

A dark wood desk with a blue pen and a glass of water. The pen is in the bottom left corner, and the glass is in the top right corner. The text is centered on the desk.

Business Law

Chapter II – Introduction to Business Law

Chapter II – Introduction to Business Law

1. Commercial Law Concept

- Normative-legal system based on rules, concepts and principles of law that, in the field of private law, regulate the legal business relations, the acts and facts inherent to business.
- Special branch of private law with different rules from common law, built as a separate subject of law.

Chapter II – Introduction to Business Law

2. Commercial Law Conceptions

- Objectivist conception - branch of law which regulates the trade acts, practiced by traders or not traders (provided that these acts belong to one type of trade act regulated in commercial law);
- Subjectivist conception - branch of law constituted by the set of rules which regulate the conduct or activities practiced by traders in the exercise of their trade (not allowed commercial isolated acts committed by not traders).

Chapter II – Introduction to Business Law

3. Commercial Law Purpose

- System of organizational structures through which economic activities are made and subsumed to the legal concept of trade (business issue, competition protection, business crises);
- Rules on commercial entrepreneurs - traders - (legal terms, obligations, sole traders, collective traders - commercial companies);

Chapter II – Introduction to Business Law

- Legal rules which regulate juridical acts structured of commercial life or derived from it (commercial acts);
- Typified documents and regulated by law to serve as vehicles for stimulating circulation and dynamization of credit - debt instruments (bills of exchange, promissory notes, checks).

Chapter II – Introduction to Business Law

4. Commercial Law Historical Evolution

A – Ancient Age:

- Babylon - Hammurabi Code - sparse rules on some contracts (company, loan interest, deposit);
- Phoenicia - big traders – first rudiments of Maritime Law;
- Greece - traces of Maritime Law - nautical loan, maritime companies;

Chapter II – Introduction to Business Law

- Rome - not created specific rules for commercial activities. These were incorporated into the jus civile standards that arose under the influence of business needs (company, loan, pledge, credit operations, mortgage).

B - Middle Age:

- Twelfth century - the commercial cities in Italy (Florence, Genoa, Milan, Venice), Flanders, Germany, as well as markets, were the first poles of commercial;

Chapter II – Introduction to Business Law

- Medieval age was the source of most of the institutes of modern commercial law - banking operations, bill of exchange, bankruptcy, double-entry accounting, companies (collective companies with unlimited liability and limited partnership);
- Emergence of Commercial Law - in the proper sense, as a body or self regulatory system - jus mercatorum.
- Jus mercatorum:
 - Branch of law created by traders to regulate their professional activities which was applied by themselves;

Chapter II – Introduction to Business Law

- It was applied to all the legal relations of commerce, between traders and between traders and other social classes (ecclesiastics, nobles, soldiers, farmers, foreigners);
- Prevailed on Canon Law and Civil Law;
- Was seen in a subjective way (regulating traders and their acts of commerce), it was corporate and strongly customary.

Chapter II – Introduction to Business Law

C - Modern Age:

- The medieval corporatist Commercial Law was gradually replaced by legal procedures of real origins, based on the monarchical centralization of that age:
- The traders class was no longer the creator and builder of commercial law; The traders corporations were regulated and controlled by the State;

Chapter II – Introduction to Business Law

- The commercial courts (although composed by traders) were no longer an emanation of traders corporate autonomy, but state courts;
- The costumes were outweighed by laws of the sources in the field of Commercial Law.
- The Commercial Law remained having subjective characteristics, however the first general commercial legislation stipulated commercial acts as purely objective (the French ordonnance of land trade - 1673 - and the French Navy ordonnance - 1681).

Chapter II – Introduction to Business Law

D - Contemporary Age:

- The principles of freedom and equality which inspired the French Revolution simultaneously with seizure of power by the bourgeoisie led to the extinction of commercial corporations (Allarde Law and Le Chapelier Act of 1791);

Chapter II – Introduction to Business Law

- French Commerce Code (1807) - First Commercial Code - qualifies as traders those which make from the practice of trade acts their profession (article 1), and as commercial a set of acts (including those related to manufacturing and services) which don't have to be practiced by traders - sharpens the objective character of the Commercial Law.

