The Civilian Codes of Commerce and the U.C.C.†

Comparative law specialists have been accused of excessively stress of differences which separate legal systems rather than of emphasizing the similarities which bring them together.¹ The accusation may have some justification. However, for purposes of international dealings and communication it is preferable to be on guard constantly, particularly against apparent similarities which are actually misleading. This happens in the general as well as in the technical language, especially in the case of cognate words, the meaning of which has followed different semantic directions in various languages.

For example, the English word “candid” and the Spanish word “cándido” both derive from the Latin “candidus,” meaning bright and white. But while the English word is generally used as a synonym for “frank” or “honest,” its Spanish counterpart is mostly used when referring to a naive person. Similarly, the Spanish word “sensible,” with the same spelling as the English “sensible,” means in fact “sensitive.” The Spanish adverb “actualmente” cannot be translated literally as “actually,” but really means “at the present time.”

Such examples could be multiplied, but this is hardly necessary.² They are intended to call attention to the very misleading technical expression “commercial law.” Particularly after the completion and adoption of the Uniform Commercial Code³ in all but one jurisdiction, that expression has

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²This paper contains the substance of remarks delivered at the ABA Committee on Corporate Law Departments at its meeting held in New Orleans on November, 6, 1970.

²"Contrary to the traditional weakness of comparativists who seem to enjoy differences rather than similarities, the work was directed optimistically and constructively toward finding the latter, identifying, whenever possible, a common core of the legal systems under study." See Bayitch, Book Review and INT. AM. L. REV. (1966).


³Louisiana has not adopted it. The Council of the Louisiana Law Institute (an official law-revision commission, law reform agency and legal research agency of the State of Louisiana), at its session in June of 1969, voted against recommending to the Legislature
become more and more generally used in the United States.\textsuperscript{4}

This situation has created great misunderstanding abroad, in both Europe and Latin America, where many lawyers and law professors think that the United States has reverted back to the old dichotomy of private law, which originated during the Middle Ages and is still prevalent in most civilian countries.\textsuperscript{5} As is known, the dichotomy was eliminated in England in the 18th century as a result of the absorption of the \textit{lex mercatoria} or law merchant by the common law.\textsuperscript{6}

The expression "commercial law" evokes a very different mental reaction according to whether one is a civilian or a common law lawyer for the following reasons. The dichotomy which, in civil law countries, splits private law into civil law (in a narrower sense) and commercial law finds expression in two separate codes, namely, the civil code and the code of commerce. Codes of commerce are generally classified into two types: objective and subjective.\textsuperscript{7}

The objective type is based upon transactions which have traditionally been regarded as commercial, such as the purchase of commodities for resale, and also manufacturing, banking, shipping and insurance. The subjective system is based upon the professional activities of merchants.\textsuperscript{8} Neither system is entirely objective or subjective, since the objective system also takes into consideration the professional activities of merchants, and the subjective system must resort to the kind of transactions performed in order to classify a person as a merchant. It may be stated that the objectivity or subjectivity of commercial codes is mostly a question of emphasis.

The practical consequences of this dichotomy of private law are considerable and rather bewildering for the non-civilian. There is a civil sale and a commercial sale, a civil lease and a commercial lease, a civil bankruptcy

\textsuperscript{4}"In particular, it would be most unfortunate to set up a category of commercial law in a classification of the common law. Such may be one effect of the Uniform Commercial Code, prepared under the auspices of the American Law Institute and the Conference of Commissioners on Uniform State Laws, and a tendency in the law schools to set up a course on commercial law." See Pound, \textit{V Jurisprudence} 73 f (1959).

\textsuperscript{5}The following statement is an example: "The preparation of a draft of a Uniform Commercial Code in the United States of America may be interpreted as an expression of the trend contrary to unification (of private law). See Mantilla Molina, Derecho Mercantil 37 (1966) (Translation by the writer).

\textsuperscript{6}Lord Mansfield is generally credited with the completion of that process of unification. See \textit{Radcliffe and Cross, The English Legal System} 176 f (4th ed., 1964).


\textsuperscript{8}Id.

