de su cobro de los créditos, pudiendo también asumir las obligaciones siguientes:

a) Financiar al proveedor.

b) Asumir el riesgo de insolvencia de los deudores".

More, according to the rule the factor could assume more obligations: "Asimismo el factor podrá asumir otras obligaciones tales como la llevanza de la contabilidad, realizar estudios de mercado o investigar y seleccionar la clientela".

Another innovative choice consists in regulating the so called financial contracts or "los contratos financieros".

The article 571 para. 1 states that these have as material object an amount of money and as purpose the financing another person, in direct or indirect way, with a financial compensation: "Son contratos financieros aquéllos por los que, teniendo por objeto una cantidad o suma de dinero de curso legal, en adelante suma monetaria, una o ambas partes conceden o facilitan a la otra directa o indirectamente financiación monetaria en la forma, plazo o términos que estipulen, a cambio de un precio".

Relevant for the modernization processus can be considered the regulation of some contracts related to the improvement of the technology.

On one hand, art. 532-2 regulates the contract that supposes providing means of electronic communications. According to article mentioned above "por el contrato mercantil de servicio de comunicación electrónica el prestador, a cambio de una remuneración, se obliga frente al cliente a suministrarle el acceso a la red pública de comunicaciones electrónicas para la transmisión de datos o información".

On the other hand, according to the article 532-12 "por el contrato de alojamiento de datos el prestador, a cambio del pago de una remuneración, se obliga frente al cliente a poner a su disposición una determinada capacidad de almacenamiento en un sistema de información bajo su control, a conservar los datos o la información almacenados,

[8] See Fatima Lois Bastida, El contrato de descuento, 692. See also Joaquin Garrigues, Contratos bancarios, p.285-6 and Garcia-Pita y Lastres, El Contrato bancario de descuento, Contratos bancarios, (Madrid, 1992) 727,735.

[9] See Dan Velicu, "Los contratos bancarios en el nuevo Código Civil rumano. Un análisis crítico de la reciente reforma" in *Revista Electrónica de Derecho de la Universidad de La Rioja* (11, 2013), 147.

así como, en su caso, a permitir el acceso de terceros a los mismos en las condiciones pactadas en el contrato o, en su defecto, conforme a lo previsto en el presente Código o en disposiciones especiales".

Finally, the draft retains also the definition of the "contrato de publicidad", which supposes that "un anunciante encarga a una agencia de publicidad, mediante una contraprestación, la ejecución de publicidad y la creación, preparación o programación de la misma".

3. Conclusions

It is obvious as we have anticipated that a complete and matured analysis of draft is impossible taking into account the time or the space we dispose and also the length of the draft.

On short, we have tried to mention only some key concept which can be very useful in every debate on the modernization or the reform of the commercial legislation.

The Spanish draft is, in our opinion, a good example which proves that it is possible to reform or modernize the commercial code without renouncing to the dualistic character of the private law.

As a preliminary observation, we consider that the draft offers a more coherent system and vision in comparison with the Romanian reform, conclusion that doesn't mean the draft has to be considered perfect as never a code was and never will be.

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