The New Commercial Code of Guatemala

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Initiatives to reform the traditional Latin American commercial codes or even replace them with new ones have resulted, until recently, in extensive discussions and, here and there, in new drafts. However, the awareness of the need for a planned economic development on the one hand, and the impetus from economic integration, on the other, have added a note of urgency. It is not surprising, therefore, that starting in the 1950's these attempts became more serious and, finally, resulted in significant new codifications in the area of commercial law. One of these codes is the one enacted in Guatemala in 1970.

LATIN AMERICAN COMMERCIAL LAW

Latin American commercial law is characterized by three main factors. First, it constitutes a separate body of law, both substantive and procedural, distinct from the general civil law (derecho común). Consequently, such dualism unavoidably results in numerous duplications in the sense that there are in force two sets of laws for the same type of transactions. Sales contracts, for example, may be governed by general civil law or they may be subject to commercial law if they fall within the scope of the commercial code, regardless of the fact that some aspects of the commercial sale may be regulated by general civil law as a subsidiary source.

The second characteristic common to Latin American law generally, and to commercial law in particular, is that it is codified in extensive codes which have their particular status in the hierarchy of legal sources. The commercial codes cover various facets of commercial activities, from those involving individual merchants or business associations of various kinds to commercial contracts (particularly sales), maritime law, insurance, credit operations and bankruptcy.

The third characteristic is that Latin America did not produce commercial codes of its own. Instead, Latin American commercial codes are

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wholly or partially borrowed from Europe. In most instances they follow the Napoleonic Commercial Code of 1807. This code was adopted, for example, in Bolivia (1838), Haiti (1826), and in the Dominican Republic (1884), where the original codes are, with some modifications, still in force. In other republics the Napoleonic Code was adopted in the form of its copy, the Spanish Commercial Code of 1829. This was the case in Paraguay (1846), Peru (1853), Nicaragua (1869), Honduras (1890) and Puerto Rico (1899); in others it was used as the principal model, for example in Venezuela (1867) and in Mexico (1889). In addition to the Spanish-French model, some Latin American codes have been influenced by other European models outside of the Spanish motherland. In its Commercial Code of 1850, Brazil followed, for obvious reasons, the Portuguese code of 1833 which, in turn, shows strong imprints of the Napoleonic codification of 1807. More recently, two novel trends have appeared: one, to fashion commercial codes after other models, among them the Italian Commercial Code of 1882 and, lately, the German code of 1900. It is not surprising that such close relationship with European codal patterns brought with it an unparalleled influence of French, Spanish and Italian writers in the field; in some instances, their writing appeared in Latin America in translations with corresponding notes referring to local particularities. The other trend is evidenced by an increasing inter-fecundation between Latin American countries themselves. One of such codes is the Chilean Commercial Code of 1865. Relying on the French and Spanish codes of 1807 and 1829, respectively, as well as on the Portuguese code of 1833 and that of Argentina of 1859, the Chilean code was widely adopted by other Latin American countries, for instance, by Ecuador (1861), Venezuela (1863), Nicaragua (1867), Colombia (1873), El Salvador (1880), Honduras (1880), Panama (1916) and Guatemala (1877).

In spite of the proliferation of codifications and the changes thereto, these commercial codes show apparent weaknesses. There is too much reliance on foreign models. It seems that the drafters preferred to borrow texts from foreign models rather than to face domestic economic realities and seek corresponding legal solutions. The codes are primarily the work of doctrinaires well versed in foreign commercial law but not familiar with the shops, banks or corporations operating in their own countries. However, profound changes in the economies of Latin America, particularly under the pressure of the British and, later, United States economic penetration, demanded an up-dating of the codes. In most countries, commercial codes have been adjusted, at least to some extent, by extensive collateral legislation which left original codes intact and replaced particularly sensitive chapters, as for example, those on business associations,
negotiable instruments, credit institutions and insurance with modern laws. Recently, additional innovations have been introduced into Latin American commercial law. These are new ideas which regard the enterprise as a basic institution; in some jurisdictions installment sales have been introduced and in others monopolies, unfair competition, stock exchanges, trademarks and modern credit and security arrangements have been regulated by statute. In some instances, useful solutions have been adopted from common law countries regarding, for example, trusts, novel credit and security transactions as well as negotiable instruments.

