

## THE SOURCES OF BUSINESS LAW

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**Abstract:**

*The evolution of trade imposed the need to develop new regulations for its conduct, being adopted specific rules for this field of activity. Business law represents a set of legal standards that regulate the patrimonial, social, and non-patrimonial relations that appear between persons in connection with the development of the entrepreneurial activity, as well as the relations that appear in the case of state intervention in this activity. The law ensures organization in a company, being guaranteed by sources of law.*

**Key words:** *source of law, normative sources, interpretative sources, practices and general principles of law, judicial precedent*

**JEL classification:** K 10, K20.

### 1. INTRODUCTION

Given the new legislative and economic circumstances, with the implementation of the new Civil Code, in the context in which the business world gravitates between regulations of private and public law, business law is responsible for redefining the legal rules applicable to its field. Business law groups together norms belonging to both private and public law, tax procedures so necessary for business evaluation, and a review of contractual instruments for conducting a successful business. We can define business law, in a broad sense, as the totality of economic, banking, financial and other activities, through which commercial exchanges are carried out worldwide. Business law designates a set of legal regulations that cover a wide range of issues and refers to commercial activities in their diversity of manifestations - the actual commercial obligations, contracted by traders, more precisely, commercial documents and contracts, but also professional business obligations – namely, those duties incumbent on traders as specific professional obligations, as well as other aspects in which the business activity is materialized or conditioned, such as: labor relations, tax relations in which economic operators participate as taxpayers, institutions, public authorities with responsibilities in this field, advertising and commercial competition.<sup>1</sup>

In specialized works, the term “business” refers to an “activity carried out by productive, commercial, financial units in the private or public sector”.

In recent commercial doctrine, the concept of “business” has been explained in the sense that it means, in a narrow sense, acts of trade or a commercial operation; in a

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<sup>1</sup> See A. Miff, Business Law and Tourism Law. Course notes, Efes Publishing House, Cluj-Napoca, 2005

broad sense, it was stated that the business covers “the life of an enterprise from its establishment to its termination”.<sup>2</sup>

Business law is a multidisciplinary science that has as object of study the legal norms that regulate the social relations of the enterprise from the moment of its establishment until the moment of its dissolution, respectively the relations which are established between the State, on the one hand, and the trader, on the other (administrative, fiscal, criminal law) but also private law relations, which means the application of civil law provisions (legal regime of goods, consumer protection), labor law (employment contract, labor jurisdiction) and, last but not least, commercial law (professionals, goodwill, commercial contracts, etc.).<sup>3</sup>

## 2. CLASSIFICATION OF THE SOURCES OF BUSINESS LAW

Depending on their nature, the sources of business law are divided into two broad categories: **normative sources and interpretive sources.**

### 2.1. Normative sources

In the previous regulation in our legislation, the analysis of the sources of commercial law started from the provisions of Article 1 of the Commercial Code: “This present law applies in trade. Where it does not provide, the Civil Code will be applied”, through which the legislator established and ranked at the same time the main sources of commercial law: the Commercial Code and the Civil Code (as a common law in the matter).

From a formal point of view, the sources of business law are: the Romanian Constitution, the Commercial Code, the special commercial laws and, subsidiary, the Civil Code and the special civil laws.

**The Constitution.** As a fundamental law of the country, the Constitution regulates the principles of organizing economic activity. According to Article 134 of the Constitution, the Romanian economy is a market economy. The State must ensure freedom of trade, the protection of fair competition, and the creation of a favorable framework for the capitalization of all factors of production. The Constitution stipulates that the State guarantees the right to property in its two forms, public property, and private property (Article 136), as well as the claims on the State are guaranteed, in accordance with the law [art. 41 para. (1)].

**The new Civil Code** constitutes the basic regulation of commercial activity, which includes legal norms that regulate the fundamental institutions of commercial law. The main source of commercial law is represented by the new Civil Code, which establishes, according to Article 3 paragraph 1, that the provisions of this Code also apply to relations between professionals, as well as to relations between them and any other subjects of civil law.

**The special commercial law**, also represents a current and complex regulation, adopted in accordance with the current needs of society, but also the obligations assumed by Romania as a Member State of the European Union. In this context, the principle of the supremacy of Community law over national law must be considered, as Community regulations are fully and directly applicable in the Member States.

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<sup>2</sup> C. Vivante, Principles of commercial law, Cartea Românească Publishing House, Bucharest, 1928, p. 10

<sup>3</sup> S.L. Cîrstea, Business Law, Universitară Publishing House, Bucharest, 2012, p. 2

By commercial laws we consider: the laws adopted by the Parliament (law *stricto sensu*), the decrees-laws, the decisions, and ordinances of the government, as well as the normative acts issued by other state bodies.

The special civil legislation will also be applied in the absence of other regulations, such as in the matter of obligations or in contractual matters.

***The general practices and principles of the law.*** In the previous regulation, the Commercial Code did not refer to practices among the normative sources of law, but the doctrine and practice recognized the interpretative practices in the form of “law of the place”.

