

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 III – Commercial Acts

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1. Commercial Concept

- Legal concept commerce - it includes the commerce in the economic terms, but also industries and services. However, we can't say that the Business Law deals with all economic activities, because it hardly connects with the extractive industry, agriculture, the handmade industries and services and the liberal professionals services.

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2.The Scope of the Commercial Code

- Article 1 of the Commercial Code - the commercial law regulates the commercial acts practiced by traders or not traders.
- To Commercial Code be applied is necessary the existence of a commercial act, so the jural relation (legal relationship) must be subsumed in what the Commercial Code identifies as a commercial act (or at least that is triggered by a commercial act).

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3. Commerce Acts Concept

- Article 2 of the Commercial Code - legal clause which delineates the commercial acts - 'it will be considered as commercial acts all the acts which are especially regulated by this Code, and, beyond them, all contracts and obligations of traders which haven't exclusively civilian nature, if the opposite don't result expressly from the own act'.

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- From the article 2 of the Commercial Code results the impossibility of an unitary concept, homogeneous or generic, of commercial act.
- Unitary concept of commercial act - three criteria's:
 - a) speculative purposes - it is a commercial act the act which is practiced with profit scope;
 - b) bringing in trade or circulation of wealth;
 - c) a company existence - are commercial the acts practiced by a company and/or in a company context.

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- None of these criteria's, individually or together, is able to create an unitary concept of commercial act:
 - a) there are activities carried out with the profit intention that are not qualify as commercial act - extractive industry, handmade activities, agriculture, liberal professionals activity - and not all the commercial acts or activities have to pursue the profit (can or can't) - cooperatives, ACE's, public enterprises, ...

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b) the criteria of the interposition of trade exchanges is not enough - the Commercial Code considers as commercial certain acts that don't realize the interpositions of trade exchanges - guaranty (article 101), current account (article 344), collateral security or pledge (article 397);

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c) the business company and the companionship are not a sufficient criteria for the construction of an unitary concept of commercial acts - there are civil companies which their acts can't be considered as commercial.

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- May be considered as commercial acts:
 - Natural or involuntary juridical facts - dismissal - a lapse in period of time - and company rights prescription (articles 59 (2) and 174 of the Company Code);
 - Voluntary juridical facts, lawful juridical acts, simple juridical act - interpellations and warnings made by the commercial companies to default partner (articles 203 (3), 285, and 286 of the Company Code);

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- Voluntary juridical facts, lawful juridical acts, unilateral juristic acts - juridical acts constituents of Sole Limited Quota Company (article 270-A of the Company Code);
- Voluntary juridical facts, lawful juridical acts, bilateral juristic acts, contracts - Book II of the Commercial Code: 'The special commercial contracts';

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- Voluntary juridical facts, unlawful juridical acts - fault collision of ships (article 664 of the Commercial Code).
- To sum up, the commercial acts are juridical facts specially regulated in commercial law and those which realized by traders, respect the conditions established at the end of the article 2 of the Commercial Code.

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4. Objective and Subjective Commercial Acts

- Basic characterization of the commercial acts - article 2 of the Commercial Code:
 - Objectives - First part of article 2 - 'All the commercial acts which are especially regulated on this Code';
 - Subjective - Second part of article 2 - 'All the contracts and obligations of the traders which haven't nature exclusively civil, if the opposite don't result from the own act'.

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4.1. Objective Commercial Acts

4.1.1. Interpretation of the article 2, first part, of the Commercial Code

- The objective commercial acts definition by implied enumeration or catalog - The article 2 of the Commercial Code doesn't identify expressly the commercial acts, it limits itself to referring other regulatory provisions:

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- Guarantee (article 101 of the Commercial Code);
- Business Companies (article 230 of the Commercial Code);
- Agency (article 231 of the Commercial Code);
- Current account (article 344 of the Commercial Code);
- Banc transactions (article 362 of the Commercial Code);

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- Transportation (article 366 of the Commercial Code);
- Loan (article 394 of the Commercial Code);
- Collateral security or pledge (article 397 of the Commercial Code);
- Commercial deposit (article 403 of the Commercial Code);
- Bailment of goods in a storehouse (article 408 of the Commercial Code);

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- Insurance (article 425 of the Commercial Code);
- Sale contract (article 463 of the Commercial Code);
- Reporting (article 477 of the Commercial Code);
- Barter or exchange (article 480 of the Commercial Code);
- Rent (article 481 of the Commercial Code);

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- Transmission and reform of commercial debt instruments (article 483 of the Commercial Code);
- Acts related with maritime commerce (Book III of the Commercial Code).
- For most of these commercial acts, the Commercial Code establishes a specific discipline, except to the bank transactions (article 363) and to the rent (article 482), however these acts are still qualified as commercial.