A new era in the development of Latin American commercial legislation was initiated with the commercial code enacted in Honduras in 1950. This code not only abandoned the traditional reliance on the Napoleonic model and its derivatives, but adopted significant elements from the Swiss Code of Obligations (1889) and the Italian Civil Code (1942), without going all the way toward unification of civil and commercial law, represented by these two codifications. The next new code was the Commercial Code of Costa Rica (1964) which remained quite distant from its Honduran predecessor and, instead, produced significant innovations. In 1970 the Guatemalan Commercial Code appeared, the first code which, even though on a regional basis, tends toward legislative unification. Finally, the most recent enactment in this field, the Commercial Code of El Salvador (1970) was published, to be followed, it is hoped, by the new Colombian commercial codification.

THE GUATEMALAN COMMERCIAL CODE OF 1970

The new code went into effect on January 1, 1971 and replaced the code of 1942, with some exceptions to be noted later. As regards organization of the code, it follows closely the Honduran model. Book I deals with merchants and their auxiliaries; Book II with professional obligations of merchants; Book III with commercial things; and Book IV with commercial obligations and contracts followed by short procedural rules and transitory provisions.

(1) Coverage. Since Latin American commercial codes generally, and that of Guatemala in particular, maintain the separation between civil and commercial law, the question of coverage given to the latter as a special body of law becomes crucial. In delimiting their special areas of coverage, commercial codes use two criteria, the subjective and the objective. Coverage based on subjective criteria centers on the person of the merchant engaged in his professional activities, subjecting to the commercial code acts performed by him in his profession. On the other hand, the
objective criterion shifts from the person of the merchant, individual or corporate, to a list of transactions which—whether they involve merchants or non-merchants—are subject to the commercial code. Recently, this method was expanded to include an additional criterion, namely that of mercantile things (cosas mercantiles), the result being that any dealings with such things will bring the commercial law into operation. Of course, the subjective and the objective systems may be combined into a mixed system. This is the system adopted by the Guatemalan code, but with main reliance on objective criteria.

The code applies, first, to merchants’ professional activities, merchants being those who in their own name and for profit engage in any of the following activities: production or transformation industries or services; intermediary functions in the marketing of goods or services; and in banking, insurance and guaranty as well as in auxiliary functions (Art. 2). Business associations regulated by the code are considered merchants by operation of law, regardless of their particular activity (Art. 3). However, excluded are the liberal professions, agricultural activities and artisans who work only on order and have no inventory or a shop for the sale of their products (Art. 9).

Second, the code covers, regardless of the mercantile or non-mercantile characters of the participants, all transactions which involve mercantile things, a criterion suggested by the Mexican drafts of 1927 and 1943. These transactions include negotiable instruments, commercial enterprises and patents, models, trademarks and similar matters (Art. 4). In cases where the mercantile quality of participants is a factor, the code will apply even if non-merchants are involved in such “mixed transaction” (Art. 5). However, it is not clear whether dealings in land are excluded from the code, a discrimination dating from feudal times. It would seem that they are not.

(2) Sources of commercial law. The Commercial Code as the primary source of commercial law is supplemented (Arts. 1, 694) by the Civil Code (1963). However, the latter’s application in commercial matters is modified since, according to Art. 1, the Civil Code should be “interpreted in accordance with the principles inspired by commercial law.” But, a few provisions of the Civil Code have been expressly retained (Arts. IV and V of the modifying provisions) while others have been expressly repealed inasmuch as the matters covered therein are now regulated by the Commercial Code as, for example, trusts, editing and related contracts, lodging and transportation. As already stated, the Commercial Code of 1942 has been superseded except for the provisions dealing with maritime law contained in Book III, Titles I to VI and VIII. These matters are
being reserved for future codification in accordance with the planned uniform Central American maritime code.\textsuperscript{21}

It may be noted that the present Code eliminated commercial customs as one of the traditional sources of commercial law.\textsuperscript{24}

