Latin American Commercial Law: The 1955 Reform in Venezuela

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Recommended Citation
Available at: http://repository.law.miami.edu/umlr/vol10/iss4/7
COMMENTS
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REFORM IN VENEZUELA

The dualism of general, or civil law, on the one hand, and commercial law on the other, a creation of the Middle Ages with its mercantile guilds and special privileges acquired by the mercantile profession, still persists in Latin America. Such a special legal status of the merchants, persons as well as legal entities, e.g., corporations, or, at least, the special body of rules governing acts classed as commercial, makes it necessary that such rules be contained in a separate code outside of the general private law as contained in the civil code, with the latter relegated, in commercial matters, to a mere subsidiary source of law, ranking after established customs of the profession.¹

Many of the commercial codes in Latin America date as far back as the early decades of the 19th century,² and their rather antiquated features have not been erased by a periodic patch-work of amendments. Therefore, it is not surprising to find that a continuous clamor for a thorough revision of these old codes is ringing throughout Latin America, aiming primarily at bringing these codes (without even touching upon the basic justification of this now accepted dualism) in line with modern mercantile needs, particularly as regards financial, corporate and similar developments. The codes have been indicted on a number of grounds. It is pointed out that while these codes are, on the one hand, not definite enough to produce a reliable court practice,³ on the other hand, they are considered to be too specific to cover new problems as they arise.⁴ Moreover, it is stated that these codes contain “inconvenient or unnecessary or simply debatable provisions”;⁵ that they conflict unnecessarily with principles laid down in the Civil Codes;⁶ and that they retain obsolete institutions⁷ or simply fail to notice new developments.⁸

⁶. E.g., the freedom of nominating beneficiaries of life insurance policies granted by the Commercial Code to the policy holder may interfere with forced share requirements of the Civil Code, id. at 222.
⁷. E.g., obsolete forms of maritime lien, id. at 223.
⁸. E.g., there are no provisions concerning aviation law, ibid.
As a result, we find that, to cite only a few recent efforts, Honduras, among others, has promulgated a new Commercial Code (1952); Mexico has established a commission to prepare a draft, now published, and Peru has had a similar commission working on a like assignment for years. In 1955, Venezuela enacted a law to reform its Commercial Code. It will suffice here to summarize the developments in this latter country.

The first body of commercial law in force in Venezuela was the Ordonanzas de Bilbao (1737) apparently well adapted to the then commercial needs of the country, since nearly a century passed before, in 1835, a new draft for a Commercial Code was ordered by the Venezuelan Congress to be prepared. The draft was submitted in 1844, but, due to the disturbed state of the country, it was not officially approved until 1863 and even then in a revised form. In 1873 and 1904 several later revisions were incorporated into the Code. In 1919 the Code was redrafted and in 1938 it was again amended.

The recent amendment, called Ley de Reforma (1955), encompasses several important innovations: (1) the status of the married woman-merchant; (2) changes in the law concerning the commercial register, as well as mercantile books; (3) the alienation of business enterprises; (4) the introduction of the limited liability firm; and (5) a revision of provisions concerning the issuance of checks with insufficient funds.

(1) The status of the married woman-merchant. Some Latin American legal systems place a married woman to a greater extent under her husband's control than modern laws generally do. This is due not only to the persistence of a more conservative attitude toward women in public and business life generally which is, it must be mentioned, fading away rapidly, but also to the specific system of marital property prevailing in these countries.

In 1942, women were granted equal rights in Venezuela, including the right to engage in any type of business activity. However, the Commercial Code retained its provision that a married woman-merchant could engage in commercial activities only with her husband's express or tacit consent. Following similar developments in France and Argentina, this discrimination has now been abolished and, as a consequence,

10. Mantilla Molina, supra note 4, passim.
11. A commision to draft a new Commercial Code for Peru was authorized by Congress in 1929. It met inconclusively in 1936 and again from 1942 to 1945. The new Code is by no means ready for adoption. Garcia Calderon, supra note 3, passim.
14. Ibid.
a woman-merchant's property as well as her share in the marital community property are subject to liabilities incurred in her capacity as merchant. Of course, the husband may, in a gesture of generosity, subject the remainder of the marital property to such liabilities.16

