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# ADMINISTRATIVE, CIVIL AND COMMERCIAL CONTRACTS IN LATIN-AMERICAN LAW\*

JULIO CUETO-RUA†

## INTRODUCTION

**T**HAT provincialism in the Americas still holds sway in the field of law is apparent, for the common-law lawyer knows little about Latin-American law, and the Latin-American civil-law lawyer is equally ignorant of the rules and techniques of the common law. This is an era concerned with the need for closer relationships and greater mutual knowledge among all peoples. There are no national boundaries for scientific achievements, artistic developments and technological advancements. In fact, the last decades have shown a growing and fruitful exchange between North America and Latin America in the most important fields of human endeavor: arts, economy, sciences. But the lawyers of this hemisphere have not contributed a great deal towards the drive of the swelling tide which seeks to weld together the peoples of the Americas.

The deplorable lack of information with regard to the law in force in the western hemisphere is a negative element which has hindered inter-American communication in the legal field, either because of the fear of multiple technical difficulties, or because technical terminology conceals the purely classificatory nature of many of the so-called "differences" between civil and common law, or beclouds the significance of the peculiar mental processes applied by the jurists of both systems in the handling of legal matters. The consequences of this unsatisfactory situation can be felt in the area of international relations as well as in the fields of economic and cultural intercourse.

The legal profession is one of the most active factors in shaping modern society. The range of its influence is wide and pervades the whole field of social human relations. The judge, the advocate, the counselor, the jurist, the legislator, all have a vital influence in government, business, international relations, community life, and politics. Each contributes his wisdom, knowledge, and experience to the law-making process

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\* This article is part of a book the author is writing on the law of contracts in the Americas, covering mutual assent, causa and consideration, conditions and impossibility of performance, which will be published by the Southwestern Legal Foundation.

Reference to specific articles in the Latin-American codes will be made thusly: article 1 of the Commercial Code of Argentina cited as Argentina, Cod. Com. art. 1.

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which moulds society; to the slow formation of new social mores; and to the definition and fulfillment of social values.<sup>1</sup>

Because of its tremendous influence, the legal profession has a great responsibility to all the citizens of the Americas, irrespective of national affiliations.

There is no doubt that the neglect of the legal profession of the various Latin-American countries with regard to the study of the common law has been one important factor hampering better relations between the North and the South. On the other hand, the same criticism can be addressed to the United States legal profession with regard to the study of Latin-American law. The United States lawyer would probably be shocked to know how superficial and vague is the knowledge which a Latin-American lawyer has of common law. American legal materials translated into Spanish are scarce. Furthermore, such translations as exist are often a source of misunderstandings because of grave terminological problems. Still more significant is the almost entire lack of information available on the specific common-law technique whereby cases are decided by the application of prior decisions rendered by courts on similar facts. Those few Latin-American lawyers who may be interested in the study of common law can not easily satisfy their wishes, for American law books are not easy to find south of the Río Grande, and, when found, are misunderstood because the essential presuppositions of the common-law system are unknown to civil-law lawyers.

No less appalling is the lack of knowledge of the United States lawyer with regard to Latin-American law. They know, perhaps, that the civil law prevails in most of those communities, but there is little accurate understanding as to its specific content or of the highly developed methods used in construing codes and other statutory materials. Even though there are a number of civil-law codes translated into English,<sup>2</sup>

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1. See Brown, *Lawyers, Law Schools and the Public Service* (1948).

2. The German Civil Code, translated and annotated with an historical introduction and appendices, by Chung Hui Wang, Stevens and Sons Limited, London, 1907; Code of Commerce of the Republic of the Philippines, with annotation on the effect of the new Civil Code, by Vicente J. Francisco, East Pub. Manila, 1950; The Argentine Civil Code, together with the Constitution and Law of Civil Registry, translated by Frand L. Joannini, Boston, Boston Book Co., 1917; The Civil Code of Brazil, translation from the official Portuguese text, by Joseph Wheless, The Thomas Law Book Co., St. Louis, 1920; Compendium of the Laws of Mexico, 2d ed. revised and rewritten throughout by Joseph Wheless, Thomas Law Book Co., St. Louis, 1938; Petit Code Civil Annoté de la Province de Quebec, by Louis-Joseph de la Durantage, Wilson et Bafler, Montreal, 1950, transcribing also the official English version; Code of the Philippines, Manila, Bureau of Printing, 1949; the huge collection edited under the direction of Sir Thomas Edward Scrutton and William Bowstead, *The Commercial Laws of the World*, The Boston Book Co., Boston, even though obsolete, still is useful for the common-law lawyer inter-

they are not, generally speaking, the subject of study or inquiry by the American lawyer.<sup>3</sup>

The perusal of any civil-law code, per se, will not be very enlightening to the common-law lawyer, for its very broad and abstract principles are ambiguous to him, and will not give clear and definite answers to the specific problem he may have in mind. It is similar, in a sense, to the effect of the *Restatements of the Law* on a civil-law lawyer, who, when he reads them without adequate knowledge of their case-law background, does not understand them. The correct construction of the *Restatements* demands a knowledge of the cases from which the broad generalizations have been drawn, for there is an intimate relationship between the *Restatements* and the precedents which constitute common law. The situation offers a certain parallelism with regard to a civil-law code. Its proper understanding requires a command of basic civil-law doctrine, that is to say, of the theoretical contributions of the great jurists which paved the way for codification, and who have developed the subject matter through their treatises and analyses. Civil-law doctrine is a living and essential part of the civil-law codes, and without fair knowledge of the first, the second is a highly complex and abstract set of legal provisions whose meaning is difficult to grasp.

The fact that Latin-American legal science ignores the achievements of the common-law theorists, and legal scholarship in the United States ignores the achievements of the civil law, dangerously isolates the two great theoretical efforts of this hemisphere.

The picture is not completely gloomy, however, for here and there can be found encouraging indications of a change. The organized bar has sought closer relationships among the members of the legal profession throughout the Americas by the creation of the Inter-American Bar Association in 1941.<sup>4</sup> The *Academia Interamericana de Derecho Com-*

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ested in obtaining information about civil-law techniques. This collection publishes the most important commercial codes of the civil-law area with an English translation. The Civil Law in Spain and Spanish-America, including Cuba, Puerto Rico, and Philippine Islands and the Spanish Civil Code, by Clifford Stevens Walton, Washington, D.C., W. H. Lowdermilk & Co., 1900; Translation of the Civil Code in Force in Cuba, published by the Division of Customs and Insular Affairs of the War Department, Washington, Government Printing Office, 1899; Civil Code of Peru, translated by Frank L. Joannini, St. Louis, Thomas Law Book Co., 1920.

3. The exception appears to be the Louisiana lawyer, because of the strong civil-law influence in the shaping of Louisiana's private law.

4. See Inter-American Bar Association, Proceedings of the First Conference (1941); 1-6 Federação Interamericana de Advogados Anais da Segunda Conferência (1943); 1-3 Federación Interamericana de Abogados, Memoria de la Tercera Conferencia (1945); Federación Interamericana de Abogados, Quinta Conferencia (1947); Inter-American Bar Association, Proceedings of the Sixth Conference (1949); Inter-American Bar Association, Proceedings of the Ninth Conference (1956).

*parado e Internacional* in Havana, has undertaken a vigorous campaign to promote inter-American legal studies, drawing to Cuba jurists, practitioners and law students from both the civil-law and the common-law areas for intensive studies in the fields of private and public law.<sup>5</sup> In the United States there is a growing interest in the field demonstrated by the excellent work of the Inter-American Law Institute at New York University,<sup>6</sup> the Law Institute of the Americas at Southern Methodist University,<sup>7</sup> and the solid support of the Ford Foundation for inter-American legal studies. More and more schools are including comparative law courses in their curriculums and the pioneering efforts of Tulane University, the University of Michigan, and Harvard University, have set the pace for an intensified drive to establish a bridge linking the jurists of both systems.

Against this background of contemporary activity a survey of the Latin-American law of contracts would not appear to be amiss, the more so if some of the techniques and devices furnished by the com-

5. See 1-4 Academia Interamericana de Derecho Comparado e Internacional, *Cursos Monográficos* (1948-54); 1-2 Academia Interamericana de Derecho Comparado e Internacional, *Debates de Mesa Redonda* (1947-51).

6. Eder, *A Comparative Survey of Anglo-American and Latin-American Law* (1950).

7. The Law Institute of the Americas has sponsored a series of studies in this area of inter-American legal studies among which are the following: *El Common Law Análisis de un problema interpretativo concreto*, *Revista Jurídica Argentina La Ley* [hereinafter *La Ley*] (Feb. 1957); *El Common Law, La explicitación de la norma general involucrada en la Sentencia precedente*, *La Ley* (Feb. 1957); *El Common Law, Modernas tendencias*, *La Ley* (Dec. 1956); *El Common Law, Stare decisis*, *La Ley* (Dec. 1956); Cueto-Rua, *El Common Law, Teoría tradicional. Su Crítica. Nuevas Perspectivas*, *La Ley* (Nov. 1956); Cueto-Rua and Harding, *La enseñanza del Derecho Comercial Comparado*, *La Ley* (March 1955); Singer, *El Seguro Social de desocupación en los Estados Unidos*, *La Ley* (April 1955); *La Compensación de los accidentes del trabajo en el Common Law*, *La Ley* (Jan. 1954); Fernando Barrancos y Vedia, *Observaciones sobre el Regimen Jurídico del Mandato*, *La Ley* (March 1954); *Modernas Tendencias pedagógicas en las Escuelas de Derecho norteamericanas*, *La Ley* (Nov. 1953); *El Case Method*, *La Ley* (Aug. 1953); Fernando Barrancos y Vedia, *Contracts Between a Corporation and its Directors*, 5 *Am. J. Comp. L.* 497 (1956); Cueto-Rua and Harding, *Teaching Comparative Commercial Law*, 4 *Am. J. Comp. L.* 40 (1955); Cueto-Rua and Cesar Ramos, *Conceptos básicos sobre el regimen jurídico de las llamadas condiciones en el Derecho norteamericano de los Contratos y observaciones Comparativas en relación a los Derechos argentinos y mexicano*, 44 *Revista de Derecho y Legislación*, Caracas, Venezuela 270 (1955); *La indemnización por accidentes del trabajo en el Derecho legislado de los Estados Unidos de America*, 15 *Derecho de Trabajo (Argentina)* 321 (1955); Thomas and Thomas, *Igualdad de los Estados en el Derecho Internacional. Realidad Ficción?* 31 *Revista del Colegio de Abogados de Buenos Aires* 185 (1953); Cueto-Rua, *El "Law Institute of the Americas,"* 4 *Revista Jurídica del Peru* 152 (1953); Cueto-Rua, *El Common Law. Su Estructura Normativa* (1957); Thomas and Thomas, *Non Intervention, The Law and its Import in the Americas* (1956); Thomas, *Communism v. International Law* (1953).

parative method are employed as an aid to span the gulf that has parted the two legal systems of this hemisphere.

#### SOURCES OF THE LAW OF CONTRACTS IN LATIN AMERICA

The common-law lawyer, seeking an answer to a legal problem, looks for analogies in recorded past judicial experience. His main normative source is to be found in that collection of reported cases which offer a certain degree of similarity with the fact situation at hand. The common-law lawyer predicts the probable outcome of the case on the basis of prior decisions by judges of the same jurisdiction in similar past cases. The closer the analogy, the better the likelihood that the case will follow the path of precedent cases, for, in general, the rule of *stare decisis* will govern. The source of the law is the precedent in point. This search for precedents does not require the use of a high degree of abstract logic but, rather, demands versatile ability to appreciate and evaluate past fact situations and to find the appropriate general rule of law from a concrete judicial decision rendered in a similar case.