Judicial proceedings involving matters within the scope of the commercial code are regulated by the Code of Civil and Commercial Procedure (1964);\textsuperscript{25} the summary procedure will apply (Art. 1039), unless the parties have agreed on conciliation or arbitration (Arts. 671, para. 2 and 1039).\textsuperscript{26}

(3) \textit{Conflict of laws}. The new commercial code has but scattered choice-of-laws rules. There are provisions dealing with foreign merchants and foreign business associations to be summarized later.\textsuperscript{27} In regard to foreign business associations the code provides (Art. 220, para. 2) that the "acts, contracts and dealings related to their activities are subject to and governed by the laws of the Republic." With regard to contracts generally, the code deals only with one aspect, namely that of form, providing (Art. 671) that "contracts concluded in Guatemala to take effect there, shall be in Spanish." There is no provision for non-compliance with this precept. A rather significant rule appears in Art. 798, dealing with transportation by land, water and air. It provides that "whenever a combined transport (i.e., a transport undertaken by two or more carriers) started and ended outside of Guatemalan territory, the carriers domiciled in Guatemala are liable only within the limitations set by Guatemalan laws and respond only in Guatemalan courts."\textsuperscript{28}

These few provisions are to be implemented by conflict rules contained in the Law on Judicial Administration (Decree No. 1762, 1968).\textsuperscript{29}

(4) \textit{Merchants}. Merchants\textsuperscript{29} as defined in the new commercial code are persons engaged in the commercial activities listed in Art. 2; also business associations enumerated in Art. 10, regardless of the nature of their activities (Art. 3). Merchants are subject to a number of duties imposed upon them by the code. One of them is to register (Art. 332) in the proper mercantile registers (Art. 333). These consist of a number of books each serving a particular purpose. The important books are those in which individual merchants are inscribed (Art. 335), those for business associations (Art. 337) and those where commercial enterprises register (Art. 337). The effect of an inscription is determined by the code. Acts and documents inscribed or filed take effect vis-à-vis third persons (Art. 339). Special provisions dealing with foreign business associations (Art. 352-355) will be summarized later.\textsuperscript{30}
Merchants also are bound to keep books as requested by Art. 368 and retain correspondence and other documents for five years (Art. 382).

In addition to these formal duties the code imposes on merchants significant substantive obligations. Among these is the obligation to refrain from monopolistic practices, defined in the code as the duty to provide equal treatment to all customers (Art. 361), as well as from acts of unfair competition listed in Art. 363. In the performance of their "obligations and contracts" merchants must conform to principles of truth and good faith (verdad sabida y buena fe guardada) in order to safeguard proper and honorable intentions and to comply with the intent of the parties "without impairing their natural effects by arbitrary interpretation" as provided by Art. 669 under the heading of "philosophic principles."

(5) Business associations. Art. 10 of the code lists five types of associations: partnerships (sociedad colectiva), limited partnerships (sociedad en comandita simple); limited-liability firm (sociedad de responsabilidad limitada), corporation (sociedad anónima) and limited partnership with shares (sociedad en comandita por acciones). The code did not include some Latin American commercial codes nor did it adopt the individual enterprise with limited liability (empresa individual de responsabilidad limitada), introduced by the Commercial Code of Costa Rica of 1964 (Arts. 9-16). However, a partial effect is given to the idea in the Guatemalan Code by Art. 661 which provides that a writ of execution against the owner of an enterprise will be enforced by intervención of the enterprise (forced administration thereof) and executed against moneys, credits and the inventory, but without impairment of the normal operation of the business.

Rules regulating business associations are found in two sets: general provisions applicable to all types (Arts. 14-58, 203-212, 225-255, and 256-262), and provisions dealing with particular types. Generally speaking, most of these provisions are of the routine type. The scope of this study prevents treating them in depth and the discussion will be limited to a few observations on matters of special interest.