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and a commercial bankruptcy, for which even the technical names are different. There are additional consequences of the dichotomy, some resulting from the different natures of the two branches of law, others merely as a result of the two codes having been enacted at different times. The following will serve as examples: a presumption of joint and several liability of debtors in commercial engagements, which does not exist under civil law, different rates of interest, different rules of evidence, different periods regarding the statute of limitations, a compulsory registry of merchants (both individuals and business organizations) which finds no parallel for the non-merchant.9

In the case of the so-called "mixed transaction," that is, when one of the parties to a contract is a merchant and the other is not, most codes of commerce provide that commercial rather than civil law shall govern the contract.10 However, there is another system according to which the status of the defendant party, should litigation arise, is the criterion for determining the civil or commercial nature of the lawsuit.11 The situation is further complicated in the case of a counter-claim.

The dichotomy between civil and commercial law also finds expression in the field of company law. Companies are either civil or commercial depending on the activities to be performed,12 and sometimes depending on the absence or predominance of the profit motive.13 The variety of types of business organizations is greater under the civilian commercial law than under the common law. The following are recognized: the general partnership, the simple silent partnership, the silent partnership which issues shares, the limited liability company, and the business corporation. All of the types mentioned, including the general partnership, are granted juristic personality different from that of the partners or shareholders.14

It would seem clear from the foregoing, why the expression "commercial law" has a different meaning and mental associations under the civil and common law. There are additional reasons for holding that the U.C.C. is

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9 See, for example, Book I, Title III of the Venezuelan Code of Commerce.
10 Article 7 of the Argentine Code of Commerce provides: "When a transaction is commercial for one of the parties, all parties involved shall be subject to commercial law ..."
11 Article 1050 of the Mexican Code of Commerce reads as follows: "When, according to articles 4, 75 and 76, of the two parties who enter into a contract, one performs a commercial transaction and the other performs a merely civil (non-commercial) contract, and such contract gave rise to a lawsuit, the contest shall be substantiated according to the provisions of the present chapter when the party performing the commercial transaction is the defendant. Conversely, that is, when the defendant is the party who performed the civil transaction, the contest shall conform to the rules of the common (civil) law."
12 Article 2059 of the Chilean Civil Code.
13 Article 2688 of the Civil Code for the Federal District and Territories of Mexico.
14 See, for example, article 25, paragraph iii of the Mexican Civil Code, and article 2 of the General Law on Commercial Companies of Mexico.
not the equivalent of the civilian codes of commerce. Leaving aside some basic aspects related to historically different legal backgrounds and traditions, drafting techniques, legal concepts and terminology, attention should be called to the more limited, but still significant, question of coverage. The U.C.C. comprises only 400 sections dealing with general provisions, sales, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading and other documents of title, and investment securities.

Codes of commerce, on the other hand, average over 1500 sections regulating the registry of commerce, duties of merchants (business organizations are included under the term “merchants”) commercial agents and brokers, commercial contracts, banking, negotiable instruments, admiralty law and bankruptcy. A number of codes also include patents, trademarks, trade names and commercial procedure. It is quite apparent, therefore, that the U.C.C., as regards codes of commerce, represents only a partial codification.

In relatively recent times, a trend toward unification of private law has made its appearance in Latin America. Like most legal institutions of private law, this trend finds its source in European developments. Switzerland unified civil and commercial obligations and contracts at the end of the 19th century, by means of a single code of obligations. In 1942, Italy enacted a new civil code which, to a great degree, eliminates the distinction between civil and commercial law. It is doubtful that the Italian example will be followed in Latin America.

The more recent attempts in some countries point toward the Swiss solution. In most countries, however, the sharp separation between civil and commercial law is likely to remain indefinitely. Commercial law in the United States, for the reasons stated earlier, even if that expression becomes officially recognized, cannot convey the same meaning as the civilian counterpart.

Comparative law is no longer a luxury for lawyers. It is a most necessary instrument in dispelling possible misunderstandings which may easily arise when the structure and institutions of two legal systems, such as those between the civil and common law, are sufficiently different.

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16Id.
17This might be said to be the case of Brazil and Venezuela.