This is not the manner in which a Latin-American lawyer approaches his problem. In the first place, theoretically, there is no principle of *stare decisis*. The judges are bound by the abstract provisions of the civil code, the statutes, the decrees of the executive power, or by administrative regulations, but not by the decisions of other judges rendered in similar cases. The authority of precedent in the civil law is, in general, only persuasive.<sup>8</sup> No judge is obliged to render a decision

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8. The situation offers a somewhat different feature in those countries where "casación" has been established, i.e., Venezuela, Código de Procedimiento Civil, arts. 413-45; Colombia, Código Judicial, arts. 519-41; Chile, Código de Procedimiento Civil, arts. 764-809; Costa Rica, Código de Procedimientos Civiles, arts. 902-32; Cuba, Ley de Enjuiciamiento Civil libro 2, título 21; Dominican Republic, Ley Sobre Procedimiento de Casación; Guatemala, Código de Enjuiciamiento Civil y Mercantil, arts. 505-25; Haiti, Loi No. 8 sur la cassation des jugements en matière civile et en matière de commerce; and Loi organique du Tribunal de Cassation du 16 mars 1928; Honduras, Código de Procedimientos, arts. 899-960; Nicaragua, ley del 2 de Julio de 1912. The recurso de casación is a special type of appeal whose scope varies from country to country, but which has a feature which makes it similar in certain aspects to the binding force of judicial precedents at the common law. It is generally accepted that the doctrine of the Court of Cassation ought to be followed by the lower courts. In civil-law countries this implies that the meaning attributed by the Court of Cassation to the words employed by the legislator in the statutes under consideration have to be accepted by the lower courts. Paraphrasing Dean Levi's statements (*An Introduction to Legal Reasoning* 23 (1957)), we may say that once a decisive interpretation of the code or statute has been made by the Court of Cassation and a direction has been fixed within the gap of ambiguity, lower courts ought to follow the indicated direction. In this sense, the Court of Cassation's interpretation of legislation is not dictum. The words it uses do more than decide the case. They give broad direction to the code or statute.

It is important to point out that the decision of a Court of Cassation in construing the

based on preceding cases whatever the similarity of fact situations may be. Even though the judge is not bound to follow precedent, the fact is that judges, in actuality, do follow precedent in most of the instances as a matter of course.

A civil-law lawyer faced with a contractual problem must answer several questions before undertaking a thorough study of the matter at hand. The first question is related to the nature of the contract. Is it a civil contract, a commercial contract, or an administrative contract? The common-law lawyer generally is not much concerned about such classifications, for there are no essential differences at common law among administrative, commercial (business), or purely civil contracts. The general theory of contracts applies to all types, without making any important distinction, and this includes contracts entered into by the government or its agencies with private persons. But in civil law the first step to be taken in dealing with a contract question is the determination of its category (administrative, civil, or commercial), for each classification is governed by different rules of evidence and procedure, has different statutes of limitation, and the parties thereto have different rights and obligations.

#### A. *Administrative Contracts*

In civil law it is difficult to draw up an acceptable definition of an administrative contract which would satisfy all civil-law jurists. The situation is further complicated by the fact that administrative law has not been codified. This has proved to be a drawback for the civil-law lawyer, who usually feels himself on safer ground when dealing with codified matters.

There are, nevertheless, certain features which are essential elements of an administrative contract. The first is that one of the parties to the

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meaning of an article of a code or of a statute offers a kind of abstract flavor to which the common-law lawyer is not accustomed in his dealings with case-law materials. The decision of the Court of Cassation will state the meaning of certain words of the article of the code, by using other words which are also an expression of abstract concepts. The logical extension of the article of the code will be diminished to some extent, but not sufficiently to make the construed article concrete and unambiguous in its relationship to social reality. When a civil-law lawyer studies and analyses a decision of the Court of Cassation he is not obliged to concentrate his attention on the facts of the case in order to determine what is material and what is immaterial, in order to ascertain the proper scope of the decision. His problem is to determine what is the conceptual extension of the words employed by the court in its definition of the meaning of the words of the code or the statute. Those abstract but definitive words, employed by the Court of Cassation in its description of the meaning of the words of the code or the statute, have, in fact, a binding force with regard to lower courts.

transaction must be the government or an agency of the government,<sup>9</sup> that is to say, an entity of public law,<sup>10</sup> such as the federal government, the provincial government, municipalities, and their branches. The second requirement is that the promise to be performed must be in the nature of a public service.<sup>11</sup> Typical cases of administrative contracts include the following: an agreement whereby a person in return for payment promises to undertake the construction of a public work; an agreement whereby the state leases public lands, or whereby the right is granted to a person to operate a public utility; a contract whereby an employee agrees to perform services at the offices of the government; the sale of goods or merchandise to the government when these are necessary to carry on a public service; the underwriting of issues of government bonds or papers of a similar nature; and the concession of property or equipment owned by the state to persons who are engaged in the performance of a public service. All of these contracts are regulated by administrative law, and the provisions of the civil codes are only applied in a subsidiary manner. Thus the question of capacity becomes one of jurisdiction; the question of *causa* becomes one of public interest; the question of enforcement becomes one of administrative procedure.

These basic differences make the distinction between administrative contracts and private (civil or commercial) contracts a major one. To this effect two tests are usually applied. The first test has been developed by French doctrine, and it is known as the public service test, for it takes into account the nature of the promise to be performed.<sup>12</sup> If the promise is related to services which are provided by the state to satisfy general social needs,<sup>13</sup> then the contract can be classified as an administrative contract. This test is difficult to apply because the concept of public service is, in itself, vague and obscure. For example, there is no question as to the public interest which derives from the operation of a railroad. The contract whereby the state authorizes a person or corporation to own a railroad is an administrative contract. But suppose

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9. It is important to recall that the government or its agencies may be engaged in activities of a purely private nature, as, for instance, in the operation of a bank, or in the production and distribution of merchandise. Contracts entered into by the government while engaged in private transactions are regulated by the civil or commercial codes, as the case may be.

10. Bielsa, *Principios de Derecho Administrativo* 107 (1948).

11. Cavalcanti, *Tratado de Direito Administrativo* 359 (1948), says that there are contracts called administrative contracts because of the parties who made them and the public interest surrounding the performance of the promises made by the parties.

12. Hauriou, *Précis de Droit Administratif et de Droit Public Général* 67-70 (9th ed. 1919).

13. Appleton, *Traité Elementaire du Contentieux Administratif* 114 (1927).



that the state itself owns and operates a railroad, and in connection therewith enters into an agreement with a coal miner to purchase coal. Such a contract is not an administrative contract, because in this instance the state is not acting as a public entity but rather as a private person. It is generally agreed that the procurement of fuel under these circumstances is subject to the provisions of the civil or commercial code, as the case may be, and not to administrative law. To rationalize this conclusion, it is declared that a contract does not fall within the administrative category when the services for whose operation the materials are acquired are performed in competition with services offered by private persons.<sup>14</sup>

The second test applied to administrative contracts takes into account the nature of the character which the administration assumes in the instant case. This test is related to one of the most important doctrines of continental administrative law, i.e., the double legal personality of the state. In accordance with this widely accepted doctrine, the state may in certain cases clothe itself with the same rights and duties of a private person. In such cases, its activities are regulated by private law; hence, the contracts it makes in such a capacity are to be regulated by the civil or commercial code, as the case may be. In other instances, the government or its agencies act as a public entity, a person of public law (*persona de derecho público*) whose acts are regulated by constitutional and administrative law.

In these latter situations, the government occupies a position of privilege or priority with regard to any person who enters into contractual relations with it. This test requires a careful analysis as to the position of the government in its dealings with third parties, the scope and meaning of the statutes and regulations which have authorized the specific type of activity concerned, and the nature of its powers with regard to third parties.

### B. *Civil and Commercial Contracts*

Another basic distinction in civil law, and, more specifically in Latin-American civil law, is the distinction between civil and commercial contracts. Each of the twenty Latin-American republics differentiates between the two types of contracts in its law, and the distinction is an important one, not only because different rules of substantive law apply for commercial and civil contracts, but also because it relates to some important jurisdictional and procedural matters.<sup>15</sup>

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14. Bielsa, *op. cit.* supra note 10, at 108.

15. Pineda Leon, *Principios de Derecho Mercantil* 49 (1952), lists the following consequences: (a) special procedural rules; (b) different types of evidence; (c) rates of in-

The evidence required to prove a commercial case may not be the same as the evidence required to prove a civil case. Each Latin-American commercial code has a set of provisions describing the formalities of the various types of books of accounting which the merchants are required to keep, and the various means whereby commercial transactions can be proved.<sup>16</sup> The codes of commerce not only regulate the specific way in which these books must be kept, but also state their value as evidence either as against the merchant who keeps them, or against other merchants, or against any other person who is not a merchant but who happens to be engaged in a legal controversy with a merchant.<sup>17</sup>

terest; (d) qualification of the person who performs such acts with regularity; (e) liability for breach of contract. Olavarria Avila, *Manual de Derecho Comercial* (1950), adds to this list the value of customary usage as source of law and special taxation privileges or immunities.

16. Argentina, Cod. Com. arts. 208-11, 43-67; Bolivia, Cod. Com. arts. 211-13, 32-64; Brazil, Cod. Com. arts. 10-16, 122-25; Chile, Cod. Com. arts. 25-46, 127-29; Colombia, Cod. Com. arts. 27-54; Costa Rica, ley del 5 de Julio de 1901, arts. 1-13, 16-19; Cuba, Cod. Com. arts. 33-49, 51-52; Dominican Republic, Cod. Com. arts. 8-11, 109; Ecuador, Cod. Com. arts. 35-48, 54-59, 164-68; El Salvador, Cod. Com. arts. 13-30; Guatemala, Cod. Com. arts. 16-41, 50-59, 218-23; Haiti, Cod. Com. arts. 9-12; Honduras, Cod. Com. arts. 33-41, 47-49, 78-79; Nicaragua, Cod. Com. arts. 28-42, 111-17; Panama, Cod. Com. arts. 71-88, 45-200; Paraguay, Cod. Com. arts. 208-11, 43-67; Peru, Cod. Com. arts. 33-44, 51-52; Uruguay, Cod. Com. arts. 54-67, 192-95; Venezuela, Cod. Com. arts. 32-37, 124, 126-28.

17. Typical of this type of provision are arts. 63-65 of the Codes of Commerce of Argentina and Paraguay which state that the entries in the books of accounting in commercial transactions are conclusive evidence against the merchant who carries them; that those entries can be invoked as evidence against another merchant, if the latter does not show entries to the contrary in his own books of accounting carried as indicated by law or does not produce convincing and satisfactory evidence to the contrary; that if a party offers as evidence the entries in the books of accounting of the counterpart merchant, he is bound to admit the relevancy of all the entries combined which have any bearing on the matter under discussion, and is prevented from selecting those which are convenient to his cause, rejecting the others. If the transaction is not commercial then the books of accounting will not serve as sufficient evidence, but may be introduced as partial evidence which requires other proof as corroboration. The Code of Commerce of Chile has provisions of a similar nature: if merchant B's books of accounting have been altered, or show blanks, or erasures, or lack of continuity in their pages, they will not have value as evidence for the merchant B who carried them; furthermore if the other party, A, is also a merchant, who has carried his own books of accounting in the manner required by law, then A's books of accounting will be sufficient evidence against B unless B can produce a preponderance of evidence against the merchant who carries them (art. 38); and if one party, A, states that he will accept as sufficient evidence whatever entries have been made by the other party, B, in B's books of accounting and B refuses to show his books, then A will be allowed to prove by oath acts, the evidence of which he wanted to introduce (art. 37). Article 48 of the Code of Commerce of Peru carefully regulates the respective value as evidence which books of accounting have for merchants who are parties to a law suit, following, in general, the provisions of the Argentine Code. The Vene-

There are certain rules which are applicable to commercial contracts only, either with regard to the availability of parol evidence, or with regard to the formalities which must be met in the making of contracts. The Latin-American codes of commerce have established regulations for a series of professional activities which are intimately related to trade. These regulations not only define the respective duties and rights of the parties to the transaction,<sup>18</sup> but also include provisions with regard to the formalities to be fulfilled by the parties, and the type of evidence available to the parties. Thus, for instance, the activities of brokers,<sup>19</sup> auctioneers,<sup>20</sup> owners of depots and warehouses,<sup>21</sup> and carriers<sup>22</sup> must

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zuelan Code of Commerce provides (art. 38) that the books of accounting which have been carried in accordance with the requirements of the Code can be used as evidence between merchants with regard to business transactions. If the other party is not a merchant, then the books of accounting can be used as evidence only against the merchant who carries them, but in this instance whoever invokes the books of accounting as evidence is bound to accept the validity, as evidence, of those entries which are favorable to his interests, as well as those which are not. Similar provisions can be found in almost every Latin-American code of commerce.

