

II. VARIA

1. "TREATISE ON COMMERCIAL LAW" - BOOK REVIEW

Rodica-Diana APAN *

**Stanciu D. CĂRPENARU, Universul Juridic Publishing House,
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6th jubilee edition, 2009-2019, 10 years since its first issue

We are honored to host in our publication, the review of the "*Treatise on Romanian Commercial Law*" (hereinafter referred to as the Treatise), the work of Professor PhD. Stanciu D. Cărpenu, published in 2019 at the Universul Juridic Publishing House, as the 6th jubilee edition, 2009-2019, respectively 10 years since its first issue.

From the first edition it has been obvious that we have before us a Treatise of reference in the Romanian commercial law landscape, from at least two perspectives: from the perspective of the author, professor PhD. Stanciu D. Cărpenu being a distinguished personality of Romanian law; secondly from the perspective of the content and amplitude of the paper, developing on the relevant institutions of commercial law, in a total of 824 pages, updated with the regulations in force at the time of each edition.

The 6th edition of the Treatise comprises eight chapters which deal in an exhaustive manner with the main institutions of commercial law as they result from the regulation of legal relations involving the professionals, included in the Civil Code, Law no. 287 of 2009 and mainly in special laws, namely Law no. 26 of 1990 on the trade register, Law no. 31 of 1990 on trading companies, Law no. 85 of 2014 on insolvency and insolvency prevention procedures, as set out below:

* Assoc. Prof. PhD., Faculty of Law Cluj-Napoca, Christian University „Dimitrie Cantemir” Bucharest

(i). The first chapter deals with the theme of “*Introductory notions of commercial law*”, namely: a historical look at commercial law; the notion, the object, the definition, the regulatory system, the normative and interpretative sources of law and the modern trends of commercial law. It is indicated in this chapter of the paper that under the empire of the system established by the new Civil Code, the legal trade relations continue to exist “rebaptized as relations between professionals (art. 3)”. “Following the research on the historical perspective and the present-day perspective on the concept of “commercial law”, we note a grounded plea for a new Commercial Code, based on the unitary system of regulations, contained in the Civil Code, a type of Commercial Code as “legislative consolidation” of European Inspiration, a code that would include “the special laws in force concerning the legal relations involving those carrying out professional type of activities.”

(ii). In the second chapter it is developed the theme of the “*Enterprise - the legal form of carrying out the activity of a professional character*” and the notions and concepts regarding the enterprise, the forms of the enterprise and the economic (commercial) enterprise - legal form under which commercial activity is carried out. The reforming concept of the Civil Code “has generalized the notion of enterprise”, which represents the legal form of carrying out a professional activity, while the exploitation of an enterprise consists in the systematic exercise by one or more persons of organized activities consisting in the production, the administration or the sale of goods or the provision of services, whether or not for profit.

In this chapter of the paper, it is outlined the distinction, with relevance in practice, between the forms of the enterprise, namely the economic (commercial) enterprise whose purpose is profit making and the civil enterprise, with a non-economic object (non-commercial), and the characteristics of each are the object of a comparative analysis.

(iii). The topic of “*Traders as professionals of the economic enterprise*” is dealt with in the third chapter, starting from the premise that although the Civil Code enshrines the unitary concept for patrimonial relations, it also makes a distinction between the participants in these legal relations, respectively “between mere private persons and professionals”. As a consequence, this chapter deals mainly with the concepts of professional traders, namely: notion, categories and the quality of professional trader; the conditions for the exercise of the commercial activity and the obligations of the professional traders before

and during the exercise of this activity. Defining the notion of “professional trader” presents a practical interest, because this quality “implies a certain legal status, different from that of professionals non-traders and non-traders.” The categories of professionals traders subjected to analysis are the well-known ones: professionals traders natural persons, in the form of authorized natural persons, the entrepreneur holding an individual enterprise, member of a family enterprise; professionals traders as legal entities under the forms of the company carrying out commercial activity, commercial companies, autonomous companies, economic interest groups, cooperative companies, cooperative organizations, European cooperative companies, as well as the more recent categories, having a European character, European companies and European economic interest grouping.