Rules governing partnerships (Arts. 59-67), limited partnerships (Arts. 68-77) and limited partnerships with shares (Arts. 195-202) follow traditional patterns. The rules applicable to limited liability firms (Arts. 78-85) appear patently insufficient. Rules regulating corporations contain a few interesting provisions. There are provisions regulating non-monetary considerations for shares (aportes, Arts. 91-94); participation of promoters (fundadores, Arts. 95-98); cumulative voting (Art. 115), and shareholder's actions (Arts. 136, 174 and 175). General provisions deal-
ing with increase and reduction of capital (Arts. 203-212), with dissolution and liquidation (Arts. 225-255) and with merger and transformation (Arts. 256-262) in the case of corporations are provided for in the rules applicable to business associations generally.

(6) *Auxiliary organs.* Merchants, individually or organized as associations, may conduct their business with the help of certain types of auxiliaries. Auxiliaries are considered merchants (Art. 2) and are regulated by additional rules in the code (Arts. 263-331). These auxiliaries include factors who are defined as persons who “manage an enterprise or an establishment.” In fact, factors are general agents similar to the *Prokurists* of the German commercial law and a far cry from factors as understood in this country. The main problem arising with this type of agent is the extent of his powers (Art. 267), the corresponding liability of his principals (Art. 268) and the validity of his acts. In any event, limitations on the powers granted the factor, if below those vested in him by operation of law, must appear in the commercial register to be effective against third persons (Art. 266). Another type of auxiliary organ is the commercial agent, who may act in a dependent or independent capacity (Art. 280). A third type is the broker (Art. 292-302). Finally, there is the commission agent who engages in commercial activities on the principals’ account (Arts. 303-331).

(7) *Mercantile things.* Mercantile things include three types of assets pertaining to business: negotiable instruments (Arts. 385-654), mercantile enterprises (Arts. 655-667), and patents and trademarks (Art. 668).

Provisions dealing with negotiable instruments (títulos de crédito) appear in two sets: in the general provisions (Arts. 385-414) and in provisions dealing with particular types. Letters of exchange are regulated in Arts. 441-493, and checks in Arts. 494-500, with added provisions for some particular kinds as, for example, crossed checks (Arts. 517-520), checks drawn on an account (Arts. 521-523), certified checks (Arts. 524-529), guaranteed checks (Arts. 530-532), cashier’s checks (Arts. 533-534), travellers’ checks (Arts. 535-541) and checks with a form for receipt attached (Arts. 542-543). Additional chapters deal with bonds and obligations (Arts. 544-583), warehouse certificates (Arts. 584-587), bills of lading and connaissances (Arts. 588-590) and the factura cambiaria (Arts. 591-604), i.e., a negotiable instrument issued in commercial sales by the seller to the buyer for the unpaid amount of the purchase price (Art. 591). Additional provisions deal with mortgage bonds and other types of certificates (Arts. 605-606). The chapter of the code dealing with negotiable instruments concludes with procedural provisions:
actions on letters of exchange (Arts. 615-629), their enforcement (Arts. 630-631), and rules regulating cancellation, repossession (Art. 632) and recovery (reivindicación, Art. 654).

The second mercantile thing, the enterprise, is defined as a unit consisting of work, material and immaterial assets which, when co-ordinated, offers goods or services to the public for profit and in a systematic way (Art. 655). The code only covers problems arising from dealing with enterprises, mainly their transfer (Art. 656) and its effect on parties to such contracts and liabilities connected with the enterprise (Arts. 658-660); with execution (attachment) against the enterprise, already mentioned (Art. 661); the cessation of its activities (Art. 662); the duty not to compete, imposed on the seller (Art. 663), and usufruct or leases involving enterprises (Art. 664).

The third kind of mercantile thing, trademarks and patents (Art. 668) are regulated by special laws.