Chapter II – Introduction to Business Law

5.The Commercial Law in Portugal

A - Middle Ages:

- Trade was regulated by customs (mostly local), charters (local), and little legal provisions of the Visigothic Code and from the Canon Law;
- The sparse and the little existing legislation aimed to trade, especially maritime trade, markets foundations and to avoid the rising of prices;

Chapter II – Introduction to Business Law

- The Commercial Law didn't have autonomy because:
 - Of the strong monarchic centralization of the state;
 - In addition besides the bourgeois traders, intervened in the commercial activity the members of the royal household, the religious orders and the military orders;

Chapter II – Introduction to Business Law

- The commercial associations had in the first centuries of monarchy little or no meaning;
- There were no commercial courts (the first - the Consulate - was created only in the end of the sixteenth century);
- The markets, although having appeared in the eleventh century, never achieved a great projection.

Chapter II – Introduction to Business Law

B - Modern Age:

- The great development of foreign trade caused by maritime discoveries was not accompanied by significant legislative movement-commercial;
- The sixteenth century recorded half a dozen of laws about judicial organization and maritime trade;
- The Philippines Ordinances were also scarce in the trade provisions:

Chapter II – Introduction to Business Law

- Two clauses on commercial court's jurisdiction (LI and LII titles of Book I);
- The prohibition of clerics and the noblemen from making purchases for resale (Title XVI of Book IV);
- One article about association and company contracts (XLIV title IV of the book);
- Two titles on purchases of bread, wine or olive oil to resell (securities LXXVI and LXXVII Book V).

Chapter II – Introduction to Business Law

C - Contemporary Age:

- The beginning Commercial Law codifications era was traced by the Commercial Code of 1833, Ferreira Borges Code, which replaced a scattered, confused and obsolete legal system;
- The Commercial Code of 1833 built the Portuguese Commercial Law as an autonomous branch of private law, endowed with an organized body of principles and specific rules designed to regulate the legal relations born from the commercial activities;

Chapter II – Introduction to Business Law

- The Ferreira Borges Code clothed in a subjectivist conception, once the discipline imposed by it was addressed to traders and scope the 'transactions, acts and obligations of active and passive exercises of trade' (article IV of Book I);
- The second Portuguese Commercial Code, prepared by Veiga Beirão, was approved by the Law of June 28, 1888, replacing the 1833 Code;

Chapter II – Introduction to Business Law

- The Veiga Beirão Code was inspired by an objectivist conception, aimed at regulating the trade conducts (acts), regardless the profession of their practitioners, however it could be detected up some relevant subjectivists legal proceeds;
- The Commercial Code of 1888 still remains applicable nowadays, although with several rules amended and the majority revoked.

Chapter II – Introduction to Business Law

6. Application of Civil Law to Commercial matters

- The Civil Law is applicable to commercial issues, according to article 3 of the Commercial Code – ‘If the questions about commercial rights and obligations can't be solved, not by the text of the Commercial Law or by its spirit, nor by similar cases prevented, it must be decided by the civil law’;
- The article 3 of the Commercial Code allows the use of civil law to fill the gaps in the Commercial Law - embodiment of the idea that the Civil law is the subsidiary law in relation with Commercial one;

Chapter II – Introduction to Business Law

- However, the rules of commercial law frame an autonomous branch of law, with the possibility of analogy application inside of Commercial Law field itself;
- Rather than article 3 of the Commercial Code seems to imply there no need to previously exhausted all the possibilities of analogy within the Commercial Law, and only after appeal subsidiary to the Civil Law - the Commercial Law rules don't enjoy of precedence over civil ones;

Chapter II – Introduction to Business Law

- The interpretation of commercial law rules don't offer any specific problem, so they should be interpreted according to the rules of article 9 of Civil Code.
- **7.Sources of the Portuguese Commercial Law**
- **International Sources:**
 - International Conventions - Uniform Law for Bills of Exchange and Promissory Notes (1930) and Uniform Law for Checks (1931), the Paris Convention on Industrial Property; Primary European Law (Treaties establishing the European Union); Secondary European Law (regulations and directives which are based on Treaties) - Article 8 of the Portuguese Constitution.

Chapter II – Introduction to Business Law

➤ Internal sources:

- Portuguese Constitution - contains rules relating to commercial law, as articles 61 (private economic initiative, cooperative and self-management), 82 (coexistence of property sectors: public, private, cooperative and social), 85 (cooperatives experiences and self-management), 86 (private enterprises), 99 (trade policy objectives), 100 (industrial policy objectives) and 293 (reprivatisation of companies).