(2) Changes in the law concerning the commercial register. Under typical Latin American commercial law, the importance of the commercial register and the books of a merchant, namely the journal, the ledger and the inventory, is considerable. The commercial register represents merely a record of important facts. The mercantile books, on the other hand, being officially authenticated, are conclusive evidence of the information they contain, although, in Venezuela, other documents are also admissible in evidence. Because of this particular function, mercantile books, as well as accompanying documents and even the correspondence of a merchant, formerly had to be kept for the entire period of the existence of the business and for an additional ten years afterward.17

In this respect, the 1955 reform law made a number of changes. Since they are of a rather technical nature, it may suffice to mention here that among other provisions the period for preserving books has been shortened to ten years from their closing, while other records may be destroyed at will.18

(3) The alienation of business enterprises. The third group of rules introducing innovations into the Code are those dealing with the transfer of a commercial enterprise. It has been long recognized by Latin American legal authors, following Continental leads in theory and legislation, that a commercial enterprise approximates what may be termed a quasi-juridical entity. Such an entity includes everything that comprises a business, from fixtures, merchandise and machinery to patents, trademarks and the firm's good-will. This universalistic concept also includes claims belonging to the entity as well as obligations connected with it.19

It is not surprising to find that this basically sound idea, developed in derogation of principles of Roman law and introducing Germanic collective elements into modern business law, provoked an enormous amount of dogmatic legal writing.20 This trend was about to reach a stage where an Argentine writer warned that the new monster, if it should continue to be fed by the same amount of ardent writing, could easily

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19. Scolni, L'Alienation de Fonds de Commerce en Amerique Latine, 7 CAHIERs DE LEGISLATION ET DE BIBLIOGRAPHIE DE L'AMERIQUE LATINE 27 (1952); Goldschmidt, La Notion Juridique de Fonds de Commerce, ibid. 9; Arecha, La Propriete Commerciale en Argentine, ibid. 39; Ayulay, La Conception Brasiliennne des Fonds de Commerce, ibid. 43.
20. MANTILLA MOLINA, DERECHO MERCANTIL 106 (1952).
swallow all the rest of the Commercial Code.\textsuperscript{21} Be that as it may, within reasonable bounds the doctrine of a quasi-juridical entity of an enterprise proved itself to be an inspiring new idea in the field of commercial and, in some countries, general civil law. Adopting this basic premise, for example, it is easy to justify that liabilities attach to the enterprise and are not exclusively \textit{in personam} rights against the proprietor.\textsuperscript{22} This doctrine, moreover, has a very practical value, namely to protect business creditors in case of alienation of a business, without compelling them to seek redress under the difficult requirements of the Pauliana (fraudulent conveyances statutes).\textsuperscript{23}

Compared with other legislations, the Venezuelan reform law oversimplifies the problem. Its approach is based upon the requirement of publication of the impending transfer of an enterprise with the result that the liability of the acquirer will be determined by the alienor's compliance or non-compliance with this requirement. According to the Venezuelan law, a non-compliance with the requirement of publication makes the party acquiring the business enterprise jointly and severally liable, together with the alienor, to the creditors of the latter. However, there is no express provision as to consequences of a proper publication and filing, by creditors, of their claims, except that such creditors may “although their debt may not yet be due, demand payment of their claims or security therefore”. This would indicate that these creditors remain creditors of the alienor and have to settle their claims with their personal debtor and that no transfer of claims duly filed will be effectuated as a consequence of the transfer of the enterprise involved. On the other hand, if the fact of the alienation of the enterprise is not published, both alienor and acquirer of the enterprise become jointly liable without any limitations as to the value of the enterprise so transferred. This liability extends to properly filed claims against the alienor where such claims have “not been paid or security given” for such payment by the alienor.\textsuperscript{24}

4. \textit{The introduction of the limited liability firm.} The most important innovation brought about by the Ley de Reforma of 1955 is the introduction, into Venezuela, of the limited liability firm.\textsuperscript{25}

In a short-hand way, it may be stated that this association is a combination of a corporation and partnership with overtones of a cooperative.\textsuperscript{26} The idea of such a legal hybrid in the field of commercial law

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\textsuperscript{21} Malacarreira, \textit{I Tratado Elemental de Derecho Comercial} 897 (1951).
\textsuperscript{22} Mantilla Molina, \textit{op. cit. supra} note 20, at 109.
\textsuperscript{24} Codigo de Reforma Parcial, Art. 16 (1955).
\textsuperscript{25} Leyde Reforma Parcial Art. 26 (1955).
\end{flushright}
was conceived in the later part of the nineteenth century in Germany when the need to strengthen through "MittelstandsPolitik" the middle layer of the society, between the big capitalists and the restless proletariat, reached even into the field of business associations. As a result, the G.m.b.H. was born by statute (1892) and spread as no other legal invention has done in less than half a century throughout the whole non-common law world from one end to the other, extending, quite early, to all the more important Latin American countries.