18. The provisions defining the rights and duties of the parties to the contract are usually of a supplementary nature, i.e., they will be applied if the parties to the transaction have been silent as to their intent with reference to the specific point raised. In other instances, however, certain provisions will have a mandatory character, and the parties cannot set them aside by virtue of the agreement.

19. Argentina, Cod. Com. arts. 88-112; Bolivia, Cod. Com. arts. 66-106; Brazil, Cod. Com. arts. 36-67; Chile, Cod. Com. arts. 48-80; Colombia, Cod. Com. arts. 65-91; Cuba, Cod. Com. arts. 88-115; Dominican Republic, Cod. Com. arts. 74-90; Ecuador, Cod. Com. arts. 70-99; El Salvador, Cod. Com. arts. 39-60; Guatemala, Cod. Com. arts. 72-201; Haiti, Cod. Com. arts. 44-89; Honduras, Cod. Com. arts. 827-41; Mexico, Reglamento de corredores para la Plaza de Mexico, November 1, 1891; Nicaragua, Cod. Com. arts. 49-70; Panama, Cod. Com. arts. 107-27; Paraguay, Cod. Com. arts. 88-112; Peru, Cod. Com. arts. 88-115; Uruguay, Cod. Com. arts. 89-113; Venezuela, Cod. Com. arts. 66-81.

20. Argentina, Cod. Com. arts. 113-22; Brazil, Cod. Com. arts. 68-73; Chile, Cod. Com. arts. 81-95; Colombia, Cod. Com. arts. 106-20; Ecuador, Cod. Com. arts. 100-12; El Salvador, Cod. Com. arts. 61-72; Guatemala, Cod. Com. arts. 202-14; Nicaragua, Cod. Com. arts. 71-79; Panama, Cod. Com. arts. 128-39; Paraguay, Cod. Com. arts. 113-22; Peru, Cod. Com. arts. 116-23; Uruguay, Cod. Com. arts. 114-23; Venezuela, Cod. Com. arts. 82-93.

21. Argentina, Cod. Com. arts. 123-31; Brazil, Cod. Com. arts. 87-98; Chile, statutes No. 389 and 5069 and Reglamento de ley de Almacenes Generales de Depósito; Cuba, Cod. Com. arts. 303-10; Guatemala, Cod. Com. arts. 469-76; Honduras, Cod. Com. arts. 842-73; Mexico, Ley General de Títulos y Operaciones de Créditos, arts. 280-87; Nicaragua, Cod. Com. arts. 460-85; Panama, Cod. Com. arts. 168-91; Paraguay, Cod. Com. arts. 123-31; Peru, Cod. Com. arts. 297-304; Uruguay, Cod. Com. arts. 124-32.

22. Argentina, Cod. Com. arts. 162-206; Bolivia, Cod. Com. arts. 174-95; Brazil, Cod. Com. arts. 99-118; Chile, Cod. Com. arts. 166-232; Colombia, Cod. Com. arts. 258-330; Costa Rica, Ley del 29 de Noviembre de 1920; Cuba, Cod. Com. arts. 349-79; Dominican Republic, Cod. Com. arts. 102-08; Ecuador, Cod. Com. arts. 204-60; El Salvador, Cod. Com. arts. 99-121; Guatemala, Cod. Com. arts. 138-71; Haiti, Cod. Com. arts. 95-106;

be analyzed from a legal standpoint by taking into account the specific provisions of the codes of commerce regulating their professional activities.

How can one distinguish a commercial contract from a civil contract? There is no universal criterion of classification, and among the various Latin-American countries there are important differences to be taken into account. The consideration of each particular contract requires a close study of the local law under which the contract was entered into.

There are two different tests to determine whether a contract falls within the category of commercial or civil. The first test is objective, and the second, subjective. Most of the codes of commerce of the Latin-American republics combine both tests, although the objective test predominates. From a historical standpoint the subjective test was the first to be applied. Even the French Ordinance of 1763, where the objective criterion appeared for the first time,<sup>23</sup> declared that business transactions (*actes de commerce, actos de comercio*), were those conducted by merchants. Merchants were defined as members of the merchant guild. When the French guilds were eliminated by the Edict of Turgot, in 1776, the necessity of defining business transactions in accordance with some other test became acute. The French then established the doctrine of the objective act of commerce which concluded that the purchase of goods for resale was a commercial transaction in itself, regardless of the profession or calling of the buyer.<sup>24</sup>

In accordance with this idea, Lyon-Caen and Renault declared that there are acts of commerce which are commercial in themselves, i.e., independent of the profession of whoever undertook them, while other acts are deemed to be commercial solely because they were undertaken or performed by merchants.<sup>25</sup> The first type are usually called objective acts of commerce and the second, subjective acts of commerce.<sup>26</sup>

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Honduras, Cod. Com. arts. 1070-1104; Mexico, Cod. Com. arts. 516-604; Nicaragua, Cod. Com. arts. 369-89; Panama, Cod. Com. arts. 663-727; Paraguay, Cod. Com. arts. 162-206; Uruguay, Cod. Com. arts. 163-89.

23. Olavarria Avila, *op. cit.* supra note 15, at 180.

24. See citation of Vincens, Pradier-Fodere and Colvafrù, by Siburu, *Comentario del Código de Comercio Argentino* 69 (3d ed. 1933).

25. Lyon-Caen and Renault, *Manuel de Droit Commercial* 29 (1924).

26. See I Vivante, *Trattato di Diritto Commerciale* 97 (3d ed. 1896). Some Italian and German writers have criticized not only the distinction made in the text, but also the distinction between commercial transactions (acts of commerce) and civil transactions. The most important exponent of this doctrine, probably, is Ercole Vidari, *Corso di Diritto Commerciale* 25-48 (5th ed. 1900). The teachings of Vidari have not been followed in Latin America. All Latin-American nations make the distinction between civil and commercial contracts an essential one.

It is apparent that the first concept of the French doctrine, i.e., that the commercial transaction comprised the purchase of goods for resale, was limited in its scope and that some new concept had to be developed in order to cover all the manifold activities of modern trade and commerce. Many attempts have been made to isolate a certain element or feature of an act which would thereby make it commercial. All such attempts have failed because the various elements which have been selected by the jurists have not been sufficient to cover the wide range of commercial transactions.<sup>27</sup> In general, those doctrines have hinged upon the ideas of mediation between producer and consumer, profit and speculation. Acts of commerce, it is said, are either those which promote or facilitate the circulation of wealth or those which are performed for profit or speculation.<sup>28</sup> It is apparent that neither of these two ideas, nor a combination of both, is sufficient to furnish adequate coverage for the various types of transactions which have been regulated by the codes of commerce. The prevailing continental doctrine has come to the conclusion that there is no single element nor essential concept whose presence will make a transaction a commercial one and nothing else.<sup>29</sup> Lyon-Caen and Renault have stated that, in fact, no such common essential element exists.<sup>30</sup> This obvious conclusion has led to the only possible answer, that is to say, that the commercial nature of the act has to be determined by taking into account the specific definitions and classifications set forth in the code of commerce of each nation.<sup>31</sup> Since a precise and detailed description of all the acts of commerce under the Latin-American codes is beyond the scope of this study, only a description of the most important of these transactions which are considered to be commercial, regardless of the person who undertook them, performed the services, or entered into the agreement, will be given.

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27. This is not the place to analyze and discuss these theories. An excellent exposition thereof is Thaller, *Traité Élémentaire de Droit Commercial* (4th ed. 1900). An original contribution which has raised considerable interest is Rocco, *Saggio di una teoria generale degli atti di commercio*, 1 *Rivista di Diritto Commerciale* [hereinafter R.D. Co.] 81 (1916).

28. Sibur, *op. cit. supra* note 24, at 70; Lyon-Caen and Renault, *op. cit. supra* note 25, at 29.

29. See Rocco, *op. cit. supra* note 27, at 92; Mezzera Alvarez, *Curso de Derecho Comercial* 51 (2d ed. 1951).

30. Lyon-Caen and Renault, *op. cit. supra* note 25, at 29.

31. 1 Vivante, *op. cit. supra* note 26, at 97 says that the commercial nature of a transaction is derived from the mandatory declaration of the law. The same approach in Lyon-Caen and Renault, *op. cit. supra* note 25, at 30; and Mezzera Alvarez, *op. cit. supra* note 29, at 57.

### 1. *Objective Acts of Commerce*

The Latin-American codes have followed two different procedures in defining or describing the acts or situations considered to be commercial per se, i.e., objective acts of commerce. One has been to list those acts in a descriptive, though usually not exclusive, manner. This technique, for instance, has been followed by the Codes of Argentina, Paraguay, Uruguay, Haiti, Chile, Mexico, Colombia, Dominican Republic, Venezuela, Panama, Guatemala, and Ecuador. The other technique has been to set forth in a general statement what is, from an objective standpoint, an act of commerce and/or to establish regulations in the various chapters of the code for what are considered to be the typical cases of commercial transactions, leaving it up to the jurists, judges and commentators to define the common genus of all these transactions, if any can be ascertained. Thus the Code of Commerce of Honduras, article 3, defines acts of commerce as those whose finality is the operation, the convergence, or the winding up of an enterprise and other acts of an analogous character, unless they are essentially civil in their nature.

The message which accompanied the draft of the Code when it was submitted for its approval to the Honduran National Congress elaborated on the above mentioned definition in the following terms: "It is the opinion of the Executive Power that the distinguishing feature of these acts (the acts of commerce) is to be found in the fact that commercial transportation, commercial insurance and commercial sale imply the execution of thousands of similar acts, showing identical legal and economic characteristics. These are acts which are performed as a series of acts *en masse*. Because they are performed by the thousands (*en masa*) they demand specific legal regulations, simple in their nature, where good faith and legal security may be attained; where the manifestation of the will of the parties may be adjusted to forms in which the personality of the contracting party loses influence and significance. On the other hand, those acts performed as a series of acts by the thousands (*en masa*) demand the presence of an adequate professional organization: insurance is unthinkable without an insurance enterprise, or transportation without a transportation enterprise, or storage without the warehouse company, or banking operations without the presence of the bank, or sales without an enterprise which is professionally devoted to sell to the public. Who perchance buys for resale, who perchance transports for a price, who occasionally receives merchandise for storage, who occasionally offers credit, who performs an act of a nature traditionally considered commercial, but does it not as an instance of his professional activity or of his enterprise, does not need special legis-

lation."<sup>32</sup> As it can be easily seen, the test applied by the Honduran Code closely approaches the subjective test, because the commercial nature of the act derives not so much from its intrinsic structure as it does from the relationship it keeps with other acts of the same nature performed by an entrepreneur.

Article 2 of the Commercial Code of Peru takes a position that the simpler acts of commerce are those subject to the regulation of the Commercial Code including those which are analogous to the ones so regulated. The Commercial Code of Nicaragua follows a system which offers certain similarity with the system set forth in the Code of Commerce of Honduras, i.e., article 82 considers as acts of commerce all the acts and obligations related to the Code, and the transactions mentioned by article 20 of the same Code. Article 20 declares merchants to be the persons who own stores, shops, bars, hotels, restaurants, coffee shops, factories, printing companies, bookstores, publishing houses, carriers, van lines, storehouses, insurance companies, agencies, brokerage houses, etc., i.e., in general, those persons who perform acts regulated by the Code of Commerce. Again, in this case, it can be seen that a combination of the subjective and objective test appears to have taken place. The same can be said of the Code of Commerce of Ecuador, article 3 of which describes acts of commerce by referring to the nature of the act, but article 140 provides that a contract is a commercial contract if it has been entered into with a duly registered merchant.