Currently, according to Article 1, paragraph 1 of the Civil Code, the practices and general principles of law are sources of civil law. This new civil regulation gradually has the role of normative source of custom and tertiary normative source of general principles of law<sup>4</sup>, each of which is applicable only in the absence of a higher normative source such as the law.

Practices can be sources of law only if they are in accordance with public order and good morals. When we refer to practices, we include both the customs and the professional practices - rules specific to a profession.

Customs can be defined as a long-term practice that has a certain degree of seniority, repeatability and stability applied to an indefinite number of traders, which may or may not be a source of law. In certain legislations, as well as in Romania, custom is listed as a source of law, having mandatory power like the law.

The general principles of the law, normative sources of commercial law, include:  
- *the principle of freedom* – In commercial matters, it is essential to ensure the credit, speed, and security of trade relations. Agreements must be respected, and this principle enshrines the decisive role of the will of the parties, in accordance with good faith and good morals.

- *the principle of equality* – This principle is subordinated to the principle of justice, equality being a form of justice.

- *the principle of responsibility* – The professional must be held accountable for his actions and deeds.

Specific principles of commercial law are added to the normatively enshrined general principles of the law<sup>5</sup>:

- the principle of the onerous nature of legal acts;

- the principle that money always produces interest;

- the principle that in commercial contracts, if in doubt, the rule favoring circulation shall be applied, etc.

## **2.2. Interpretive sources**

In addition to normative sources, there are also interpretive sources of commercial law. The role of these sources is to help with the interpretation of the will manifested in commercial relations, as in the case of **commercial usages**, or to interpret the **commercial normative acts**, for their application.

***Commercial usages.*** Usage (practice or custom) is a rule of conduct arising from social practice, used for a long time, and respected as a mandatory legal norm. In Romanian

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<sup>4</sup> Mihăilă, S., Dumitrescu, A.-D., Romanian commercial law, C.H.Beck Publishing House, Bucharest, 2013, p.5

<sup>5</sup> Cărpenaru, St.D, Romanian commercial law. University course, 5th Edition, All Beck Publishing House, Bucharest, 2004, p.18

commercial law, commercial usages are not normative sources. The conclusion is arising from the fact that Article 1 Com. code, which regulates the sources of commercial law, does not mention them. The solution is even more necessary as the provisions of the Italian Commercial Code, which enshrined commercial uses as a normative source, were not reproduced in the Romanian Commercial Code.

If there are no normative usages in our commercial law, judicial doctrine and practice recognize interpretive (conventional) usages. They result from the presumed will of the parties and are intended to clarify the meaning and limits of this determination.

The existence of interpretative usages (customs) is deduced from certain provisions of the Civil Code, which, based on art. 1 C. code, are also applicable in commercial law.

Thus, according to art. 970 Civ. code, conventions must be executed in good faith. The conventions oblige not only to what is expressly provided in them, but also to all the consequences that equity, custom or law give as an obligation according to its nature. Under these provisions, obligations in commercial contracts must be performed in good faith, with the diligence of a good trader. These contracts also include the obligations resulting from the habits of the commercial activity, even if there is no express stipulation.

Then, art. 980 Civ. the code stipulates that the doubtful provisions are interpreted according to the custom of the place where the contract was concluded. Therefore, if certain terms of the commercial contract are doubtful or ambiguous, in order to establish their meaning, it is necessary to resort to the custom of the commercial activity existing at the place where the contract has been concluded.

Finally, according to art. 981 of the Civil Code, the usual terms of a contract are implied, although they are not expressly provided in the contract. This legal provision is of great importance in commercial activity, which is based on certain practices. These customs are considered by law to be tacitly accepted by the contracting parties.

It is generally acknowledged that doctrine is not a source of law. The conclusion is equally valid for commercial law. But the doctrine of commercial law is an important instrument for interpreting commercial laws and, therefore, applying them. It is a factor in the progress of the law, as its solutions are often taken up by the legislator and transposed into normative regulations. Of course, the new doctrine of commercial law, based on the legal regulation adopted in the post-revolutionary period, is being developed.

***Judicial practice or judicial precedent.*** Traditionally, in our law, judicial practice has not been recognized as a source of law. According to the principle of separation of powers in the State, the courts are competent to enforce the law. But the solutions given by the courts, without having the power of the judicial precedent, contribute to the interpretation of commercial laws.

As has been said, judicial practice is the “laboratory” where the soundness of the conception and, implicitly, the efficiency of the law are verified. The signals of judicial practice can be a source of inspiration for the commercial legislator.

A certain role in the interpretation of commercial laws tends to be acquired by the decisions of the Supreme Court of Justice (united sections), given in the trials of appeals in the interest of the law (Article 329 Code of Civil Procedure).

## CONCLUSIONS

Business law, as a branch of law, consists of all the legal regulations governing the social relations that appear in the sphere of the economic activity. As a discipline, business law is a legal multidisciplinary that has as object of study all the norms that regulate business life. In addition to the normative sources of business law, certain interpretative sources of law are also recognized, with an important role in the interpretation of legislative acts. In a narrow sense, the sources of business law are forms of expression of the specific regulations of this branch.

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