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- Are objective commercial acts only those specially regulated in the Commercial Code?
- The expression 'this Code' established in the article 2 of the Commercial Code must be extensively interpreted to incorporate other commercial laws.

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➤ When can a law be classified as commercial?

a) The law which replace rules from the Commercial Code will be classified as commercial according to article 4 of the Charter Law of June 28, 1888: 'In the future any change made in the subjects regulated in the Commercial Code will be considered as part of it and will be classified as commercial'.

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- So are objectively commercial:
 - Companies incorporation acts provided by the Company Code, which replaced the articles 104 and followings of the Commercial Code;
 - Business related to bills of exchange, promissory notes and checks provided by Uniform Law of Bills of Exchange and Promissory Notes and Uniform Law of Checks, which replaced the articles 278 and followings of the Commercial Code;

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- Stock exchange pursued under Securities Code, which replaced articles 351 and followings of the Commercial Code.
- Not all the laws which replace articles from the Commercial Code will be qualified as commercial or considered as commercial acts. Thus, the Chapter II of Decree-Law 231/81 of 28 July, concerned with association in participation contract where, contrary to what is established by the article 224 of the Commercial Code, it does not require that the trader or his activity must be considered as commercial.

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b) Law which qualifies itself as commercial or which classifies acts as commercial:

- The European Economic Interest Groups - R (EEC) 2137/85 of 25 July - it may have civil or commercial purpose. When the subject of an EEIG is commercial, its incorporation contract is qualified as an objective commercial act.

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c) Laws which don't qualify themselves expressly as commercial - To know if the laws in analyze are commercial is necessary to observe if they discipline analogous subject to the matters regulated in the Commercial Code or in other laws classified as commercial.

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4.1.2. The meaning of article 230 of the Commercial Code in the context of commercial acts

- What is the meaning of the word 'company' in the body of the article 230 of the Commercial Code?
 - a) Doctrinal position 1 - the 'company' concept under the article 230 of the Commercial Code means the same as entrepreneurs (traders) - natural or legal persons who practiced the commercial acts referred to in the article.

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b) Doctrinal position 2 - the 'company' concept under the article 230 of the Commercial Code refers to the complex objectives commercial acts which are repeatedly practiced.

➤ Doctrinal position adopted - the 'company' concept under the article 230 of the Commercial Code consolidates joint or series of acts (activities) objectively commercial practiced in the context of trade organizations, because:

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- a) Chapter II - 'The traders' - Title II (articles 13 and following of the Commercial Code) of the Commercial Code establishes who is and who is not a trader, so does not make sense the article 230 of the Commercial Code attributes directly this quality to certain businessmen;
- b) We can have people (legal - associations, foundations, state, ...) exploring the commercial activity under the article 230 of the Commercial Code, without thereby acquiring the trade quality.

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- What is the scope of the rule of the article 230 of the Commercial Code? Will be objectives commercial acts only the contracts where the exercise of the company typically develops [supply contracts (2), agency (3), editing (5), building contract (6), transport (7)] or all the acts practiced in the exploration of the business company?

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- It should be considered as objectives all the commercial acts practiced in the operation of companies under the article 230 of the Commercial Code because:
 - a) This article seems to be based on the characterization of some companies which their activity is settled in not legal or negotiating facts [processors companies (1); public performances companies (4)];
 - b) The companies mentioned in this article can be exploited by no traders - and there is no place in this article for subjective commercial acts.

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4.1.3. Commercial acts qualified by analogy

- The implicit enumeration of commercial acts of present in the first of the article 2 of the Commercial Code is merely illustrative or an exhaustive enunciation? The Commercial acts legislatively regulated or prescribed by laws whose character is not declared can be classified as commercial acts by analogy with other commercial acts specified in Business Law?

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- The problem can't be solved if we use the article 3 of the Commercial Code because the question concerns with the lack of legislation and not with the acts already classified as commercial.
- The thesis of the inadmissibility of commercial acts by analogy - 3 arguments:
 - a) Letter of the law - it would only be considered as commercial acts those which are specially regulated by the commercial law;

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- b) Historical reason - the first part of the article 2 of the Commercial Code was inspired by the 2 paragraph of article 2 of the Spanish Commercial Code of 1885 which allowed the use any kind of analogy, although this reference was deliberately removed from our law;
- c) Legal Certainty and security - the analogy permission would be offensive of the legal security.

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- Critics to the inadmissibility thesis of the commercial acts by analogy:
 - a) The letter of the article 2 of the Commercial Code is not conclusive establishing that the commercial acts are only the one's specifically regulated in commercial law;
 - b) The subjectivist-historicist interpretation of the laws no longer applied;
 - c) The certainty settlement is rather inconsistent.