It is possible to undertake a general description of the acts and transactions which most of the Latin-American codes usually consider commercial, but the reader should keep in mind four caveats. First, that many times the act described by the code as being a commercial act will require in addition that it be performed with the intent of making a profit and/or that it is an integral link in the chain of acts which bring the goods from production to consumption. Second, that the definition may refer not only to acts, but also to business organizations, or to certain typical situations which are deemed to be commercial in their very nature, for example, the transactions, undertakings, and activities related to maritime transportation.<sup>33</sup> Third, that contracts, trans-

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32. Exposición de Motivos del Proyecto de Código de Comercio presentado al Soberano Congreso Nacional por el Ministro de Hacienda, Crédito Público y Comercio, Dr. Urbano Quesada, Segunda Explicación, para. a.

33. See Fernandez, *Código de Comercio de la República Argentina Comentado* 54 (1951). Alberto Zuleta Angel, in his *Conferencias de Derecho Mercantil*, has made some accurate remarks, which, even though primarily related to Colombian commercial law, fairly represent the general tendency of the Latin-American commercial codes. He says that art. 20 of the Code of Commerce of Colombia enumerates three different types of situations or acts: (a) commercial contracts, (b) enterprises, and (c) formal acts of com-

actions, and acts performed gratuitously will not be considered commercial. Finally, that acts analogous in their nature to the acts which have been specifically considered commercial, usually will also be considered commercial.

The following is a list of the most common acts, transactions, contracts, associations, and situations which are considered to be commercial by the Latin-American codes. This list is not all-inclusive but is limited rather to those generally considered commercial by most of the Latin-American countries: (1) the purchase of movables with the intent of reselling them for profit, either in the same condition they had when they were purchased or after having altered or changed their shape or condition,<sup>34</sup> (2) banking transactions,<sup>35</sup> (3) stock exchange transactions,<sup>36</sup> (4) brokerage, commercial agency and/or commission,<sup>37</sup> (5) negotiation of instruments to the bearer or to order,<sup>38</sup> (6) commercial de-

merce (such as the negotiation of an instrument to bearer or to order), i.e., acts which are considered commercial merely on the basis of their form. See the citation of Zuleta Angel by Jorge Ortega Torres, *Código de Comercio Terrestre, de Colombia*, 25 (1953).

34. Argentina, Cod. Com. art. 8; Bolivia, Cod. Com. art. 303; Brazil, Cod. Com. art. 191; Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; Costa Rica, Cod. Com. art. 306; Cuba, Cod. Com. art. 325; Dominican Republic, Cod. Com. arts. 109, 632; Ecuador, Cod. Com. art. 3; El Salvador, Cod. Com. art. 3; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. art. 2; Honduras, Cod. Com. art. 763; Mexico, Cod. Com. art. 75; Nicaragua, Cod. Com. art. 341; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. art. 320; Uruguay, Cod. Com. art. 7; Venezuela, Cod. Com. art. 2.

35. Argentina, Cod. Com. art. 8; Brazil, Cod. Com. art. 120; Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; Costa Rica, statute of April 25, 1900; Cuba, Cod. Com. arts. 199-217, 177-83; Dominican Republic, Cod. Com. art. 632; Ecuador, Cod. Com. art. 3; El Salvador, Cod. Com. art. 3; Haiti, Cod. Com. art. 2; Honduras, Cod. Com. arts. 875-1069; Mexico, Cod. Com. art. 75; Nicaragua, Cod. Com. art. 20; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. arts. 184, 203, 563; Uruguay, Cod. Com. art. 7; Venezuela, Cod. Com. art. 2.

36. Argentina, Cod. Com. art. 8; Brazil, Cod. Com. art. 221; Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; Cuba, Cod. Com. arts. 64-80; Dominican Republic, Cod. Com. arts. 71, 632; Ecuador, Cod. Com. arts. 3, 60; El Salvador, Cod. Com. art. 3; Guatemala, Cod. Com. art. 596; Haiti, Cod. Com. art. 2; Mexico, Cod. Com. art. 75; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. art. 67; Uruguay, Cod. Com. art. 7; Venezuela, Cod. Com. art. 2.

37. Argentina, Cod. Com. arts. 8, 87; Bolivia, Cod. Com. arts. 107-43; Brazil, Cod. Com. arts. 35-67, 140-90; Chile, Cod. Com. arts. 3, 48-80; Colombia, Cod. Com. art. 20; Costa Rica, Cod. Com. arts. 62-119; Cuba, Cod. Com. arts. 83-111, 244-80; Dominican Republic, Cod. Com. arts. 74-90, 94, 632; Ecuador, Cod. Com. arts. 3, 70, 122; El Salvador, Cod. Com. arts. 3, 39; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. arts. 2, 96; Honduras, Cod. Com. arts. 372, 804, 827; Mexico, Cod. Com. art. 75; Nicaragua, Cod. Com. arts. 20, 49, 398; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. arts. 88, 237; Uruguay, Cod. Com. art. 7; Venezuela, Cod. Com. art. 2.

38. Argentina, Cod. Com. arts. 8, 87; Bolivia, Cod. Com. arts. 349-459; Brazil, Ley 2044; Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; Costa Rica, Ley of Novem-



posit and warehousing,<sup>39</sup> (7) transportation,<sup>40</sup> (8) maritime transportation,<sup>41</sup> (9) business associations (incorporated or unincorporated),<sup>42</sup> (10) the activities of managers, bookkeepers and other employees of merchants, in so far as they relate to the trade of the principal,<sup>43</sup> and

ber 25, 1902; Cuba, Cod. Com. arts. 443-556; Dominican Republic, Cod. Com. arts. 110-89, 632; Ecuador, Cod. Com. Títulos VIII, IX; El Salvador, Cod. Com. art. 3; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. art. 2; Honduras, Cod. Com. arts. 458-504; Mexico, Cod. Com. art. 75; Nicaragua, Cod. Com. arts. 600-76; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. arts. 67, 434-556; Uruguay, Cod. Com. art. 7; Venezuela, Cod. Com. art. 2.

39. Argentina, Cod. Com. arts. 8, 87; Bolivia, Cod. Com. art. 342; Brazil, Cod. Com. arts. 87, 98, 280; Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; Costa Rica, Cod. Com. art. 351; Cuba, Cod. Com. arts. 8, 10, 193, 303; Ecuador, Cod. Com. art. 528; El Salvador, Cod. Com. art. 3; Guatemala, Cod. Com. art. 469; Honduras, Cod. Com. art. 842; Mexico, Ley General de Instituciones de Crédito, art. 75; Nicaragua, Cod. Com. arts. 20, 460; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. arts. 197, 279; Uruguay, Cod. Com. art. 721; Venezuela, Cod. Com. art. 512.

40. Argentina, Cod. Com. arts. 8, 87; Bolivia, Cod. Com. arts. 107-48; Brazil, Cod. Com. arts. 35-67, 140-90; Chile, Cod. Com. arts. 3, 48, 80; Colombia, Cod. Com. art. 20; Costa Rica, Cod. Com. arts. 62-119; Cuba, Cod. Com. arts. 88-111, 244-80; Dominican Republic, Cod. Com. art. 632; Ecuador, Cod. Com. arts. 3, 70, 122; El Salvador, Cod. Com. arts. 3, 39; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. arts. 2, 96; Honduras, Cod. Com. arts. 372, 804, 827; Mexico, Cod. Com. art. 75; Nicaragua, Cod. Com. arts. 20, 49, 398; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. arts. 197-297; Uruguay, Cod. Com. art. 721; Venezuela, Cod. Com. art. 512.

41. Argentina, Cod. Com. arts. 8, 87; Bolivia, Cod. Com. arts. 174-95; Brazil, Cod. Com. arts. 99-118; Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; Costa Rica, statutes of November 29, 1909, and December 3, 1909; Cuba, Cod. Com. arts. 184, 349-79; Ecuador, Cod. Com. art. 3; El Salvador, Cod. Com. arts. 3, 91; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. art. 2; Honduras, Cod. Com. art. 1070; Mexico, Cod. Com. art. 75; Nicaragua, Cod. Com. arts. 20, 369; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. arts. 67, 188, 344; Uruguay, Cod. Com. art. 7; Venezuela, Cod. Com. art. 2.

42. Argentina, Cod. Com. art. 8; Brazil, Cod. Com. arts. 457-796; Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; Costa Rica, Cod. Com. arts. 530-646, 670-940; Cuba, Cod. Com. arts. 573-869; Dominican Republic, Cod. Com. arts. 190-436; Ecuador, Cod. Com. art. 3; El Salvador, Cod. Com. art. 3; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. art. 2; Mexico, Cod. Com. art. 75; Nicaragua, Cod. Com. art. 20; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. arts. 67, 586; Uruguay, Cod. Com. art. 7; Venezuela, Cod. Com. art. 2.

43. Argentina, Cod. Com. arts. 282-449; Bolivia, Cod. Com. arts. 225-306; Brazil, Cod. Com. arts. 287-353, and decreto 22456; Chile, Cod. Com. art. 348; Colombia, Cod. Com. art. 463; Costa Rica, statute of November 24, 1909; Cuba, Cod. Com. arts. 116-74, 218-38, statute of April 17, 1929; Dominican Republic, Cod. Com. arts. 19, 634; Ecuador, Cod. Com. art. 261; El Salvador, Cod. Com. arts. 167-230, 302-30; Guatemala, Cod. Com. art. 279; Haiti, Cod. Com. art. 20; Honduras, Cod. Com. art. 13; Mexico, Ley General de Sociedades Mercantiles, and Ley General de Sociedades Cooperativas; Nicaragua, Cod. Com. art. 118; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. arts. 282-449; Peru, Cod. Com. arts. 124-83; Uruguay, Cod. Com. arts. 387-512; Venezuela, Cod. Com. art. 206.

(11) security transactions, generally if collateral to an act of commerce.<sup>44</sup>

It is obvious that a serious problem arises from the fact that the Latin-American codes often require that in order to consider the act a commercial one, it must be performed with the intent of making a profit, or that the purchase must be made with the intent of reselling or leasing the goods for profit. In this type of case it is common that only one of the parties has this necessary intent, while the other does not. Take, for example, an instance of retail sale. In so far as the buyer is concerned, the retail sale is a civil contract, because he is buying goods or merchandise for consumption or use. On the other hand, the same act is a commercial contract for the retailer, because this is a part of his trade. His retail sale is the expected consequence of the acquisition of the merchandise. He buys the goods with the intent of reselling or leasing for profit.

The same difficulty arises when the codes take into account the status of the parties to the transaction in order to determine whether the transaction is commercial or civil.<sup>45</sup> Thus, as will be seen later, in many instances the act or contract is considered commercial merely because it was performed or agreed upon by a merchant in the normal course of his business operations. It often happens that only one of the contracting parties is a merchant, and the resulting effect is that the contract or act is commercial with regard to the merchant, but civil with regard to the other party.<sup>46</sup>

This difficulty has not been effectively solved by most of the Latin-American codes, and many times the choice of whether the civil code or

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44. Argentina, Cod. Com. arts. 8, 87; Bolivia, Cod. Com. arts. 149-73; Brazil, Cod. Com. arts. 74-86; Chile, Cod. Com. arts. 338-47; Colombia, Cod. Com. arts. 20, 435-63; Costa Rica, Cod. Com. arts. 62, 120-49; Cuba, Cod. Com. arts. 281-302; Ecuador, Cod. Com. arts. 3, 113-19; El Salvador, Cod. Com. arts. 137-54; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. art. 2; Honduras, Cod. Com. art. 355; Mexico, Cod. Com. art. 75; Nicaragua, Cod. Com. art. 435; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. art. 275; Uruguay, Cod. Com. art. 7; Venezuela, Cod. Com. art. 2.

45. Argentina, Cod. Com. art. 8; Bolivia, Cod. Com. art. 346; Brazil, Cod. Com. art. 256; Chile, Cod. Com. arts. 820-21; Colombia, Cod. Com. arts. 946-57; Costa Rica, Cod. Com. art. 359; Cuba, Cod. Com. art. 439; Dominican Republic, Cod. Com. art. 91; Ecuador, Cod. Com. arts. 533, 541; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. art. 91; Honduras, Cod. Com. arts. 1289, 1308, 1313; Mexico, Cod. Com. art. 344 and *Ley General de Títulos y Operaciones de Crédito*; Nicaragua, Cod. Com. arts. 500-06; Panama, Cod. Com. art. 2; Paraguay, Cod. Com. art. 8; Peru, Cod. Com. arts. 315, 430, 557; Uruguay, Cod. Com. arts. 603, 741; Venezuela, Cod. Com. arts. 515, 524.

