

DEVELOPMENTS IN COMMERCIAL LAW. PARADOXES AND CHALLENGES. A NEW ERA.

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SUMMARY: I. *First stage*. II. *The paradoxes or contradictions. Apparent or real ones*. III. *The world of information and law*. IV. *The globalization*. V. *The commercial law in the present and future*.

I. FIRST STAGE

An analysis of Commercial law compared to other branches of legislation can be viewed as a constant interpenetration of civil and commercial law, and thence to other branches of public law such as administrative law, constitutional and criminal law.

This phenomenon is not only the root for more consistency but the basis, together with the said branches of law, to a new space where the connection with computer law and, electronic commerce is made.

From the collision of particles between the various branches of law, apparent contradictions and paradoxes arise, which can be found in the new law of this last century.

The law, jurisprudence, doctrine develop as living structures, which can better be understood from a fractal¹ concept point of view, rather than a Euclidean geometric one.

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¹ View Fractals, written in 1977 by Benoit B. Mandelbrot and his predecessors Thom (1972) and Sir Darcy Thompson (1917): the reference is taken from the Effective Date, Buenos Aires, April 1981 num. 47 p. 39 et seq.

The legal system is not a system with replacements in which new rules take the place of old ones in a harmonic and organized way. The overlap of legal rules between today's new world and yesterday's old one is the standard. This is why we say that a legal system of a certain country cannot be characterized from a Euclidean geometry point of view but from a fractal geometrical or scaling order typical of the living organisms.

After the deep crisis that stroke legislations in the twentieth century due to revolutionary wars being them implicit or explicit, violent or silent, the planet all experienced essential changes, full of contradictions and paradoxes.

II. THE PARADOXES OR CONTRADICTIONS. APARENT OR REAL ONES

A paradox is a strange fact that is opposed to general opinion and feelings.

The Paradox from Epimenides, historical author of this concept, is as follows: Epimenides was a Cretan. He said that Cretans are always liars, so if what he said was true, he, for being a Cretan, had to lie and therefore what he claimed should be false.

Together with large doses of social reforms that sought to improve the lives of the people, we find extreme forms of capitalism side by side to fundamentalist narrow-mindedness.

On one hand, we see an increase in the accumulation of goods and wealth, more poverty, a struggle for peace and the unleash of violent actions, and at the same time we also see exemplar actions and sublime work done by different sectors and groups which are all contrasted with despotism, war and terror.

The bipolar world should be finished, regional unions are in crisis, despotic governments are overwhelmed by social unrest and some democracies dwindle into dictatorships.

In various parts of the world's we see the worst corruption mingled with honest people working and struggling to live with dignity.

To this world in convulsion that calls for a substitute, belongs a defined "rule of law" that is not liquid, whose reason for being there is not a nonsense, nor has lack of values but unfolds in paradoxes, contradictions and surprises.

This also happens, regarding business law. Between hundreds of possible examples, we will only mention just a few.

At various times, Government is concerned on policies to protect citizens from fundraisers.

In Argentina, as in many other countries, the government focused to protect the common citizen from the apparent “attractive” offers made by fundraisers for business purposes.

The said tender offers were subject to detailed regulation.

Law 17,811 gave place to the National Securities Commission and enacted strict rules regarding securities, Article 16 strictly defines the public offering of securities as

“the call made in a general way to persons or to particular sectors or groups to perform legal acts related with securities, being these securities held by the issuers or by organizations or corporations engaged exclusively or partially in the trade of such securities. through personal offers, newspaper publications, radio broadcasts or television, movies, posters, signs, programs, circulars and printed communications or any other media activity”.

Today, virtual reality supports a new form of business on the web, known as “crow funding, which can be described as an informal call asking to contribute money for any business, usually operated by young people that manage sites or platforms on the web, thus creating a very real home market outside the traditional “public calls” to invest. Who invest their money do not have any protection, except the general rules on civil liability and criminal law.

Should it be accepted a so different way of fundraising? Are there any different dangers for the average citizen compared to normal fundraising?

The goal would be to analyze whether it would be desirable to enact laws for these practices to protect consumers (in this case, small investors), knowing that an excess in regulation can terminate this type of business.

There are other paradoxes of interest.

Legal positions today argue that the law should be flexible, legislation should follow open standards and notions (better known as soft law), compared to the old and rigid standards of law.

Another issue is the tendency to delete from the law certain definitions and concepts, such as “company”, “merchant”, “merchant statue”. (In Argentina, the proposed new unified code submitted to the National Congress on June 8, 2012, follows this trend).

While some legal systems carefully regulate the notion of legal entity — such as it is in the current Argentine law and the proposed new unified code of civil and commercial — in other jurisdictions, (e.g. the German Commer-

cial Code) the law only names the notion of “legal status” describing few consequences and refraining from defining the term.

The notion of “merchant” was a nineteenth-century law archetype of the law fully defined and described in detail in the codes of the nineteenth century, indicating the pros of becoming a merchant and the cons of breaching the so-called “merchant Statute”.

The same occurred with the notion of “commercial transactions” which evolved in two different ways, one into its deletion; the other, followed by Mexicans and French, into the increase of the number of acts to be considered “act of trade”.