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- Thesis adopted - the admissibility of the analogy to qualify the acts as commercial.
- This admissibility is applied to the legis analogy, to the juris analogy, or to the both of them?
- Legis analogy - article 230 (6) of the Commercial Code refers only to companies which build houses. But shouldn't be considered commercial the construction companies from other works (roads, dams, ...)? The article 230 (6) of the Commercial Code should be extended by analogy to other construction companies.

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- Juris analogy - article 230 (2) of the Commercial Code has been a fertile source for recognizing the commercial viability of a number of commercial activities through:
 - extensive interpretation (water supplying, gas or electricity companies);
 - integration by analogy (services providing companies: hotel companies, advertising, property management, beauty treatments, car repair, laundry, ...).

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- Many of the identified companies are not required to successive services against a preset cost - the analogy fails legis, just for those companies that are classified as commercial services is necessary to resort to analogy juris.

4.2. Subjective Commercial Acts

- The subjective commercial acts began to be the acts practiced by traders.
- To be qualified as a subjective commercial acts, the acts and obligations of the traders can't have nature exclusively civilian (such as the marriage or affiliation), this does not mean that the acts expressly provided by the civil law have a civilian nature.

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- Second part of the article 2 of the Commercial Code - intends to qualify as Commercial Law the commercial acts and obligations connected with the professional commerce, although not established in commercial law.
- They can also be subjective the commercial unlawful acts that haven't nature exclusively civilian, but which results from the commerce exercise (example - a trader who dedicates his activity to freight negligently causes an accident with his truck from which resulted several damages).

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- It can also be subjective the commercial acts or obligations the nature not exclusively civilian of a trader, if the opposite does not result from the own act.
- So:
 - If from the own act results a connection with trade, the act is commercial (a grocer buys a van to transport the fruit of his grocery);

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- If from the own act does not result a no connection with commerce, the act is also commercial (a grocer buys a van without declare anything about its purpose);
- If from the own act results a no connection with commerce, the act is not commercial (a grocer buys a van to take his family on holidays).

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- The second part of the article 2 of the Commercial Code establishes as commercial the acts which accomplish three requirements:
- Being practiced by traders;
 - Not have a nature exclusively civilian;
 - If from them don't result that they aren't connected with the commerce practiced by the traders.

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4.3. Summary and examples

- Objectives commercial acts - all the acts which are specifically regulated by the Commercial Law, whether or not the trader is the person who carries them out - sale of personal property for resale [article 463 (1) of the Commercial Code];

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- Subjective commercial acts - all the acts practiced by traders which haven't nature exclusively civilian, if the opposite does not result from the own act - the sale contract established under the article 874 of the Civil Code can be commercial or not (it will be commercial if it is practiced by a trader and in connection with a commercial activity).

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5. Absolute or autonomous commercial acts and accessories or by connection commercial acts

- Autonomous commercial acts - acts qualified as commercial by themselves, regardless their connection with other acts or commercial activities. Acts created to meet the needs of the commercial activity - buying for resale.
- Accessories commercial acts - acts which are qualified as commercial because they are related or connected with autonomous commercial acts - guaranty (article 101 of the Commercial Code); agency (article 231 of the Commercial Code); loan (article 394 of the Commercial Code); pawn or collateral security (article 397 of the Commercial Code); deposit (article 403 of the Commercial Code).

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6. Substantially Commercial Acts and Formally Commercial Acts

- Substantially commercial acts - commercial acts inserted in the commercial activity which confers the trade quality to whom practices it professionally - sale of personal property for resale.
- Formally commercial acts - acts which are not as commercial acts by themselves, but once they are specifically regulated by the commercial law they acquire the qualification of a commercial act - debt instruments (bill of exchange, promissory note, check).

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7. Bilateral or Pure Commercial Acts and Unilateral or Mixed Commercial Acts

- Bilateral commercial acts - acts that are commercial relatively to both parties, so the both parties are traders - trader buys to another trader a good for resale in his commercial activity.
- Unilateral commercial acts - acts that are commercial relatively to only one party while the other is civilian - a trader buys to a farmer a good which was produced by him.

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8.Special Acts of the Legal Obligations and Commercial

a)Form

- The consensual principle is assumed by the Civil Law (article 219 of the Civil Code), although it is applied more extensively in Commercial Law context, such as:
 - Article 96 of the Commercial Code establishes the freedom of the language in the commercial acts (diverging from the article 365 of the Civil Code);
 - Article 97 of the Commercial Code establishes the admission of private telegraphic correspondence documents, in broader terms than those resulting from the rule of the article 379 of the Civil Code.