46. The instances of contracts with the double character of commercial and civil are many. It is sufficient to think of the services rendered by commercial enterprises to their customers. See Carvalho de Mendonca, *Tratado de Direito Comercial Brasileiro*, 507 (2d ed. 1930).

the commercial code will govern the case depends upon which of the parties first appeals to the court to enforce the contract.<sup>47</sup> Another solution is to divide the application of the rules, in so far as possible, between both parties. Thus, the rules of the commercial code will be applied to the merchant or to the party who performed the act or entered into the agreement for profit, and the rules of the civil code will be applied to the non-commercial party. The Supreme Court of Cassation of Colombia held that the civil rules of evidence were to be applied to the party with reference to whom the act was civil, and the commercial rules of evidence were to be applied to the party for whom the act was commercial.<sup>48</sup> In five countries the law establishes an express solution for such problems. The Codes of Argentina, Panama, Paraguay, Venezuela, and Honduras declare that if the act is commercial for one of the parties and not for the other, the entire transaction will be regulated by the commercial law, i.e., that it will be commercial for both parties.<sup>49</sup> There appears to be sufficient legal authority to conclude that in most of the Latin-American countries, where the problem has not been expressly solved, the court will hold that if one party is a merchant, the contract will be treated as commercial.<sup>50</sup> The reasoning for such a decision is that as the commercial codes have been enacted to regulate the transactions and activities of merchants while carrying out their trade, to exclude the application of a code with regard to the acts which are not commercial for the other party would defeat the purposes of commercial legislation.<sup>51</sup> But the provisions of such codes are far from

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47. 1 Olavarría Avila, *Manual de Derecho Comercial*, 190, 215 (1950). See also, Vivante, *Trattato di Diritto Commerciale*, 186 (3d ed. 1896).

48. *Casacion*, 31 Julio 1936, XLIV, 95. The French Court of *Casacion* arrived at the same conclusion in S. 1875. 1. 365; J. Pal. 1875, 880; D. 1875. 1. 229. Cf. Lyon-Caen and Renault, *Manuel de Droit Commercial*, 380 (14th ed. 1924).

49. Argentina, *Cod. Com.* art. 7; Honduras, *Cod. Com.* art. 5; Panama, *Cod. Com.* art. 4; Paraguay, *Cod. Com.* art. 7; Venezuela, *Cod. Com.* art. 109. With regard to Brazil, Joao de Oliveira Filho, quoting Carvalho de Mendonca, and art. 19 of the *Regulamento No. 737* of 1850, says that an act of commerce is such for both parties, and not only for one of them. Hence, only the Code of Commerce controls. See 5 Carvalho Santos, *Repertorio Enciclopedico do Direito Brasileiro* 3 (1947).

50. Olavarría Avila, *op. cit.* supra note 47, at 186, remarks that in Chile, the courts will usually declare the act to be commercial, if one of the parties to the transaction is a merchant.

51. Mezzera Alvarez, *Curso de Derecho Comercial* 84 (2d ed. 1951). That is also the conclusion of the Uruguayan Court, see L.J.U., t. XVIII, case No. 2849. 1 Rodriguez Rodriguez, *Curso de Derecho Mercantil* 30 (2d ed. 1952), arrives at the same conclusion, that is to say, that if the act is commercial for one of the parties and civil for the other, it should be decided solely in accordance with the provisions of the commercial law. He adds that art. 1050 of the Commercial Code of Mexico refers only to the applicable rules of procedure which control the case and not to the substantive rules of law involved.

being conclusive,<sup>52</sup> and a contrary argument could be made that since commercial law is a law of an exceptional nature as distinguished from the civil law, it should be applied only to transactions and acts which are commercial for both parties.

In general, it can be said that transactions and contracts with regard to immovables are usually considered to be civil and not commercial in their nature. Such was the traditional French doctrine<sup>53</sup> which was adopted by most of the Latin-American codes. Portalis, one of the drafters of the Code Napoleon, wrote in the *Discours préliminaire sur le Code civil*: "The distinction between immovables and movables (*richesses mobilières*) establishes the idea of things civil in their nature and commercial in their nature." This has also been the prevailing doctrine of French courts<sup>54</sup> and thus, most of the Latin-American codes will consider the sale and purchase of immovables to be subject to the regulations of the civil codes, even if one or both parties entered into the transaction with the intent of making a profit.<sup>55</sup> There is also a tendency to regard any type of transaction or contract related to immovables as being pure-

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Article 1050 provides that if a suit arises with regard to an act which is commercial for one of the parties and civil for the other, the rules of commercial procedure will be followed if the act is commercial for the defendant in the suit; and, vice versa if the defendant is the party for whom the act is civil, then the case will be litigated in accordance with the rules of civil procedure.

52. Chile, Cod. Com. arts. 1, 3; Colombia, Cod. Com. arts. 1, 10, 20; Cuba, Cod. Com. art. 2; El Salvador, Cod. Com. arts. 3, 5; Guatemala, Cod. Com. arts. 3, 5; Mexico, Cod. Com. art. 1; Nicaragua, Cod. Com. art. 1; Peru, Cod. Com. art. 2; Uruguay, Cod. Com. art. 6. The Code of Commerce of Ecuador furnishes additional ground to the doctrine which declares such acts to be commercial by stating, in art. 140, that a contract is a commercial contract if it has been entered into by a duly registered merchant. The confusion in most of the Latin-American codes is further complicated by the fact that the purchase of goods for consumption is expressly declared to be non-commercial. As we have seen above, the sale of goods originally bought with the intent of reselling them for profit is expressly considered to be a commercial transaction.

53. Lyon-Caen and Renault, *op. cit. supra* note 48, at 32.

54. Cassation, June 4, 1850, D. 1850. 1. 163; Paris, February 15, 1868. S. 1868. 2. 259, J. Pal. 1868. 1. 223, D. 1868. 2. 208; Cassation, April 18, 1882, S. 1882. 1. 407, J. Pal. 1882. 1. 1016; Lyon, July 10, 1901, D. 1904. 1. 347.

55. Olavarria Avila, *op. cit. supra* note 47, at 198; Fernandez, *op. cit. supra* note 33, at 49; Mezzera Alvarez, *op. cit. supra* note 51, at 53; Siburu, *op. cit. supra* note 24, at 87; Malagarriga, *Tratado Elemental de Derecho Comercial*, 54 (1951); 1 Ferreira, *Instituciones de Direito Comercial*, 99-100 (1951); 5 Carvalho Santos, *Repertorio Enciclopédico do Direito Brasileiro*, 8 (1947). See Argentina, Cod. Com. arts. 8, 452; Bolivia, Cod. Com. art. 308; Brazil, Cod. Com. art. 191; Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; Costa Rica, Cod. Com. art. 307; Cuba, Cod. Com. art. 325; Ecuador, Cod. Com. art. 3; El Salvador, Cod. Com. art. 3; Guatemala, Cod. Com. art. 1; Haiti, Cod. Com. art. 2; Paraguay, Cod. Com. arts. 8, 425; Peru, Cod. Com. art. 320; Uruguay, Cod. Com. art. 516; Venezuela, Cod. Com. art. 2.

ly civil in nature.<sup>56</sup> This conclusion is supported by the fact that immovables are not considered to be commercial merchandise under the traditional French doctrine, and also by the more important factor that the Latin-American commercial codes usually do not have provisions regulating contracts on immovables. It is said, for instance, that a mortgage<sup>57</sup> taken out as collateral for a commercial transaction should be considered commercial in accordance with the rule that the accessory follows the principal, *accessorio sequitur principalia*.<sup>58</sup> This conclusion, however, will not substantially alter the respective duties and rights of the parties to the transaction since mortgages are exclusively regulated by the provisions of the civil code. Similar unsuccessful attempts have been made seeking to place within the commercial category the lease of immovables, or other transactions regarding immovables (usufruct, rights of way, use) when the immovable is being employed in connection with commercial activities. Such attempts had no major significant results because, whether they are commercial or non-commercial, the transactions are substantially regulated by the civil code since most of the commercial codes in Latin America do not have provisions concerning transactions of this type. There has been a great deal of criticism of this legal approach, mainly on the ground that transactions with regard to immovables are, as a matter of fact, undertaken as a business for profit by merchants,<sup>59</sup> and, as such, should be regulated by the code of commerce.

The Code of Commerce of Italy of 1883, covered such transactions by providing regulations for contracts entered into with the intent of making a profit with reference to negotiations involving immovables.<sup>60</sup> This precedent has been followed in Latin America by the Codes of Mexico, Panama, and Honduras. The Code of Commerce of Mexico, article 75, II, and of Panama, article 2, section 5, provide that the sale and purchase of immovables are commercial transactions if entered into for profit. Article 763 of the Code of Commerce of Honduras provides that purchase and sale of immovables are commercial if they are incidental to the normal exploitation of a commercial enterprise, and the *Exposición de Motivos*, that is to say, the message the Executive Power

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56. See authors cited in note 55 supra.

57. In most of the Latin-American countries mortgages can be created only with regard to immovable property and not to movables.

58. Fernandez, op. cit. supra note 33, at 49; Siburu, op. cit. supra note 24, at 103. See the following Argentine cases: J.A. 1-241; 14-529; 25-690; 26-753; 27-1071; 37-388; 55-1023; 41-815; 45-381; 45-678; 57-984; 68-475; 34-165; 11-594; La Ley 4-393; Olavarria Avila, op. cit. supra note 47, at 203.

59. Malagarriga, op. cit. supra note 55, at 54, and doctrine cited therein.

60. See Vivante, op. cit. supra note 47, at 136.

sent to the Honduran Congress when the project was submitted for its consideration, declared that the nature of the object sold is immaterial.<sup>61</sup> Hence, in Honduras, the commercial or civil nature of a contract for the purchase or sale of an immovable will depend upon the nature of the seller or buyer. If either one is an entrepreneur whose business is the purchase and sale of immovables for profit, the contract will be commercial.

In most of the Latin-American countries, agricultural activities are governed by the civil code, and a contract for the sale of crops and agricultural produce, regardless of the profit motive, will be considered a civil contract, at least in so far as the seller is concerned.<sup>62</sup>

Finally, if a contract is not onerous but gratuitous, it will be considered as civil and not commercial.<sup>63</sup>

The preceding constitutes a broad generalization, and in many instances additional information may be required to determine fully whether the act or contract in question falls within the commercial or civil category. Case law (*jurisprudencia*) has made its contribution toward a more specific definition of commercial and civil contracts. The nature of this study will not permit a detailed analysis of this matter

61. Exposición de Motivos del Proyecto de Código de Comercio, presentado al Soberano Congreso Nacional por el Ministerio de Hacienda, Crédito Público y Comercio, Dr. Urbano Quesada, p. 46, printed by Talleres Tipo-Litográficos "Ariston", Tegucigalpa D.C., Honduras, 1950, in its edition of the Code of Commerce of Honduras.

62. Argentina, Cod. Com. art. 452; Bolivia, Cod. Com. art. 308. The Brazilian and Chilean Codes of Commerce are not specific, but this is also the conclusion of Brazilian writers. See, e.g., Carvalho Santos, João de Oliveira Filho, *Atos de Comercio*, 5 *Reparatório Enciclopédico do Direito Brasileiro*, 4 (1947); Chilean writer, Olavarria Avila, op. cit. supra note 47, at 219. Colombia, Cod. Com. art. 22; Costa Rica, Cod. Com. art. 307; Cuba, Cod. Com. art. 326; El Salvador, Cod. Com. art. 81. The Code of Commerce of Haiti is not very clear, but it is very similar to art. 632 of the French Code of Commerce, and in France the prevailing doctrine is to the effect that agricultural activities are civil and not commercial (Lyon-Caen and Renault, op. cit. supra note 25, at 33). Haitian doctrine usually follows French. The question under Nicaraguan law is doubtful, especially when the producer has organized into an enterprise; it appears, however, that under arts. 20, 82 of the Code, agricultural activities will be considered civil activities. Solorzano, in *Glosas al Código de Comercio de Nicaragua* (1949), is silent on this point. Paraguay, Cod. Com. art. 452; Peru, Cod. Com. art. 321; Uruguay, Cod. Com. art. 516; Venezuela, Cod. Com. art. 5. See also Fernandez, op. cit. supra note 33, at 60. There are four countries where the situation is the opposite: in Ecuador (Cod. Com. art. 3 § 1); in Guatemala (Cod. Com. art. 1, §§ 1, 2); in Honduras, provided the producer is organized as a commercial enterprise (Cod. Com. art. 763); and in Mexico (Cod. Com. art. 75, XXIII).