There is a dual existing law generating discussions and clashes because of the existence of local laws coexisting with regional integration law.

Something similar happens in between market protectionism and market freedom. These virtual or real paradoxes in law, confirm that this science is not exact but social and the rules that regulate human beings in their behaviors are built in protein and non-geometric frames.

To end these examples, there is one referred to a triple legal solution.

This triple legal solution can be seen in the formalities required to consider an existing agreement or contract between the parties.

The offer and acceptance in writing is the traditional rule of law since writing is known by men. This rule was later ratified without amendments with the invention of printing.

Written consent provides certainty and is proof of the existence of agreement or acceptance.

This is the interpretation in the old codes. In Argentina, both the Civil Code from Velez Sarsfield in 1871, and the Commercial Code, written also by him together with the Uruguayan jurist Acevedo, establish only for very small amounts the validity of a witness proof trying to demonstrate that a contract has been accepted.

Therefore, our country made the reservations permitted by the 1980 Vienna Convention on the law of International Trade, that is, requiring writing as an essential proof of offer and acceptance of a contract.

But the world has gone other ways. And the few countries that took the reservation have been seeing a change in their business reality to which they need to adapt.

Also the New York Convention on arbitration related to the implementation and enforcement of awards, refer to documents in “writing”. The same happened with the model law of arbitration UNCITRAL, which was taken by many countries as part of their domestic law.

The issue was that Guttenberg's invention was very important to mankind. But this lighting event is fading .as time goes by.

Today things are different. Together with the informality of contracts and agreements, which derive from the need of speed in business, we can find Internet which helps to communicate in real time with anyone anywhere on the planet. If it wouldn't be for informality and internet, the exponential increase in international business would not have existed.

And so we have a triple order, which is not necessarily contradictory, but indicates an evolution:

- a. Contracts in which the acceptance is made in writing.
- b. Written agreements, required as a general principle, but being followed, and therefore diluted, by new complementary rules which accept non-written forms. An excellent example is the Peruvian law of arbitration, taken from UNCITRAL model.
- c. Electronic contracting, in which there is a "document" in a technical sense, but not in "writing".

In issuing electronically a binding will, it is considered that an "available document" exists when the following conditions are met:

1. The Message is perceptible by the senses.
2. It is possible to storage it in records.
3. It can be reproduced.
4. Information can be taken out of it.

Are all these requirements, necessary to consider that there is an "available document"? Or just one or some of them are sufficient?

Every one of these requirements are indivisibly linked, as they are the characteristics of the same phenomenon.

Together they describe something real, that American law, Chile and other countries including not few judgments and arbitration awards consider as an available document, ie, valid to be presented as evidence in court or arbitration, as proof of an existing will.

Argentina, with the enactment of law 25506 regarding digital signatures, has accepted a concept of much more flexibility. What has yet to be done is the withdrawal of the reservation made in the Vienna Convention regarding International Trade.²

² As an example in this topic, there is a court decision in the city of Budapest, in which, despite the fact that Hungary had made the same reservation as Argentina and other countries, the ruling admitted the validity of an international sales contract concluded by telephone. Quoted in the new book-Zuppi Garro, on the International Sale of Goods published in Buenos Aires in 2012 by Editorial Abeledo Perrot of Buenos Aires.

III. THE WORLD OF INFORMATION AND LAW

Technology evolution is today highly appreciated, perhaps too much, There is a constant effort to simplify and accelerate business and therefore life course itself.

The digital revolution does not allow anything else that what can be done in brief. You can only communicate summaries of any thought, and also limiting the amount of text. Hence the success of Facebook, Twitter or the online journal Huffington Post.

Electronics is the present and close future revolution. The World Wide Web continues to evolve since the page <http://info.cern.ch>, created by Tim Berners-Lee, appeared twenty years ago-at that time only intended to exchange information.

Predictions say sites in the web will multiply and become cheaper. Tools will be simpler and costs to access the web as well as its main current applications (e-mail, chat, video calls, not forgetting the purpose for which it was born, the traditional: file sharing) will be much lower.

Search engines are wonders, which permit a universal access to information (browser) and the HTML is the primary language to write web pages.

The website will be developed, possibly the same way as the Big Bang, that is, with a plurality of new expressions.³

Even Courts tend to improve themselves through computer systems.⁴

All companies going after these developments will help free the end user from middle men. Business activities on these tracks are essential, but also essential is the fact that companies compete against each other in the market, so there is not a single voice out there that can decide what can and cannot be done on the network.

Recently, the G8 has met with the CEOs of the companies developing new technologies to regulate various issues regarding the web, such as inter

³ One of them is the looming David Gelernter of Yale, who is leading a trend called “lifestream” (current life) that seeks to explain a proposal for the future development of the Internet through a chronological flow of documents that function as a set of life experiences, which are stored to be shared by the digital community. This idea is shared by the engineer and writer Eric Freeman. To Galernter and colleagues, all of our activities will be in the future reflected in the Web, which today is, as defined by him, a “a huge diffuse nothing”.