The matter of the obligations of the professionals traders is focused on those obligations that are imposed on the trade professionals, obligations “closely related to the exercise of the commercial profession” namely: publicity through the trade register, organizing and keeping the commercial activity accounting books, and exercising the trade within the limits of the licit competition. As for the latter obligation, considering its relevance in the commercial activity, its components are investigated, namely: protection against anti-competitive practices and economic concentrations, protection against unfair competition and protection against unfair practices in relation to consumers, by laying out the definitions of the related notions, as well from the perspective of the bodies that ensure market surveillance, the protection of competitors and consumers against illicit practices and apply sanctions, such as the Competition Council and the National Authority for Consumer Protection.

The Trade Fund, both the definition of the concept as well as a special look at its constituent elements, namely, intangible assets -the company name, the logo, the industrial property rights, the copyright and the tangible assets - the immovable assets, the tangible movable assets also analyzed *in extenso* in Chapter III. By treating *hic et nunc* the theme of “the auxiliaries of the professionals traders” the commercial agents are classified and their relatively new categories in the business activity are listed: financial investment services companies authorized by the Financial Supervisory Authority and credit institutions authorized by the National Bank of Romania acting on the capital market; brokerage companies and brokers acting on the commodity exchange market; insurance agents and insurance brokers operating on the insurance market.

(iv) Chapter IV handles the topic of “*Companies carrying out commercial activity (Law no. 31 of 1990)*”, laying out a review of the causes that led to the creation, origin and evolution of companies in the commercial activity; the legal regulation and their forms, the rules common to any company and the specific ones applicable in relation to the form of each company from the perspective of its set-up, functioning, modification, dissolution and liquidation. An even more detailed development is granted, in this fourth chapter, to the “Specific elements of the company contract that is at the basis of the company carrying out commercial activity”, namely: the contributions of the associates and their legal regime; the share capital and the patrimony of the company, the intention of the associates to cooperate in carrying-out the activity of the company (*affectio societatis*), the split of the profit. In relation to the practical relevance of the moment when the companies are set-up, the work discusses *in concreto* the constitutive acts and formalities necessary for setting-up, respectively registering in the trade register and authorizing the functioning of the company carrying-out commercial activity, as well as the requirements regarding the legal acts concluded during the setting-up of the company and the consequences of inobserving these requirements.

Chapter IV copes also with the legal regime and the functioning of the company carrying-out commercial activity, as a private legal person, with a special regard to the deliberative body-the general assembly, as the “trustee of the will of the company”, which was established in the decision of the general assembly, “*sui-generis legal act*”, “expressing the will of the associates in a collegial framework and in accordance with the majority principle, in the sense of achieving a common goal, which corresponds to both the personal interests of the associates and the interests of the company.” Or, “the will of any trading company expressed in the general assembly is fulfilled through the actions of the persons or bodies that are invested, who carry out the administration and the leadership of the company”, is therefore well grounded the continuation of the doctrinal undertaking, by researching the administration and the leadership of commercial companies, both from the perspective of the legal status of the administrators, having as central subject the legal nature of the relationship between the administrator and the company - as mandate relation, as well as the obligations and liability of the administrators.

Researching the subject of the joint stock company, the aspects regarding the simultaneous setting-up and the setting-up through public subscription are

detailed, indicating the elements expressly regulated from the content of the shares prospectus, “which must be well-known by those interested in subscribing the shares of the company”, as well as the applicability of the sanction of nullity in the case of share prospectus that does not include all these elements. The single tier and the two tier system of management and administration of the joint-stock company are developed with a special regard to the responsibilities and functioning of the administrative board, as well as the board of directors and the supervisory board. Regarding the limited liability company, the subject of the transfer of the equity shares and the conditions under which it operates: between associates, between associates and individuals outside of the company and by way of inheritance; as well as the withdrawal of the associate from the company, with the remark that “According to the law, the rights of the withdrawn partner concern the equity shares. In reality, these rights refer to the dividends from the profit obtained in the financial year, as well as to the company's patrimony, which includes the profit and the assets of the company.”