63. Fernandez, op. cit. supra note 33, at 49; Malagarriga, op. cit. supra note 55, at 53; Siburu, op. cit. supra note 24, at 85; Rodríguez Rodríguez, op. cit. supra note 51, at 29; 1 Ferreira, op. cit. supra note 55, at 100-02; de Oliveira Filho, op. cit. supra note 49, at 9; Mezzera, op. cit. supra note 51, at 40-83.

with regard to each country, but the review of some cases may serve as good illustration of what actually happens in Latin America. The following are Argentine cases chosen at random as instances of case-law<sup>64</sup> developments: an enterprise whose line of business is the management of houses and apartments for rent is not commercial;<sup>65</sup> brokerage is to be considered commercial even if the contract entered into by two parties with the assistance of the broker is a civil contract;<sup>66</sup> auctions are commercial even if the thing sold is an immovable;<sup>67</sup> show business is commercial;<sup>68</sup> boarding houses are commercial if the families who undertake to provide such services have made a business of the performance of those services;<sup>69</sup> private hospitals and sanitariums are commercial;<sup>70</sup> the technical direction of the construction of buildings is civil,<sup>71</sup> but there is authority which declares this construction to be commercial if the builder furnishes the materials.<sup>72</sup>

## 2. *Subjective Acts of Commerce*

Before the great French Ordinances of the 17th Century,<sup>73</sup> commercial law was "professional law" in the sense that it regulated the activities of a specific class, the merchants.<sup>74</sup> During the Middle Ages, commercial activities were closely regulated by the guilds and *corporaciones*, and a merchant was unmistakable, not only because of the specific nature of his activities but also because of his formal membership in the merchant guilds. But the growing powers of the bourgeoisie and the ever increasing needs of trade found a barrier in the tight organization of the

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64. The reader should not give to the expression "case-law" the usual meaning of the common-law theory. "Case-law" is used in this text as the best available translation for "jurisprudencia," "jurisprudence," "jurisprudenza." A case, in the common law, is a source of law, in the sense that the judge will determine a principle or ratio decidendi from it, in accordance with which he is bound to decide similar cases. At the civil law, the principle or ratio decidendi is given to the judge in the codes, and there is no question of determining a ratio decidendi but of giving more specific meaning to the abstract terms of the law. This is the useful function of cases in civil law.

65. J. A. 61-793.

66. J. A. 10-625, 44-789.

67. La Ley 51-172; Gac. For. 193-458; Gac. Paz 80-169.

68. La Ley 55-69; 37-692; 25-653; 44-141.

69. La Ley 46-42.

70. La Ley 2-34; 14-743; 31-581.

71. La Ley 16-781.

72. Gac. Paz 79-590; La Ley 11-102.

73. Ordinance of 1673, known also as the "Code Savary," whose subject was the regulation of non-maritime trade (commerce de terre, comercio terrestre) especially commercial partnership, bill of exchange, bankruptcy, etc., and Ordinance of 1681, covering maritime trade.

74. See Arecha, *La empresa comercial* 63 (1948).

guilds and *corporaciones* and thus, by the end of the 18th Century, an important change took place: trade permeated the various classes of society and commercial law ceased being exclusively the law of merchants. Business activities spread, and acts of commerce were performed by persons who were not formally merchants.

The need was felt of applying the commercial provisions to certain types of acts (the acts of commerce) regardless of the qualities or nature of the person who performed the act or entered into the transaction. The French Ordinance of 1673 opened the way whereby the act of commerce itself became the main source or ground to determine the applicability of commercial law. As we have seen, this is the situation today in most of the Latin-American countries. But the standard or test based upon the quality or nature of the person performing the acts was never entirely eliminated, nor could it be completely eliminated. For one, there was the problem of determining whether the act was performed or the contract entered into with the intent of making a profit. Here a psychological element enters into the picture in order to make commercial an act which would otherwise have been civil. The fact that a merchant was a party to the transaction lent strong impetus to the claim that the profit motive was present in a particular case. The factors of rising capitalism, the progressive accumulation of wealth, the development of new techniques and means of transportation and communication, the control of powerful sources of energy, the availability of new machinery and equipment, and the mass production of merchandise and goods for national and international markets added weight to the importance of merchants in social and economic life, a change, the repercussions of which were reflected in the commercial codes of the Continent and Latin America. The merchant and his auxiliaries were kept in the codes, as subjects of detailed regulations, and the presence of a merchant in a transaction showed a commercial nature. During the Middle Ages and until the last quarter of the 18th Century, acts and transactions were usually considered commercial if they were undertaken, performed or agreed upon by merchants in the ordinary course of their business. Merchants were the persons so qualified by their formal membership in merchant guilds and trade associations. But after the French Revolution, the disappearance of guilds and *corporaciones* abrogated the purely formal test of membership in a merchant guild. Some other criterion had to be found if the commercial codes were to regulate the activities of merchants. Nevertheless the rise of the objective test, i.e., the per se acts of commerce, never brought about the complete elimination of the subjective test, nor the disappearance of the merchants from the codes as specific subjects of regulation. Therefore, the need for cer-



tain elements which would identify a person as a merchant was strongly felt. The answer which was eventually found for this problem is an excellent instance of circular reasoning in civil law: merchants were the persons who engaged, undertook or performed acts of commerce to earn their livelihood. Thus in many instances an act will be considered commercial because it is performed by a merchant, and a person is a merchant because he performs a commercial act.<sup>75</sup> This difficulty has been solved to some extent by the institution known as the Register of Commerce wherein merchants or persons about to engage in commercial activities are required to register. Today in Latin America both criteria are employed to determine whether or not a person is a merchant: engaging in commercial transactions and a listing in the Register of Commerce.

Practically all the Latin-American codes have followed the French system as to the essential qualifications of a merchant. Usually a merchant is described as one who: (1) performs acts of commerce, (2) in his own name, (3) as a profession.<sup>76</sup> But the approach of the Honduran Code of Commerce is somewhat different. This modern Code,

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75. *Id.* at 64.

76. Argentina, *Cod. Com.* art. 1; Chile, *Cod. Com.* art. 7; Colombia, *Cod. Com.* art. 9. The Costa Rican Code of Commerce, art. 1, required as an essential element registration at the Public Registry of Commerce, but this formality has been eliminated by statute of October 15, 1901. Cuba, *Cod. Com.* art. 1; Dominican Republic, *Cod. Com.* art. 1; Ecuador, *Cod. Com.* art. 2; El Salvador, *Cod. Com.* art. 4; Guatemala, *Cod. Com.* art. 4; Haiti, *Cod. Com.* art. 1; Mexico, *Cod. Com.* art. 3; Nicaragua, *Cod. Com.* art. 6; Panama, *Cod. Com.* art. 28; Peru, *Cod. Com.* art. 1. The Uruguayan Code of Commerce, art. 1, also required registration at the Public Registry of Commerce, but this formality was set aside by statute (*decreto-ley*) No. 888 of July 27, 1867. Venezuela, art. 10. In Brazil art. 4 of the Code of Commerce requires registration as an essential requisite, but Bevilacqua in his annotation to this article holds that it is not a requisite since *non sola matricula, sed mercature facit mercatorem* (not only registration but doing business makes a person a merchant). Achilles Bevilacqua, *Codigo Comercial Brasileiro* 13 (8th ed. 1945). Accord, *C. Ap.* December 15, 1931. This same conclusion is in 2 Carvalho de Mendonca, *Tratado de Direito Commercial Brasileiro*, 24 (2d ed. 1933). The Bolivian Code of Commerce, art. 1, appears to have followed the Spanish Commercial Code of 1829, requiring formal registration as a condition for the recognition of a person as a merchant. Fernando Bedoya, a Bolivian lawyer whom we have consulted on this matter, thinks that the question is doubtful. It could be held that a non-registered person who in Bolivia engages in the performance of acts of commerce as a profession is a merchant, even though deprived of the benefits and privileges the commercial law grants to merchants. On the other hand, by strict adherence to the letter of the Code, a procedure followed very often by Bolivian courts, it could be held that registration is an essential, *sine qua non* requirement without which a person cannot be deemed to be a merchant. No cases on this matter have been found in the reports available: *Jurisprudencia Nacional, Cochabamba, Bolivia*, edited by Guillermo Urquidí and *Jurisprudencia Comentada de la Excma. Corte Suprema de Justicia*, 1946, by Rodolfo Virreira Flor.

under the influence of certain German doctrine, has brought to the foreground the notion of enterprise, stating that an act or transaction is to be considered commercial, not because of any peculiar or intrinsic element, but merely because of its repetition in many cases (*actos o transacciones en masa*). The permanent element in reference to acts which are repeated many times is the commercial organization, the enterprise, which performs them. It is irrelevant whether the enterprise be owned by a person or a commercial association.<sup>77</sup> The Honduran Code of Commerce does not define an enterprise, but the *Exposición de Motivos* makes reference to the prevailing doctrine which visualizes an enterprise as an organization of capital, labor and other intangible elements of economic value, whose purposes are the performance of economic activities.<sup>78</sup> The operation of an enterprise, its conveyance, winding up its affairs and such other analogous activities, are deemed to be commercial acts. As can be seen, in the Code of Commerce of Honduras, the basic concept is the concept of enterprise. Thus, it is only reasonable that the Code defines merchants as those persons who own a commercial enterprise.

It can generally be said that a professional practice makes a person a merchant if the acts performed are acts of commerce. In so far as associations are concerned, this is not the only manner available in which one can qualify as a merchant. There are certain types of associations which are commercial per se, that is to say, the form of the association itself may make it a commercial association, a merchant, provided certain formalities are met. It is here that reference should be made again to a basic civil-law distinction which is not familiar, or, if familiar, not very important in common-law jurisdictions. The Latin-American civil law distinguishes between commercial partnerships and civil partnerships,<sup>79</sup> and subjects them to different legal requirements and consequences. For instance, today there is no doubt that commercial partnerships are endowed with juridical personality, while there is a serious question, at least in several Latin-American countries, as to whether civil

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77. Honduras, Cod. Com. art. 2.

78. Arecha, op. cit. supra note 74, at 202 lists the following essential component elements of an enterprise: (a) capital; (b) organization; (c) labor.

