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Recent Challenges and Developments in Commercial Law

DAVID FABRI

(Head of the Department of Commercial Law at the University of Malta)

Introduction: the changing face of commercial law

In simple terms, commercial law is all about how business is regulated. The law regulates business in a number of ways and adopts a variety of devices and measures. Various laws promote and facilitate the carrying on of business activities as these activities which provide employment and generate wealth in the community. They include laws on shipping, aircraft, company law, intellectual property, international trade, financial services and tourism-related activities. All these activities are business activities carried out by persons or entities which the law deems to be traders.

As business activities develop and advance in different directions, the teaching of commercial law has had to evolve correspondingly, often venturing into unfamiliar territory, in order to remain relevant and to continue to reflect the ever changing business regulatory environment. In this context, of particular interest is the growing role of a plethora of

oversight and administrative agencies and important developments in the area of regulation of business and compliance obligations, corporate governance, financial services and consumer law, and in technology.

The Commercial Code and the Civil Code

This paper addresses the continued relevance of the Commercial Code. But it will also hopefully show the inter-operability between the civil and the commercial laws, and how this relationship has been changing and developing during these past years. It is an often complex relationship. The inter-play seems to be one of increasing mutual complementarity and inter-dependence. The senior partner in this relationship, in my view, remains the civil law, a foundation of basic principles and institutes and of rights and remedies which the commercial law continues to build upon. This enquiry forces us to have a second look at the phenomenon of codification and of what has become of it. We should remain mindful of the phenomenon, benefits and objectives of codification. The Codes did not just happen without a reason but were drawn up to be, if not complete in every respect, at least a self-sufficient and self-contained number of rules, coherently laid down, and which were capable of growing and evolving from within themselves through judicial application and interpretation. This is no longer the case, for a variety of reasons.

Students and practising lawyers need to be wary of the dangers of underestimating the relevance of the civil law in the practice of commercial law. The importance of the civil law to commercial law and to business relationships should never be under-estimated. In whatever area of law one practises, one loses sight of the basic civil law rules at great risk.

To a large degree, the Civil Code still manages to provide adequate answers and remedies to our private law questions and demands more than 200 years after the original French Code Civil on which it had been broadly modelled. The provisions of the Commercial Code however no longer represent what society expects and today fails to provide the answers and devices required by a fast changing and evolving society in a post-EU membership scenario. There are grounds for suggesting that the Commercial Code does not speak the language that reflects 21st century business, that it is not up to date with how business is really carried on in Malta today and fails to come to terms with legal and technological developments that have taken place during these past twenty years, a period which has witnessed tremendous changes in the way business is carried out and regulated. A fundamental underlying assumption of the Code is that the State would play a marginal role and would not intervene heavily in the market place. Instead, the State has today become very active and interventionist, a development that reflects public expectations of what the State should do to ensure that the public gets a fair deal from business operators. Today, like never before, the State is present in the market and intervenes through many laws, regulations and public regulatory authorities that were unheard of when the Commercial Code and the Civil Code were being originally compiled. Indeed, today more than ever, public law has become an integral part of our commercial law. Much of our commercial laws are no longer just private law driven, but instead employ public law techniques, remedies and measures. Public agencies established to licence and supervise different areas of business, inevitably also greatly influence the way those activities are carried out.

The Commercial Code makes no reference to these developments, which are instead located in special legislation adopted outside the codified framework. By itself, this fact sends a signal that the Commercial Code is not only incomplete and wanting, but also partially archaic as it fails to provide the answers and remedies required by modern day business. The Code is no longer capable of fulfilling the functions attributed to it by its original drafters. The face of modern day business regulation has changed and there is a great shift towards State intervention and public law encroachment on what was formerly a securely private law environment. The Code has not kept up.

Calls for updating and improvements are not new. At one point in time an impassioned call for the reform and updating of the Commercial Code was made many years ago by Prof Carlo Mallia. He wrote an interesting piece on the subject in Melita, which was "An English and Italian Monthly periodical" way back in the January 1921 edition. His subject was in fact "*Sulla necessita' di riformare le nostre Leggi Commerciali*". He remarked that the Code and other commercial laws had failed to keep up with the times and had been left behind by the pace in which business activities evolved. He suggested they be revised and brought more closely in line with the laws of other countries with which Malta mainly carried on trade. At one point he makes this remarkable statement:

"Se venisse un giureconsulto estero e ci domanda in quale anno fosse stato promulgato il nostro vigente Codice di Commercio, sfiderei chiunque a non sentirsi arrossire se dovesse rispondere il vero."

Some reforms were eventually carried out.

Challenges in the teaching of Commercial Law

In an increasingly changing world, even the teaching and the study of commercial law have had to face several challenges.

Commercial activities and business law are necessarily inter-twined. Business activities are regulated and the proper question is not whether but how and by whom they should be regulated. Business is a dynamic phenomenon and the Commercial Law Department at University has had to remain vigilant so as not to risk irrelevance. For this reason, it has been active in regularly updating its study units and course content to better reflect the changing needs and expectations of today's fast changing business environment.

For many years the teaching of Commercial Law at University centred to a large extent on the assumption that the Commercial Code formed the bedrock of business regulation. The position today is different. Commercial law is now much more than the Commercial Code, which is increasingly looking dated despite any nostalgic inclinations to the contrary. The past twenty years have ushered in new study units on consumer protection, financial services, aircraft financing, international trade. Since 1995, the Department of Commercial has been offering a Masters in Financial Services Programme annually.