Chapter II – Introduction to Business Law

- Laws, decree-laws and regional legislative decrees:
 - ✓ Commercial Code of 1888;
 - ✓ Companies Code of 1986;
 - ✓ Industrial Property Code of 2008;
 - ✓ Securities Code 1999;
 - ✓ Commercial Registry Code of 1986;
 - ✓ Insolvency and Corporate Recovery Code of 2004;

Chapter II – Introduction to Business Law

- ✓ Decree-Law 178/86 of 3 July - legal status of agency contracts;
- ✓ Decree-Law 149/95 of 24 June - the legal contract of lease (leasing);
- ✓ Decree-Law 171/95 of 18 July - the legal contract of sale financing (factoring), ...
- Government Regulations, Autonomous Regions, Local Government, ...

Chapter II – Introduction to Business Law

- Commercial usage - social practices stabilized:
 - ✓ The article 3 of Commercial Code doesn't mention the commercial usage between the sources of Commercial Law, however, the Commercial Code itself refers to commercial usage as a source of Commercial Law, such as in the articles 232 (for the remuneration of the commercial agency worth what the parties stipulate and if that is missing worth the trade usage), 238 (the content of the agency is determined by the instructions of the principal and, in their absence or insufficiency, by the trade usage), 373, 382 and 404;

Chapter II – Introduction to Business Law

- ✓ The usage in commercial relationships has a value of contractual integration, according to article 239 of Civil Code, which as a rule correspond to what the parties would have provided if they had taken in consideration such a situation.
- Case Law.
- Doctrine.

Chapter II – Introduction to Business Law

8. The Business Law

- In more recent times, the evolution of commercial law has been marked by a tendency to a Business Law conception.
- The expression ‘Commercial Law’ is seen as reductive, because today we don’t just more talk about the trade figure, but the entrepreneur or company.

Chapter II – Introduction to Business Law

- Entrepreneur or company - It is the face of an organization resources and factors, through which it develops a profitable economic activity, independently its nature: commercial, industrial or service.
- The Commercial Law has been rebuilt itself around the business concept. As the French Commercial Code of 1807, the Portuguese Commercial Code of 1888 legally accepted the concept of business.

Chapter II – Introduction to Business Law

- The article 230 of the Commercial Code of 1888, entitled as 'Das Empresas - Enterprises', although it seems to anticipate a conceptual theorization of business companies, it merely limits to equate them to the two categories of traders provided by the article 13 of the Commercial Code:
 - The individual traders (sole traders);
 - The company traders - companies and legal entities.

Chapter II – Introduction to Business Law

➤ So the article 230 of the Commercial Code refers that Enterprises are the entities which the object is based on:

- '1. Transforming, through factories or manufacturing, raw materials, employing for that transformation, workers or workers and machines;
2. Providing supplies, in different eras, either by individuals or by State entities, attending to a price agreement;

Chapter II – Introduction to Business Law

3. Agencing businesses or auctions on behalf of others in public open offices, attending to a stipulated salary;
4. Exploring any public performances;
5. Editing, publishing or selling scientific, literary or artistic works;
6. Building houses for others with materials provided by the businessman;
7. Transporting, regularly and permanently, by water or by land, any persons, animals, tools or goods for others.

Chapter II – Introduction to Business Law

§ 1. Will not be understood as insert in the activity of the number 1 (230) the owner or the rural explorer that only manufactures the land products that produce ancillary to their farm; and neither will the industrial artist, master or mechanic official who works directly on their art, craft or industry, although employs for that workers, or workers and machines.

§ 2. Will not be understood as insert in the activity of the number 2 (230) the owner or rural explorer who makes the supply of products of their own property.

§ 3. Will not be understood as insert in the activity of the number 5 (230) the authors who edit, publish and sell their own works'.

Chapter II – Introduction to Business Law

- From the article 230 of the Commercial Code emerges the structure of the Portuguese economy of the late nineteenth century with a traditional agrarian pattern and an organization tissue composed by agents whose activity was based mainly in primary and secondary sectors.
- The concept of the company, as was established in the Commercial Code, is merely an ancillary entity which allowed to expand the scope of the trade acts - until then restricted to individuals who made their from trade their profession and to commercial companies.