79. A warning with regard to terminology: the civil-law lawyer always speaks of *sociedad*, *sociedade*, *societá*, *société*, and these terms cannot be translated into the English term "society" which conveys quite a different meaning. These foreign terms are words of a very broad meaning, signifying business and non-business associations, incorporated as well as unincorporated. As the reader will immediately realize, there is no equivalent in English to the Spanish *sociedad*, or the Portuguese *sociedade*, or the Italian *società*, or the French *société*. The only convenient way to solve the difficulty is to resort to the word "partnership" advising the reader that this word is given a broader meaning than the one recognized by English legal terminology, thus including partnerships proper and also corporations.

partnerships (*sociedad civil*) have or have not a juridical personality.<sup>80</sup>

80. In Argentina and Paraguay the prevailing legal opinion recognizes the juristic personality of commercial partnerships or rather that which amounts to the same thing, namely a commercial partnership acts as if it were a juristic person, on the basis of a legal construction made by application of arts. 291, 300, 406, 413, 414, 417, 443 of the Code of Commerce (see Malagarriga, *op. cit. supra* note 55, at 180, and the doctrine cited therein). With regard to civil partnerships the situation is doubtful although there appears to be a certain amount of agreement that a civil partnership is entitled to own property and to perform legal acts in its own name. (See 1 Salvat, *Tratado de Derecho Civil Argentino* 605-09 (8th ed. 1947)). In Bolivia there are good grounds to arrive at the same conclusion, at least with regard to commercial partnerships, on the basis of arts. 231, 233, 237, 238, 239, 241, 249, 297, 298 of the Code of Commerce, art. 1171 of the Decreto Supremo of March 8, 1860, enacted as statute on November 13, 1886, and art. 3 of Decreto Supremo of September 1877. (See Carlos Walter Urquidi, *Régimen Legal Boliviano en Diversas Materias* 120 (1947)). With regard to civil and commercial partnerships, art. 16, livro 1, titulo 1, of the Brazilian Civil Code declares that they are juristic persons. See 5 Clovis Bevilacqua, *Código Civil dos Estados Unidos do Brasil Comentado* 116 (8th ed. 1952), holding that a civil partnership becomes a juristic person as soon as it is duly registered. Some conclusion with reference to commercial partnerships is arrived at by Martins Ferreira, *Instituições de Direito Comercial* 225 (1951). Article 2053 of the Civil Code of Chile and art. 2079 of the Civil Code of Colombia declare that a partnership is a juristic person. This applies not only to civil partnerships but also to commercial partnerships. 2 Olavarria Avila, *op. cit. supra* note 47, at 17; Valencia Zea, *Curso de Derecho Civil Colombiano*, Bogota, 1949, t. VII and VIII, p. 86; and Casacion, Colombia, March 3, 1938, XLVI, 128, and March 21, 1922, XXIX, 119. In Costa Rica, doubt which existed under Titulo VII of the Code appears to have been eliminated by art. 2 of statute N. 218 of August 8, 1939 and there are good grounds for holding that a civil partnership is a juristic person. The statute of November 24, 1909 on commercial partnership considers them to be judicial persons (art. 2). In Cuba, commercial and civil partnerships have juristic personality (Cod. Com. art. 116, Cod. Civ. arts. 35, 1669). See also 3 Camus, *Código Civil Explicado*, 423 (1945). The same concept applies in Ecuador, Cod. Civ. art. 2076, Cod. Com. art. 262; El Salvador, Cod. Civ. arts. 619, 2010; Guatemala, Cod. Civ. art. 15, Cod. Com. art. 288; Honduras, Cod. Civ. art. 1795, Cod. Com. art. 15; Nicaragua, Cod. Civ. art. 3188, Cod. Com. art. 118; Panama, Cod. Civ. art. 1360, Cod. Com. art. 251; Peru, Cod. Civ. art. 1689, Cod. Com. art. 124. While the question is doubtful in Haiti, it will probably be held that the legal status of partnerships is the same, because of the influence which French doctrine and French case law have in Haiti. Abel Nicolas Leger in his annotated edition of the Civil Code of Haiti approvingly quotes decisions of the French Court of Cassation which have recognized the legal personality of partnerships (see Leger, *Code Civil d'Haiti* Annote 694 (1931); Cassation February 23, 1891, D. P. 91. 1. 337; March 2, 1892, D. P. 93. 1. 169; January 2, 1894, D. P. 94. 1. 81). In Mexico the statute on commercial partnerships, *Ley General de Sociedades Mercantiles*, art. 21, declares a commercial partnership to be a juristic person. With regard to civil partnerships, the Civil Code is silent, but the opinion has been expressed that they also have legal personality (Rojinas Villegas, *Derecho Civil: Contratos* 460 (1944)). In Uruguay, by statute No. 10793 of September 25, 1946, art. 19, commercial partnerships are declared to be juristic persons. The question is doubtful with reference to civil partnerships and 2 Mezzera-Alvarez, *op. cit. supra* note 51, at 22, is of the opinion that they are not juristic persons. In Venezuela, commercial as well as civil partnerships are juristic persons (Cod. Com. art. 201 and Cod. Civ. art. 1651).

The distinction between a commercial and a civil partnership is usually made on either of two grounds: the purposes of the partnership or its form. A partnership, either civil or commercial, usually requires two or more persons who contribute either capital or personal services for the achievement of a certain common objective, sharing profits and losses.<sup>81</sup> In both types of partnerships the motive of profit is present, so this motive can not be the grounds for the distinction.<sup>82</sup> Normally, a partnership is considered commercial if its purposes are the performance of acts of commerce, while a partnership is considered civil if its profits

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81. Argentina, Cod. Civ. art. 1648, Cod. Com. art. 282; Bolivia, Cod. Civ. art. 1260; Brazil, Cod. Civ. art. 1363, Cod. Com. arts. 287, 288; Chile, Cod. Civ. art. 2033; Colombia, Cod. Civ. art. 2079; Costa Rica, Cod. Civ. arts. 1196, 1203, 1205; Cuba, Cod. Civ. art. 1665, Cod. Com. art. 116; Ecuador, Cod. Civ. art. 2076, Cod. Com. art. 261; El Salvador, Cod. Civ. art. 2010; Guatemala, Cod. Civ. art. 1776; Haiti, Cod. Civ. art. 1601; Honduras, Cod. Civ. art. 1782; Mexico, Cod. Civ. art. 2688; Nicaragua, Cod. Civ. art. 3175; Panama, Cod. Civ. art. 1356; Peru, Cod. Civ. art. 1686, Cod. Com. art. 124; Uruguay, Cod. Civ. art. 1875, Cod. Com. art. 387; Venezuela, Cod. Civ. art. 1649. Some Latin-American as well as continental writers also mention as a requisite a psychological element, the *affectio societatis*.

There is no agreement as to what is meant by this expression and the opinion has been advanced that it is not an independent requirement, but simply consent to organize a partnership. Those who deny the validity of this requisite usually argue that it is mere tautology, i.e., that in order to create a partnership, the partners ought to intend the creation of a partnership. (See 1 Malagarriga, *op. cit. supra* note 55, at 171, and quotations therein of 1 J. Garrigues, *Tratado de Derecho Mercantil*, t. 1, p. 403, and 1 Garo *Sociedades Comerciales* t. 1, p. 105). This position has been accepted in a well known Argentinian case, *La Ley* 58-541. On the other hand, it has been held that *affectio societatis* is a necessary element, meaning the intent of creating a partnership (3 Castillo, *Curso de Derecho Comercial* 31 (1951); 7 Valencia Zea, *op. cit. supra* note 80, at 83) or the intent of undertaking a common endeavor (*el fin de realizar una empresa comun*, 1 Rojina Villegas, *op. cit. supra* note 80, at 463). The prevailing opinion appears to hold that *affectio societatis* is necessary, although it finally boils down to an intangible element which characterizes a common endeavor where all the participants are in the position of enjoying reciprocal rights, as collaborators, even though there may be some differences as to the concrete extent of each partner's rights (Malagarriga, *op. cit. supra* note 55, t. 1, p. 173). See also 5c. Bevilacqua, *Codigo Civil dos Estados Unidos do Brasil Comentado*, 114 (8th ed. 1952); 6 Salvat, *Tratado de Derecho Civil Argentino* 5 (1946); Loreto Arismendi, *Tratado de las Sociedades Civiles y Mercantiles* 79 (2d ed. 1950).

82. There is, of course, a type of association where the profit motive is not present, e.g., the case of institutions or clubs or entities organized for purposes other than that of making profit, such as cultural, charitable, or athletic entities. These are generally called *asociaciones* or *asociaciones civiles* and are subject to specific regulations. In most of the cases, they are not considered juristic persons unless the executive power has granted them juridical personality, or they have been duly registered. See Paez, *El Derecho de las Asociaciones* (1940). The *asociaciones* are civil in their nature. Caveat as to terminology: the expression partnership is reserved in this Article for a civil or commercial entity organized with the intent of making and distributing profits among its members. The word association will be used as the equivalent of *asociacion*.

are to be made in the performance of civil acts, for example, in most of the countries, by undertaking business in the real estate field.<sup>83</sup> There may be some difficulties when there are doubts as to the civil or commercial nature of the acts. The decisive element then becomes the nature of the parties, i.e., whether or not they are merchants. This question is usually disposed of by the application of a formal test, that is to say, that certain types of partnerships will be considered commercial by their very form and by the fact of the registration of the partnership agreement in the Public Register of Commerce. The Latin-American codes usually apply to three types of partnerships: the collective partnership,<sup>84</sup> the limited partnership,<sup>85</sup> and the corporation (*sociedad anóni-*

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83. Argentina, Cod. Com. art. 282; 3 Carvalho de Mendoca, *Tratado di Direito Commercial Brasileiro* 51 (1945), quotes arts. 311, 315, 317, 325 of the Code of Commerce in support of his thesis that the distinguishing feature is the purpose to be achieved by the partnership: a commercial purpose (art. 31), or to do business (art. 315), or to undertake commercial transactions (arts. 319, 325). Costa Rica, statute no. 6 of November 21, 1909, art. 1; Ecuador, Cod. Com. art. 261; Nicaragua, Cod. Civ. art. 3191, but if a partnership simultaneously performs acts of commerce and civil acts, it will be considered a civil partnership, Cod. Civ. art. 3194. See also Solorzano, *Glosas al Código de Comercio de Nicaragua* 85 (1950); Panama, Cod. Com. art. 249; Chile, Cod. Civ. art. 2059; (2 Olavarria, *op. cit. supra* note 47, at 19); Colombia, Cod. Civ. art. 285; 7-8 Valencia Zea, *Curso de Derecho Civil Colombiano* 87 (1949); El Salvador, Cod. Civ. art. 2016; Venezuela, Cod. Com. art. 200. 2 Mezzera Alvarez, *op. cit. supra* note 51, at 22, holds with regard to Uruguayan law, that the nature of the activities of the partnerships, i.e., whether they perform acts of commerce or civil acts, is the test to be applied in determining if it is a commercial or civil partnership, unless it is a commercial partnership by reason of its form.

84. Argentina, Cod. Com. art. 301; Bolivia, Cod. Com. art. 226; Brazil, Cod. Com. art. 315; Chile, Cod. Com. art. 349; Colombia, Cod. Com. arts. 463, 464; Costa Rica, statute of November 24, 1909, art. 40; Cuba, Cod. Com. art. 125; Dominican Republic, Cod. Com. art. 20; Ecuador, Cod. Com. art. 267; El Salvador, Cod. Com. art. 167; Guatemala, Cod. Com. art. 372; Haiti, Cod. Com. art. 21; Honduras, Cod. Com. art. 38; Mexico, *Ley General de Sociedades Mercantiles* art. 25; Nicaragua, Cod. Com. art. 133; Panama, Cod. Com. art. 297; Paraguay, Cod. Com. art. 301; Peru, Cod. Com. art. 133; Uruguay, Cod. Com. art. 453; Venezuela, Cod. Com. art. 227. The collective partnership offers certain similarities with the American general partnership (unlimited liability of the partners) but it differs widely in other aspects: the collective partnership requires the fulfillment of certain formalities before it can be considered a valid collective partnership, the most important of which is registration of the written agreement at the Public Register of Commerce; and a collective partnership is considered a juristic person with different rights and duties from those of the partners.

85. Argentina, Cod. Com. art. 372; Bolivia, Cod. Com. art. 227; Brazil, Cod. Com. art. 311; Chile, Cod. Com. art. 470; Colombia, Cod. Com. arts. 463, 596; Costa Rica, statute of November 24, 1909, arts. 58, 128; Cuba, Cod. Com. art. 145; Dominican Republic, Cod. Com. art. 23; Ecuador, Cod. Com. art. 275; El Salvador, Cod. Com. art. 302; Guatemala, Cod. Com. art. 419; Haiti, Cod. Com. art. 24; Honduras, Cod. Com. arts. 58, 271; Mexico, *Ley General de Sociedades Mercantiles*, arts. 51, 207; Nicaragua, Cod.

*ma o compañía anónima*).<sup>86</sup> Some countries have other types of partnerships: the limited liability partnership (*sociedad de responsabilidad limitada*),<sup>87</sup> and the cooperative partnership.<sup>88</sup> There is a tendency to

Com. arts. 192, 287; Panama, Cod. Com. arts. 330, 347; Paraguay, Cod. Com. art. 372; Peru, Cod. Com. art. 153; Uruguay, Cod. Com. art. 425; Venezuela, Cod. Com. art. 235. This type of partnership is called *sociedad en comandita*, and its basic structure is similar to the American limited partnership: certain partners are liable only up to the amount of the capital they have contributed. They are called *comanditarios* (limited or special partners), and in most of the countries it is a necessary condition of their limited liability that they have no word in managing the partnership. Management is vested in the unlimited partners (*comanditores o gestores*).