The impact of public law

This brings us again to the public law - private law divide. Commercial law may today be described as a mixed or hybrid collection of rules which through public law techniques and private law rights and remedies establish a significant and complex legal and administrative framework. This framework allows trade to be carried on while prohibiting and sometimes punishing conduct deemed excessive or abusive to consumers or the general public. Commercial law today carries within it significant elements of the civil law as well as elements of criminal and administrative law.

The role, powers and status of public authorities which are established by Parliament to regulate different areas of commercial activity, like the Malta Financial Services Authority, the Malta Communications Authority, and the Malta Competition and Consumer Affairs Authority, form an integral part of what we refer to as administrative law. These developments have resulted in an increase in legislation where particular areas of commercial activity are singled out for special regulation and supervision.

Both the Civil Code and the Commercial Code had been constructed on the unstated underlying assumption that the public is best served by private law and by the operation of the principles of freedom of contract and free competition. They assumed that the State would keep at arm's length from regulating trading activities. This assumption is no longer valid and the State has intervened extensively through ever-increasing laws and regulations and through dedicated public agencies.

Business does not operate and should not be allowed to operate in a legal vacuum. A free market is a regulated market. Some measure of

government intervention and monitoring is today considered necessary and justifiable. About a dozen different public agencies promote consumer interests in a relatively direct manner. The existence of these various authorities, each supervising a different field of economic activity, is a clear indication of the increased state intervention in the market. The increased complexity of business activities and retail products sold to consumers and the massification of the market have raised public concern and higher expectations in favour of more and more state intervention.

Commercial law is now much more than just the Commercial Code as most new recent important commercial law rules have indeed been adopted through special legislation adopted outside the Code. These include legislation on companies, fair competition, aircraft, financial services and gaming, and now also on blockchain and crypto currencies. One may also suggest that the structure and the provisions of the Code betray its age and seem archaic compared to the new sophisticated commercial laws adopted in more recent years.

Consumer law as part of business law

Recent trading regulation law has given to the consuming public new improved rights and remedies formerly unknown to (and indeed unheard of) in the Civil Code. The European Union has had a tremendous influence on the development of consumer law in Malta. Many if not most of the measures introduced these last twelve years find their origin in EU Directives and several have had a significant impact on our private law rules and principles. One remarkable innovation was the so-called cooling-off period which allows a consumer the right to withdraw from a

contract duly signed and freely entered into. The cooling-off period and the right of withdrawal is not known to the Civil Code and arises exclusively from special laws and regulations. The mechanism now forms part of our general law. Similarly, another recently transposed revolutionary remedy today allows courts to cancel clauses deemed unfair in consumer contracts concluded with traders. This new remedy has challenged the Civil Code rules on the sanctity of contracts formerly considered inviolable. Other new rules of civil law relevance in the Consumer Affairs Act include the award of moral damages to injured consumers, and new rules on defective goods, and on producer and supplier liability in the case of harmful products.

The consumer was for a long time ignored as an important player in the business transaction. The law lacked a proper definition of who is a consumer. It was more interested in promoting and facilitating business activities than in restricting or controlling them. The Commercial Code ignored the consumer and focused on regulating traders and trader-to-trader relationships. With the official publication of the 1990 White Paper on Consumer Rights and the Consumer Affairs Act of 1994, the consumer became the focus of legislative policy which formally acknowledged that the consumer merited both conceptual recognition and articulation as well as special safeguards under specialised laws.

Conclusion: a constant search for relevance

One cannot ignore the changing face of retail business and the relevance of the international dimension in today's increasingly globalized markets. Academics need to move beyond teaching commercial law purely from a domestic perspective and give more importance to international sales law, issues in cross border trading, regulatory cooperation and other international issues in commercial law.

Students of law should enquire more about the fundamentals of business regulation: why business activities warrant regulation; how business should best be regulated and by whom; and indeed what are the objectives of regulation; whether contract law and freedom of contract and competition and other private law remedies are more effective than public regulation enforced by public agencies and resort to the criminal law.

Commercial law is becoming an increasingly hybrid set of principles and measures, with on the one side:

(a) a rather old fashioned and static Code which is no longer sufficiently responsive to modern demands and contemporary business practices: and on the other side; and

(b) an impressive number of specialized legislation which have established novel and complex frameworks for different commercial activities.

Commercial law should also be seen in the context of other legislation particularly the civil law. Consumer protection law is one clear example among several which evidences the continuing fundamental importance of contract law, the law of obligations, mandate and the rules on provision of services, and of course the law of sale which will always remain of fundamental importance in consumer protection. Consumer law has

further defined the limits of trading law and it informs traders how not to carry on their business activities in relation to their customers.

In conclusion, this brief paper has argued that commercial law cannot any longer make believe

(a) that it should be concerned exclusively with traders and not also with their customers; and

(b) that it should not concern itself with public law rules or with public sector oversight agencies.

The Commercial Code needs to come to terms with such phenomena as the internet, consumerism, rules on fair competition, globalization and the changing face of regulation and higher public expectations. The Code needs to be re-appraised and refreshed and made more responsive to the needs and expectations of today. For these reasons, the Code could benefit from a well-deserved extensive yet judicious and cautious revision to ensure its relevance for years to come.

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