The limited liability firm is intended, first of all, to make it possible to limit one's risks in a business venture, to a predetermined part of his assets. This was always available to big investors but not to the small man who had no choice but to take chances with all he had. In addition, the limited liability firm is intended to give value to non-monetary economic factors, such as work, non-cash contributions (apports), etc. and add to such associations the invigorating touch of personal cooperation between partners. It is true, however, that this pristine idea of a limited liability firm is, particularly in Latin American countries, rapidly dwindling away. Corporate features are being permitted to gain in strength and, as a consequence, the limited liability firm is becoming more like the ordinary small corporation.

Felipe de Sola Canizares, the recognized Spanish authority on the limited liability firm, has listed its main characteristics as follows: First, the liability of its members is limited which, of course, does not negate their duty to pay in their full share, or, in certain situations, to be liable for subsequent assessments which also is the rule in Venezuela; second, the number of members is limited and, in some countries, also the amount of capital; third, the firm's capital is composed of non-negotiable shares.

27. De Sola Canizares, op. cit. supra note 26 at 7-12.
28. The contribution of labor alone, however, is almost always either expressly prohibited (as in Germany, Argentina, Brazil, and Portugal) or is not specifically mentioned (as in Mexico, Bolivia, Cuba, and Spain). Chile alone expressly permits a contribution of labor. Venezuela requires that the share (Cuota) be paid at least 50% in cash. The remainder must be in kind (en especie). In Mexico, the inclusion of partners contributing their labor has been objected to as an attempt to evade the wage and hour laws. Mantilla Molina, El Proyecto del Codigo de Comercio Para la Republica Mexicana. 4 Revista de la Facultad de Derecho, 16, p. 166 (1954); De Sola Canizares, op. cit. supra, note 26 at 363-95.
29. Including securities, immovables (technical difficulties, however, may bar their transfer) an entire business enterprise (providing that the laws concerning its alienation are complied with) trade-marks, and patents. Generally, commercial credit or objects existing in the future, and property to which the contributor has only a right of usufruct are not allowed as contributions. France, however, permits contribution of the latter type of property interest, De Sola Canizares, op. cit. supra 363.
30. Some countries limit the number of members, as, for example, Argentina, Chile, Colombia, Mexico, Cuba, Bolivia, Uruguay and Guatemala, numbers ranging from ten in Cuba to fifty in Chile. Bolivia also requires a minimum of three.
32. So do Germany, Mexico, Argentina and Colombia.
33. See note 30.
34. Only Venezuela, Uruguay and Switzerland limit the amount of capital.
except where a transfer is specifically authorized by law; fourth, the process of subscription is entirely private since the shares of a limited liability firm are never sold in any financial market or quoted on an exchange; fifth, these associations have a much simpler form of organization than corporations; while a charter is generally required for corporations the limited liability firm needs no such authorization; finally, the limited liability firms enjoy a lesser degree of governmental supervision, and, in most cases, a more favorable tax rate.35

It is quite clear that the intended personal character of the limited liability firm hinges on the degree to which the transfer of shares in the firm is limited. Let us consider, for the moment, this most characteristic aspect of the limited liability firm as it appears in the Venezuelan reformed Commercial Code. Contrary to the general rule of law that an owner may freely part with his property and his rights is the rule applicable to limited liability firms. In case a member of such a firm desires to alienate his rights in the firm, the other members have a right of pre-emption. Unless they have been given a proper opportunity to exercise this privilege, sale of membership rights to an outsider is void. If the right of pre-emption is not exercised and a share is offered to an outsider, a majority of the members of the firm, representing three quarters of the firm's capital, must consent to the transfer. In case they do not consent, the firm has ten days either to select somebody to acquire the share of the withdrawing member or to buy it out of the firm's treasury.