(8) Commercial obligations and contracts. The final book (IV) of the code is devoted to commercial obligations and contracts (Arts. 669-1038). These provisions are prefaced by general provisions, among them those dealing with adhesion contracts (contratos mediante formularios, Art. 672); pólizas (Art. 673). Particular rules apply to sales (Arts. 695-706), with rules for FOB, FAS, and CIF; contracts involving periodical or continuous deliveries of goods or services (contratos de suministro, Arts. 707-712); and bailments (Arts. 714-741). The extensive chapter on credit operations (Arts. 718-765) deals with opening of credit (Arts. 718-728), discount (Arts. 727-733), current account (Arts. 734-743), also with credit cards (Art. 757). Included in this book are trusts (jideicomiso, Arts. 766-793) in view of the rule that only domestic banks may be trustees (Art. 768). There follows a chapter on contracts of transportation (Arts. 794-823), both of persons and goods, including liabilities imposed on carriers. The following chapter regulates publishing contracts relating to literary, scientific and artistic works and the reproduction and execution of such works (Arts. 824-851), and contracts relating to broadcasting and the performing arts (Arts. 852-860). A short chapter contains provisions on joint ventures (contratos de participación, Arts. 861-865) and another which deals with lodging (hospedaje, Arts. 866-873). The last chapter deals with insurance: liability (Arts. 919-955), life (Arts. 996-1019), reinsurance (Arts. 1020-1023) and surety (Arts. 1024-1038).

(9) Status of foreign business. The code contains provisions applicable to foreign individual merchants as well as to foreign business associations.
With regard to the former, the code allows them to engage in business, provided they are local residents and have obtained the necessary administrative permit (Art. 8).

Business associations established abroad but which have their administrative seat (sede de su administración) or the principal object of their business (objeto principal de la empresa, Art. 213) in Guatemala, are subject to the regulations of the code, including those which affect the requirements for the validity of their charter, a surprising provision, out of step with standards adopted in international law52 and included in most treaties of friendship and commerce. Only the form of the charter shall be governed by the country of origin, i.e., registration (Art. 213). Prohibited from operating in Guatemala are foreign business associations offering professional services for which properly recognized academic degrees are required (Arts. 213, para. 2).

Another way to engage in business in Guatemala is through agencies or subsidiaries. Without defining either term, the code requires that in both instances such agencies or subsidiaries must maintain a representative in Guatemala (Art. 214) who must have sufficient authority for the performance of all legal acts and dealings in the respective line of business, and who will be able to represent the association in and out of court as required by applicable laws. In case a representative should lack such powers, he will be, nevertheless, considered to be so authorized by operation of law. In addition to having such representative, foreign business associations must meet a number of additional requirements: they must prove that they are legally established abroad and file a copy of such document, including the approval by the competent authority; they must set up a capital assigned to local operations and promise to be liable for local acts and dealings, not only with assets held locally but also with assets located abroad; they must agree to be amenable to local jurisdiction and to be bound by local laws in regard to acts and dealings which may take place in Guatemala or may have effect there. In addition, foreign associations must file a declaration that neither the association nor its representatives or employees will invoke alienage (derechos de extranjería), but “enjoy only the rights and the way to exercise them as these are available to Guatemalans under the laws of the land.”53 Foreign business associations must, moreover, promise to respect legal provisions regulating their leaving the country, as provided by Art. 217. Finally, they must submit a certified copy of their last balance sheet (Arts. 215, 1-8).

In case a foreign business association operates in Guatemala regularly (habitualmente) without having complied with the requirements
set forth above, its representatives or agents will be liable fully and jointly with such association for "obligations entered into" (Art. 217). A rule dealing with the bankruptcy of a foreign business association in the country of its registration (Art. 219) is followed by a list of operations on the part of foreign business associations which do not necessitate local permits (Art. 220). A special permit is available to associations which intend to operate locally less than two years (Art. 221).

Foreign business associations must register in the proper commercial register located in the capital (Art. 352). The office of the registry will refer the matter to the Ministry of the Interior (Ministerio de Gobernación) which will issue or deny the permit. Once such a permit is issued, the registry will proceed with the proper inscriptions (Art. 353). The permit will expire unless the association starts operations within one year (Art. 355).

It may be added that subsidiaries and agencies of foreign business associations whose enterprise is located abroad, may keep a double set of books. In addition to the one required by the code, a second set may be kept in their native language and currency with an additional column showing the sums in the national currency; this fact must be notified to the commercial registry (Art. 369).

Finally, it is worth noting that even non-domiciled aliens, individuals and associations, may participate in any type of Guatemalan business association as partners or shareholders, except where there are provisions to the contrary in the code or in special laws (Art. 19, para. 2).