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b) Passive Solidarity

- Solidarity obligations - Those that 'each one of the debtors are liable for the full installment and that releases all the others, or when each one of the creditors have the right to require for the full installment and this releases the debtor to all the others creditors' [article 512 (1) of the Civil Code].
- The solidarity may be among the creditors (active solidarity) or between debtors (passive solidarity). The passive solidarity only exists if it results from the law or from the will of the parties (article 513 of the Civil Code).

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- According to the article 512 (2) of the Civil Code: 'The obligation does not let to be joint by the fact that debtors are required in different terms or different warranties'.
- From this provision results that, by law or by contract, the passive party of a commercial relationship may assume the position of joint debtors.
- The article 100 of the Commercial Code establishes that in commercial obligations, unless otherwise is stipulated, the co-parties are solidarity liable. 'This provision is not extend to non-traders when applied to contracts that do not constitute commercial acts.'

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- The article 101 of the Commercial Code establishes the rule of solidarity relatively to the guarantor of the commercial obligation, although this is not trader, who will become joint to the guaranteed.
- From the overview of these regulations it can be seen that the Commercial Law has special rules in comparison with the Civil Law, putting the debtors and the guarantors under the rule of passive solidarity.

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c) Prescription

- As regards to the commercial debts - specifically those that emerge from a relationship between two companies or traders - the ordinary limitation period is the 20 years, under article 309 of the Civil Code, which begins to run when the right can be exercised, or when the debtor's obligation matures and becomes payable.
- In addition to this limitation period, there are other shorter limitation periods established by law, to wit:

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- Rents and leases payable by the lessee, even if paid only one time - 5 years [article 310 (b) of the Civil Code];
- Periodically renewable installments - 5 years [article 310 (g) of the Civil Code];
- Accommodation establishment, food or drinks credits, the accommodation, food or drinks that provide - within 6 months (article 316 of the Civil Code);

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- The establishments which provide accommodation, or accommodation and meals credits, and the schools, education, care and treatment credits in relation to rendered services - within 2 years [article 317 (a) of the Civil Code];
- Traders credits by sold objects to whom is not a trader or not have commercial intentions, the credits of those who dedicated themselves to the industrial profession, to the goods or products supplies - within 2 years [article 317 (b) of the Civil Code].

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d) Interest

- The interest rate is a percentage value that someone receives for having borrowed money or has invested or deposited it in a banking institution for a specific period of time.
- The interest is directly connected to the interest rate, which is the percentage which allow to calculate the interest value produced by a capital unit in a time unit. This rate may vary according to the:

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- Amount of capital (the higher the capital transferred, the higher the interest produced);
 - Transaction time (the longer the contract duration the higher will be the interest);
 - Inflation rate (it will have implications on the real interest);
 - Transaction risk (the higher the risk, the higher the interest).
- The reason for the existence of interest is related to the reason that when someone gives capital to the others, ceases to be able to use it to their advantage, especially in a company, business, and therefore is private from having an income.

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- As regards to commercial legal relations, the article 102 of the Commercial Code establishes that 'There would be no interest account in all the commercial acts, which are created by convention or law, when the interest become mature or/and in all the special cases provided in Commercial Code'.
- The commercial interest may be legal (if they arise from a legal rule) or conventional (if they result from an agreement between the parties).
- The commercial interest rate can only be fixed by written documents.

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- The Commercial Law, by referring to the articles 559-A and 1146 of the Civil Code, establishes the principle that the statutory default interest (compensation for a late payment) and those established without a rate, when the debt creditors are companies, individual or collective, must be fixed by an Ordinance of the Finance and the Internal Administration Ministries.

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- The default interest rate 'can't be less than the value of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first day of January or July, depending on whether they are, respectively, on the first or on the second semester of the civil calendar, increased by 7 percentage points'.

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e) Liability for the commercial debts incurred by trade spouse

- The both spouses are liable (when married under the acquired common property regime or the general common property regime) for debts incurred by any of them in the course of commerce, unless it is established that they were not made in the common benefit of the both spouses [article 1691 (1) (d) of the Civil Code].
- For such debts answer the community property of the couple, and in its absence or insufficiency, severally, the spouses own property (article 1695 (1) of the Civil Code).

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- The creditors from who exercise the commerce don't have to prove that the debts incurred in the course of commerce or that they were made in the common benefit of the both spouses.
- The task of proving that they were not made in the common benefit of the both spouses has to be made by who had contracted the debts, the spouse, or both.

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- The creditors protection strengthening of the traders and commerce - article 15 of the Commercial Code - the 'commercial debts of the spouse of a trader is presumed to be contracted in the exercise of their commerce'.
- To benefit from this presumption, the creditors only have to prove that the person who contracted the debts is a trader and that the debts are commercial - resulting from an objective or subjective commercial acts.

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