Representing an economic value, such share may be garnished by a member's creditors and put up for judicial sale. In case a judicial sale is made, it is, under the Code, subject to a right of re-purchase by the firm for the price paid at the sale (Art. 205) plus any expense incurred by the purchaser. To avoid any difficulties that may arise from having to repurchase after a judicial sale, the firm may liquidate the membership rights of the withdrawing member by buying up his share at a fair price.36

A transfer of membership rights may be justified in cases where the rights in the firm become part of a member's estate. In such situations, his heir will be admitted into the firm and occupy the deceased's position; if there is a number of heirs, they may select one of their number to carry on. It is apparent that here the firm has no rights of pre-emption, inheritance being considered a personal, and, therefore, a privileged change in the person of the member. It may be added that the only way to secure to the firm the right of pre-emption in these situations is to insert express provisions covering same, into the by-laws.

35. De Sola Canizares, op. cit. supra at 29.
Venezuela the maximum is 2,000,000 Bolivares; moreover, Venezuela, along with most of the European countries and Cuba, Bolivia, Argentina, Mexico and Paraguay, require a minimum capital; in Venezuela it is 20,000 Bolivares.
36. Ley de Reforma, Art. 20.
On the other hand, the personal character of the limited liability firm and the non-transferability of its membership rights is less noticeable in regard to the management of the firm's affairs. Mostly, these entities are managed along lines established for corporations, which to a considerable extent means an important de-personalization in the original concept of the limited liability firm. This unorthodox approximation of the limited liability firm to general corporate features is particularly clear in the present Ley de Reforma, since it expressly provides that "in all matters not already provided for in regard to the limited liability firm, provisions applicable to corporations and partnerships shall apply" (Art. 247-332).37

It may be added, finally, that the bankruptcy of limited liability firms is subject to the same rules as are applicable to corporations.38

(5) A revision of provisions concerning the issuance of checks with insufficient funds. The last group of important provisions contained in the Ley de Reforma concerns bad checks.39 In this respect, it is to be kept in mind that the issuance of a check with insufficient funds has never been regarded in Latin America as a serious offense. The reasoning apparently is that this type of payment is controlled by the Commercial Code and is, consequently, peculiar to the merchant profession where a certain degree of professional solidarity has prevailed and where cash payments have been the rule. It is true that in some of the Latin American countries imprisonment for short periods has been the penalty for issuing bad checks; however, a fine is still the prevailing deterrent.40

Prior to the present Ley de Reforma, the penalty for issuing a bad check was a fine of ten percent of the amount of the check, unless fraud could be proved. At the suggestion of commercial and industrial organizations, however, the new law took a more severe attitude.41 Pecuniary sanctions are replaced by imprisonment from one month to a year. The traditional approach that such a misdeed is only of private concern not affecting the public interest, is reflected in the present provision that prosecution remains conditioned upon complaint by the injured party. In addition, the new law provides for a penalty of twenty percent of the check and for loss of any right of action against the drawer

37. Argentina divides the original share into individual shares among the heirs providing that the number of members is not increased beyond the legal maximum. According to the French and German law, the firm may force the heirs to sell at a valuation. In Mexico and Colombia the heirs may dispose of their shares without the firm's consent. Chile, Panama, Guatemala, Nicaragua and Brazil permit the shares to pass only with the firm's consent. De Sola Canizares, op. cit. supra 612.
38. Ley de Reforma Parcial, Art. 29.
39. Ley de Reforma Parcial, Art. 28.
40. GOLDSCHMIDT, Sanciones Penales en Materia de Cheque, 2 Revista del Ministerio de Justicia no. 67 at 45 (Caracas, 1953).
41. Joint resolution of the Commercial and Industrial Chambers of Maracaibo, 2 Revista del Ministerio, supra note 40.
with respect to anyone accepting a check knowing that it was issued without sufficient funds.

The reform of the Venezuelan Commercial Code described here may seem to be on a small scale only, and therefore, of no great importance. However, it is to be kept in mind that haste coupled with the desire for the collossal has hardly ever produced lasting results. Organic reform well considered and carefully adapted from the past, will add more to the legal stability and effectiveness of a legal system than the most magnificent innovation forced upon an unwilling bench, a hesitant bar and the unprepared laymen who have to live with it.

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