CONCLUSIONS

The new Guatemalan Commercial Code represents a significant development in Latin American commercial law. It has met, to a considerable degree, the goals expressed in the considerandos, namely the developmental needs of the country. In a spirit, both modern and realistic, it regulates a free enterprise economy with just and necessary controls. In doing so it adopts modern institutions in harmony with other countries of Central America.

FOOTNOTES

2Solá Cañizares, Tratado de Derecho Mercantil Comparado (Barcelona, 1963); Morelli, Concepto de Derecho Mercantil, (2) Revista de Ciencias Jurídicas (Costa


Olavarria, Los Códigos de Comercio Latinoamericanos (Santiago, 1961).


Satanowsky, Unificación del Derecho de las Obligaciones y Contratos Civiles y Comerciales, 1 Estudios de Derecho Comercial 181 (Buenos Aires 1950).

Diario Oficial No. 119 (alcance No. 27), May 27 (1964); Valle Peralta & Zurcher Acuña, Código de Comercio y Sus Reformas (San José, 1967).

228 Diario Oficial No. 140, July 31, 1970; for a summary see Bayitch, Inter-American Legal Developments, in this issue. For background Lara Velado, Introducción al Estudio del Derecho Mercantil (San Salvador, 1969).


Barrera Graf, Sujetos del Derecho Mercantil, 43 Revista de Derecho Mercantil 7 (1967).


Rodriguez Rodriguez, Curso de Derecho Mercantil 413 (Mexico, 1964).

Special laws, supplemented by the Commercial Code, apply to banks, insurance and similar institutions, exchanges, mutual institutions and others (Art. 12);
the state and related public institutions (entidades descentralizadas: autónomas y semiautónomas, municipalidades and other public institutions) are not merchants; nevertheless they may engage in commercial activities and thus make themselves amenable to the Code, except where there are laws to the contrary (Art. 13).

22Código Civil, 168 El Guatemalteco No. 84 ss. (1963).


27Infra (9).


30Infra (9).


34Gladstone, Theory and Operation of Partnership under the Latin American Codes, 16 Tulane L. Rev. 27 (1941).


37Skinner Kitti, La Organización de la Sociedad Anónima en Guatemala (Guatemala, n.d.); Aycinena Banus, La Sociedad Anónima en Centroamérica y Panamá 111 (Guatemala, n.d.); Ozores, La Sociedad Anónima, (1-2) Boletín del
Instituto Centroamericano de Derecho Comparado 103 (1963); 2 Solá Cañizares, Tratado de Sociedades por Acciones en Derecho Comparado 105 (Buenos Aires, 1957).


44 Gutiérrez, Nociones Generales sobre Títulos Valores (3-4) Boletín del Instituto Centroamericano de Derecho Comparado 211 (1964).

45 Molina Abril, Letra de Cambio, 6 (5-6) Revista de la Facultad de Ciencias Jurídicas y Sociales de Guatemala 83 (1959); Ozores, El Cheque Centroamericano, (5-6) Boletín del Instituto Centroamericano de Derecho Comparado 171 (1966). The Hague Convention of 1910 on negotiable instruments adopted in Guatemala by decree No. 874 (May 30, 1913) will be superseded by the respective provisions of the new Code; consequently, the Convention will be denounced (Art. III of the disposiciones derogatorias y modificatorias of the Code).


50Summarized supra (3).


52Inter-American Convention on Private International Law (Código Bustamante, Havana, 1928), art. 33; Declaration signed in Washington on June 25, 1936 (T.S. No. 973, also 7 Hudson, International Legislation 355, 1941).

53Calvo Clause, see Bayitch-Siqueiros, Conflict of Laws: Mexico and the United States, a Bilateral Study 76 (1968).

54Bankruptcy must be notified to the mercantile registry which shall take necessary steps to protect local interests, including providencias cautelares on the part of the administrative and judicial authorities.

55To appear in judicial or administrative proceedings; maintain accounts in local authorized banks; buy and sell through an independent commercial agent properly established; handle orders provided they will be confirmed outside of Guatemala; grant loans to local business; issue, endorse and protest negotiable instruments; and acquire movable and immovable property provided they are not part of an enterprise or business regularly conducted in the country. In any case, such activities are subject to Guatemalan laws (Art. 220, para. 2).