⁴ See internal court decision 31/11 of December 13th, 2011 on electronic notifications of the Supreme Court. Rossi, Guido, “Capitalism and diritto Umani” in *Revista delle società*, year 56/2011, page 4. Rossi, Guido, *op cit.*, page 15. Fargosi, Horace P., “Business Law of the century” in the Commercial Code, Hammurabi, Buenos Aires, 2005, vol. 1, page 127. A clear example are the “twelve priorities” that has set the European Union on April 13, 2011 for the growth of the block (COM-2011-206 final).

net neutrality.⁵

Electronic advances are not the most important in the new millennium. The bottom line is the need to educate.

It's necessary to distinguish between information, knowledge and wisdom.

T.S. Eliot in his poem *The Rock*, asks: "Where is the wisdom we have lost in knowledge? Where is the knowledge we have lost in information?"

The lives of most of us go by and encounter us immersed in the search for information, entertainment and news. One could say... How many people are stunned with entertainment with no future? With banal or ephemeral thoughts, expressions of personal issues or daily news with no importance?

We do not agree with these thoughts. We think there is always personal enrichment. And there is no clear way from error to certainty; the only way is from a complexity to another.

However, it is appropriate to remark that this enrichment is not only the consequence of information and knowledge, but also from education and study, creativity and an intelligent use of science. Comprehension becomes paramount and education a vital need.

IV. THE GLOBALIZATION

The legal system should be structured to regulate human behavior, the modern trend runs along two tracks: first, there is an increasing flexibility in various aspects of law from which, the one in international law is the more advanced (devices opt in and opt out, etc.) This openness does not mean having unlimited freedom and no controls.

Rules are good, but the new human history should be made around the capacity to understand emotionally the others, the people, and the various sectors.

As pointed out by Rossi⁶ in this globalization, both property and trade is in a profound change and this affects the concept of democracy.

The author insists on the idea that, in countries that are considered democratic, violence should be wiped out, inequality and injustice eradicated, while human dignity and rights should be respected.⁷ This is accepted and shared by everyone today.

⁵ See Tomeo, Fernando, "Internet Neutrality" in *The Law of September 9th*, 2011.

⁶ Rossi, Guido, "Capitalism and diritto Umani" in *Revista delle società*, year 56/2011, page 4.

⁷ Rossi, Guido, *op cit.*, page 15.

Ascarelli pointed in 1952 in his “Studi” “In the current crisis of values, the world demand lawyers for new ideas and not subtle interpretations: it is necessary therefore to go over the fundamentals”.⁸

The challenge is to present an adequate set of rules —most of them will be legal ones— to bring humanity to Justice without risking freedom.⁹

It is important to remember UNCITRAL Rules 2010, available as model soft law regarding “international trade agreements”, which include the principle of freedom, the obligation of the given word (1.3), respect for mandatory standards (1.4) and the obligation to act in good faith and fairness (1.7) respecting the interpretation to be done in any agreement to one’s previous actions in it (1.8).

These rules should be extended to the whole legislation, not only to “contracts” or to those considered “commercial” (Uncitral could not define “commercial” since it is not a concept distinguished in the common law). All the national legislation with the exception of Public law, should use this principles.

Today there is only one law body regarding property, as seen in any interpretation of any judge, be it under civil law or commercial law and that is the living law.

V. THE COMMERCIAL LAW IN THE PRESENT AND FUTURE

Commercial law, with all these apparent paradoxes only gives proof of vigorous growth.

The legal concept of merchant, company, consumer trade agents, will always exist, whether they are explicitly legislated or not.

There are a multitude of sources for interpreting the law; therefore more and more expertise is required to be an operator in any legal system.

The simplification in the civil and commercial systems to “legal acts” and “contract” to show the existence of a will is no longer enough. New legal categories should be created.

The new phenomenon of regionalization, integration and globalization, means that there are various legal systems coexisting which should necessarily complement in between each other.

⁸ Fargosi, Horace P., “Business Law of the century” in the Commercial Code, Hammurabi, Buenos Aires, 2005, vol. 1, page 127.

⁹ A clear example are the “twelve priorities” that were set by the European Union on April 13, 2011 for the block growth (COM-2011-206 final).

The “business incubators” existing in countries of North America and Europe are proven institutions. They are referred to as small businesses, and encourage the growth of the economy as a whole.

Trade deals are diverse and they involve private, mixed and public companies. The concept of “market” is being discussed, particularly “markets” (national, regional, international).

Also, two new concepts emerge: the “consumer” and the “stakeholder”, the latter unknown in the recent past, used to refer to all persons not necessarily being members of the company, but having some kind of link or participation regarding it.

The partnership, formerly the business center, now is evolving in different ways all allowed by law.

There has been a profound change in customs and habits which will give birth to a new law, to a new society, which is still brewing around those who use the tools of the digital age.

Education should be in the spot. Education brought unlimited progress in the welfare of large parts of the world.

Other regions, tragically back warded, are mired in illiteracy, hunger, lack of opportunities, war and misery.

Knowledge can give the world a better life. Everyone is entitled to a better life, all human beings should have access to food, clothing, housing and education.

As never happened before, many things can be solved with new energy resources, environmental policies and education.