(v) The theme of “*Economic Interest Groups*” is dealt with in Chapter V, in terms of notions, characteristics, constitution, functioning, modification, dissolution and liquidation.

(vi). Chapter VI deals with the topic of “*Business Contracts*”, namely, *ab initio*, the definition, characteristics and legal regime, general and special rules for drawing-up the contracts regarding the commercial activity, including setting-up through electronic means; rules on the performance of contracts and debtor's liability for non-compliance with contractual obligations in business contracts. Within the same chapter are examined in an exhaustive manner the issues related to special contracts, from the perspective of the notion, characteristics and legal nature, content, form, effects of their termination. The research is extended to the following categories of relevant contracts for the commercial activity, namely: the sale-purchase contract; the supply contract, the simple partnership contract, and joint-venture contract; mandate contract - with representation and without representation; agency agreement, brokerage contract, leasing contract, franchise contract, loan-to-use (commodate) and consumer contract; current account contract, bank account contracts - current bank account contract, bank deposit contract, credit facility agreement, contract for the rental of safety deposit boxes.

A special relevance for this chapter is the presentation of business-specific contracts, such as the leasing “the legal technique based on the complementarity of interests of the three persons involved in the operation” and the franchise, if we consider that the latter “represents a modern contractual technique, for the sale of products and services based on the collaboration between traders.”

(vii). Chapter VII deals with the topic of “*Credit bonds*”, namely the bill of exchange, the promissory note and the cheque, the research being targeted at each of them: the notion and the characteristics, the conditions of validity, the endorsement, guarantee and payment and the consequences of non-payment. Because “a modern legal form of movement of goods is the transfer of documents (bonds) that incorporate certain patrimonial values”, credit bonds have a major importance in the commercial activity, therefore, discussing them, including aspects regarding the endorsement, “as a specific legal instrument for the transfer of the rights arising from bills of exchange” and guarantee, which has evolved “becoming an autonomous and independent guarantee”, complement the theme specific to commercial law.

(viii). Chapter VIII is devoted to investigating insolvency and insolvency prevention procedures and *prima facie* analyzes the legal treatment applied to traders in difficulty, the regulatory field and the basic principles of insolvency and insolvency prevention procedures, namely the ad-hoc mandate and the arrangement with creditors, “preventive procedures aimed at saving the debtor in financial difficulty, in order to avoid the application of the insolvency procedure”.

The insolvency procedure is dealt with *in extenso*, starting with the notion and the characteristics of the insolvency procedure and continuing with the details of the necessary conditions for the application of the insolvency procedure and with the participants in this procedure. Established as a collective action applicable to “traders in financial difficulties”, insolvency represents “that state of the debtor's patrimony characterized by insufficient funds available for the payment of certain, liquid and exigible debts.” The content and the conduct of the insolvency proceedings are analyzed from the perspective of the introductory applications, the opening, the first measures and the effects of opening the insolvency proceedings. The judicial reorganization procedure, respectively the bankruptcy procedure, as well as the liability for the insolvency of the debtor legal person and the closure of insolvency proceedings are also analyzed. The reorganization plan, as a *sui generis* legal act, “comprises the expressed will of the legally empowered

persons, which give expression to the measures necessary for the recovery of the debtor's activity in order to pay the creditors' claims” and subject to a thorough analysis, which includes: the object, content, duration, formalities and the modification. Even more so as “according to the new regulation, the desideratum of covering the debtor's liabilities must be achieved, when possible, by the recovery of the debtor's activity, that is by reorganization.”

Taking into consideration all the aspects mentioned above, including the relevant national and European doctrine and case law, the Treatise proves its undisputable value and usefulness to theoreticians, practitioners, doctoral students, master students and students alike. It outlines, in exceptional graphic presentation, the history, evolution, mobility and timeliness of regulations in the field of commercial law.

Independently of the intrinsic value of this Treatise work, as “*Books have their own destiny*” - “*Habent sua face libelli*” (*Terentianus Maurus*), we consider that the destiny of this monumental work, *de facto*, and the destiny of each individual edition was and remains that of determining generations of legal practitioners and theorist to sink into the knowlegde of commercial law.