Chapter II – Introduction to Business Law

- With the industrial revolution advent and the industrial and service activity of the businessman, the term 'businessman' covers the producer (Italian Civil Code of 1942). This approach and the economic science evolution in the last decades of the twentieth century, leads the law to assimilate business companies as an economic unit of production.
- Currently, the term 'business company' is legally used in several meanings:

Chapter II – Introduction to Business Law

- a) Company as an agent or legal subject - the company is reduced to the person who organizes and conducts all the economic production activity or the goods and services distribution;
- b) Company as an activity - the company is reduced to the economic activity made by the businessman in a professional and organized manner, in order to achieve the production purposes and the goods and services exchanges;

Chapter II – Introduction to Business Law

c) Company as an object - the company is reduced to the organization's set of inputs and other elements gathered by the businessman for the pursuit of its business (establishment). In this meaning, we can say that business company and establishment are synonymous;

d) Company as the active set of elements - broad sense of company that leads to an institution of economic and social character which acts on a heritage of things and rights, bringing up the legal relations.

Chapter II – Introduction to Business Law

9. Companies Classification Criteria's

9.1. According to business sectors:

- Primary - Agricultural, forestry, cattle-raising companies;
- Secondary - Extractive business companies; processing, electricity, gas, industrial water companies, construction and public works companies;
- Tertiary - Wholesale ('por grosso') and retail trade ('a retalho') companies, transport, storing and communications companies, banking and insurance companies and services companies.

Chapter II – Introduction to Business Law

9.2. According to the nature of its business:

- Production companies - which use raw materials or objects, transforming and extracting from them the necessary and useful degree for their commercialization;
- Commercial companies - which dedicate their activity to finished products distribution, without introducing them any changes, restricting their activity to allocate stocks and to sell them to other business companies (wholesale) or to ensure the disposal of these products by the final consumers market (retail);

Chapter II – Introduction to Business Law

- Services Companies - which sell additional and necessary services for the economic activity of other companies, as public services: banking, insurance, transport, consultancy, technical assistance, including here the liberal professions.

9.3. According to company size (article 91 of the Employment Code):

- Micro companies - employ more than 10 employees and don't exceed 2 million Euros, in relation to their turnover or annual balance sheet;

Chapter II – Introduction to Business Law

- Small companies - employ more than 10 to a maximum of 50 employees and don't exceed 10 million Euros on its balance sheet and total annual turnover;
- Medium companies - employ more than 50 to a maximum of 200 workers and have a turnover not exceeding 50 million Euros or annual balance sheet not exceeding 43 million Euros;
- Large companies - employ more than 200 workers and have a turnover exceeding 50 million Euros or an annual balance sheet exceeding 43 million Euros.

Chapter II – Introduction to Business Law

9.4. According to the ownership of the means of production:

- Public - means of production whose rights belong to and are managed by the state or other public bodies (article 82 (2) of the Portuguese Constitution);
- Private - means of production whose rights belong to or are managed by private individuals or private groups (article 82 (3) of the Portuguese Constitution);
- Cooperatives - shall specifically comprise (article 82 (4) of the Portuguese Constitution):

Chapter II – Introduction to Business Law

- Means of production that cooperatives possess and manage in accordance with cooperative principles, without prejudice to such specific provisions as the law may lay down for cooperatives in which the public sector holds a stake and are justified by the special nature thereof - cooperatives - Cooperative Code - Law 51/96 of 7 September;
- Community means of production possessed and managed by local communities - communities companies (wasteland - companies - land owned and managed by local communities) - Law 68/93 of 4 September;

Chapter II – Introduction to Business Law

- Means of production operated by worker collectives - self-managed companies - Law 68/78 of 16 October;
- Means of production possessed and managed by non-profit bodies corporate, the primary objective of which is charitable, particularly bodies of a mutualist nature - private institutions of social solidarity (Decree-Law 119/83 of 25 February) and mutual associations (Decree-Law 72/90 , 3 March).

Chapter II – Introduction to Business Law

9.5. According to the nature of the legal and contractual obligations:

- Individual Companies - sole trader or individual establishment of limited liability companies (EIRL);
- Memberships companies - civil companies with a civil form or commercial form and commercial companies (General Partnerships; Private Limited Quota companies - plural or sole -; Joint Stock Companies; and Limited Partnerships - simple or by shares).

Chapter II – Introduction to Business Law

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