86. Argentina, Cod. Com. art. 313; Bolivia, Cod. Com. art. 228; Brazil, decreto-ley No. 2627 of 1940; Chile, Cod. Com. art. 424; Colombia, arts. 463-550; Costa Rica, statute of November 24, 1909; Cuba, Cod. Com. art. 151; Dominican Republic, Cod. Com. art. 31; Ecuador, Cod. Com. art. 285; El Salvador, Cod. Com. art. 231; Guatemala, Cod. Com. art. 384; Haiti, Cod. Com. art. 30; Honduras, Cod. Com. art. 90; Mexico, Ley General de Sociedades Mercantiles, art. 87; Nicaragua, Cod. Com. art. 201; Panama, statute no. 32 of 1927, statute no. 9 of 1946; Paraguay, Cod. Com. art. 313; Peru, Cod. Com. art. 159; Uruguay, Cod. Com. art. 403; Venezuela, Cod. Com. art. 242. The *sociedad anónima* or *compañía anónima* is, in its basic structure, similar to the American corporation although there are certain important differences as to the theory of corporate personality, duties of management, remedies and capital structure.

87. Argentina, statute No. 11645; Bolivia, statute of March 12, 1941; Brazil, statute No. 3708; Colombia, statute No. 124 of 1937; Cuba, statute of April 17, 1929; Guatemala, Cod. Com. art. 445; Honduras, Cod. Com. art. 66; Mexico, Ley General de Sociedades Mercantiles, art. 58; Uruguay, decreto-ley No. 8992 of April 26, 1933; Venezuela, Cod. Com. art. 312. In Nicaragua by statutory amendment of June 13, 1894 to the Commercial Code, the partner who manages a limited partnership (*sociedad en comandita*) is permitted to limit his liability to the amount of the capital he contributed. In fact, this appears to permit a limited partnership (*sociedad en comandita*) to become a limited liability partnership (*sociedad de responsabilidad limitada*) but there is a provision in the Code of Commerce which raises doubts as to this limitation of liability. Article 137, second paragraph, reads: "But the partners may limit their liability by agreement provided that they add to the name of the partnership the word 'limited.'" ("Pero pueden por pacto los socios limitar su responsabilidad, con tal que se agregue a la razón social la palabra 'limitada'"). This paragraph may be construed to mean that the partners may agree that their liabilities will be limited as to third parties or that the limitation of liability will be valid only among themselves. Solorzano, *op. cit. supra* note 62, at 104, quotes approvingly French and Spanish doctrine which limit the scope and meaning of the article to the second situation. The limited liability partnership (*sociedad de responsabilidad limitada*) is almost unknown in the United States. The main features of the limited liability partnership are these: juristic personality, limited liability of the partners, and concentration of management. There are, on the other hand, certain limitations as to the transferability of shares to other persons. This form of business partnership has many of the advantages of the corporation, while, at the same time, it avoids the complex formalities which most of the Latin-American countries have imposed upon the creation and operation of corporations. See Special Report on the Foreign Corporation Laws of Ten Latin-American Republics, Proceedings of the Ninth Conference of the Inter-American Bar Conference 163-226 (1956), and the very useful summaries on this matter pre-

consider all these partnerships as commercial because of their form of organization, but this is not always conclusive. A problem arises when a partnership is partially or totally engaged in the performance of acts of a civil nature. The question is difficult and both classifications have been upheld, some courts holding that they are civil partnerships and others that they are commercial partnerships.<sup>89</sup> Both individual mer-

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pared by the Division of Law and Treaties of the Department of International Law, Pan American Union, Washington, D.C. This explains why the corporate form of doing business has not been sufficiently developed in Latin America. In fact, the corporate form is used in Latin America only when a very substantial amount of capital is needed.

<sup>88.</sup> Argentina, Cod. Com. art. 392; Brazil, decreto No. 22239 of December 19, 1932; Ecuador, Ley de Cooperativas of November 30, 1937; El Salvador, Cod. Com. art. 313; Guatemala, decreto No. 643; Honduras, Cod. Com. art. 278; Mexico, Ley General de Sociedades Cooperativas of February 15, 1938; Nicaragua, Cod. Com. art. 300; Panama, Cod. Com. art. 474; Uruguay, statute No. 10761; Venezuela, Ley Especial de Cooperativas of August 15, 1942. These cooperatives are an outgrowth of the movement inspired by the pioneers of Rochdale.

<sup>89.</sup> 1 Rojina Villegas, *op. cit. supra* note 80, at 462, speaking of Mexican partnership, comments on art. 2695 of the Civil Code for the Federal District of Mexico which provides that partnerships of a civil nature organized under the form of a commercial partnership are subject to the regulation of the Code of Commerce. Commercial partnerships are collective partnerships, limited partnerships, limited liability partnerships, and corporations. Therefore, concludes Rojina Villegas, if a partnership has been organized to undertake civil transactions but adopts a commercial form, it will be considered a commercial partnership. The form will prevail over the substance. The same question was discussed in Primer Congreso Argentino de Derecho Comercial, Actas, t. 1, pp. 173-78, t. 2, p. 27 ff., and t. 3, p. 420 ff., with regard to corporations engaged in civil transactions. The opinion of the jurists present were sharply divided (see 1 Malagarriga *op. cit. supra* note 55, t. 1, at 166-69). Article 116 of the Cuban Code of Commerce states that any partnership organized in accordance with the provisions of the Code is commercial whatever its class might be ("... cualquiera que fuese su clase"). This provision gave rise to a controversy which is still raging. A group of jurists argue that, notwithstanding art. 116 of the Code of Commerce, the form of the partnership itself is not sufficient to make a partnership a commercial one, and to this effect they quote Cod. Com. arts. 123, 124, 177. See Lopez de Goicoechea, *Las Sociedades Mercantiles en el Derecho Cubano* 78 (1953); Gutierrez de Celis, Prologue to the aforementioned book, at 10; Martinez Escobar, *Sociedades Civiles y Mercantiles* 5 (1949). Other Cuban lawyers think otherwise, emphasizing art. 116 of the Code of Commerce. In their opinion, any partnership, whatever its activities, is commercial if the form adopted has been regulated by the Code of Commerce. See Cueto, *Las Sociedades Civiles con Formas Mercantiles* (1891), quoted by Aleman, *Las Sociedades Mercantiles en el Derecho Vigente* 36-39 (1919); Betancourt, *Codigo Civil* 73 (3d ed. 1917). 2 Mezzera Alvarez, *op. cit. supra* note 51, at 22, is of the opinion that in Uruguay, corporations, limited liability partnerships, and cooperatives are always commercial because of their form, and the nature of their activities is immaterial. For Pineda Leon, *op. cit. supra* note 15, at 322, the question is difficult under Venezuelan legislation, but he is inclined to think that the predominant nature of the activities of the partnership will decide the issue. In Haiti, Louis Borno is of the opinion that a partnership is

chants and commercial partnerships are required to register in the Public Register of Commerce.<sup>90</sup> This is a legal duty; violations are punished by law. Merchants who fail to register are deprived of the privileges and the benefits granted to them by the code of commerce (especially with reference to types of evidence permitted, the statute of limitations, and creditors' agreements). In the case of partnerships, the most common sanction for nonregistry is that all of the partners will incur unlimited liability,<sup>91</sup> or at least those partners who were guilty of failing to register the partnership or who entered into transactions with third parties

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commercial or civil, not because of its form, but exclusively because of the nature of its activities. Borno, Code de Commerce d'Haiti Annote, Comment to art. 19 (1910).

90. Most Latin-American countries maintain a Public Register of Commerce where individual merchants and commercial partnerships are required by law to register, furnishing data as to their business, organization, authority, purposes, etc. This is the modern expression of the old tradition which made of merchants a class of persons enjoying certain privileges because of their membership in merchant guilds and corporaciones. See Argentina, Cod. Com. art. 25; Bolivia, Cod. Com. art. 8; Brazil, Cod. Com. art. 4; Chile, Cod. Com. art. 20; Colombia, Leyes 28 de 1931, 38 de 1932, Decreto 1750 de 1942; Costa Rica, Cod. Com. art. 21, and statute No. 13 of June 21, 1901; Cuba, Cod. Com. art. 16; Ecuador, Cod. Com. art. 21; El Salvador, Cod. Com. art. 11; Guatemala, Cod. Com. art. 53 (only for partnerships); Honduras, Cod. Com. art. 384; Mexico, Cod. Com. art. 18; Nicaragua, Cod. Com. art. 13; Panama, Cod. Com. arts. 34, 55; Paraguay, Cod. Com. art. 25; Peru, Cod. Com. art. 16; Uruguay, Cod. Com. art. 32; Venezuela, Cod. Com. art. 17. Haiti and the Dominican Republic are the only countries where such a register has not been organized, but certain publicity is still required with regard to several acts, to protect the rights of third parties. (See Haiti, Cod. Com. arts. 3, 35 bis, 38, 44, etc.). In Mexico (Cod. Com. art. 19), Cuba (Cod. Com. art. 16), and Peru (Cod. Com. art. 17) the registration, though mandatory for partnerships, is optional for the individual merchant, although the availability of certain advantages is limited to those who do register (this is, then, indirect compulsion). In Chile and Venezuela, individual merchants are only required to file certain types of documents.

91. Argentina, Cod. Com. arts. 288, 294, 296, and 1 Fernandez, *op. cit. supra* note 33, 409; Brazil, Cod. Com. art. 301, and annotation thereto by Bevilacqua, *op. cit. supra* note 81, at 120; Paraguay, Cod. Com. arts. 288, 294, 296. In El Salvador, Cod. Com. art. 171, and in Guatemala, Cod. Com. art. 305, the Codes are ambiguous but there appear to be sufficient grounds to hold that only the partners who entered into a transaction on behalf of the partnership which has not been duly registered are the ones who are unlimitedly liable; in Panama, arts. 251 and 254 of the Code of Commerce are apparently contradictory. Under the first, all the partners are unlimitedly liable, while, by virtue of the second, only those partners who contracted with third parties on behalf of the non-registered partnership are liable. A recent judicial decision, of which only the syllabus has been available to this author, declared that a third party who sued one partner unlimitedly liable is not prevented thereby from suing another partner who is also unlimitedly liable, if the first judgment could not be executed (R.J. No. 72 of 1920, at 736). In Uruguay the question has not been settled by the Code, but 2 Mazzera Alvarez, *op. cit. supra* note 51, at 113, on the basis of arts. 401 and 402 of the Code of Commerce, is of the opinion that the liability of all the partners is unlimited unless the third party knows that the partnership entailed limited liability for all or some of the partners.



regardless of the fact that the partnership had not been duly registered.<sup>92</sup>

A further question arises, namely, will the mere fact of registration be sufficient to consider the registered person or partnership a merchant? With regard to persons, registration creates a rebuttable presumption that they are merchants. To qualify as a merchant it will be necessary to prove that the person in question engaged in the performance of acts of commerce in his own name, as a profession. This is really the decisive test.<sup>93</sup> In the case of partnerships, as indicated above, a distinction is made: certain partnerships will be considered commercial whatever their activities may be,<sup>94</sup> while others will have to prove that their activities were commercial in nature.

The codes have kept the subjective test in order to determine whether or not an act is commercial, even though the prevailing test today, under

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92. Ecuador, Cod. Com. art. 344, with regard to those partners who made transactions with third parties; Cuba, Cod. Com. art. 119, *idem*; Honduras, Cod. Com. art. 17, *idem*; Mexico, Ley General de Sociedades Mercantiles art. 2; Peru, Cod. Com. art. 128. There is a difficult problem of statutory construction on this matter in the Nicaraguan Code of Commerce. Article 19 provides for sanctions to be incurred by the merchants who do not register but art. 19 has no proviso with reference to the unlimited liability of the partners, dealing only with the loss of the partnership's juridical personality. Article 126 states that the partners who have contracted with third parties will incur unlimited liability vis-a-vis these third parties if the formalities required by law have not been met (for instance, if they have failed to reduce the partnership agreement to a notarial instrument, *escritura pública*). Solorzano, in his *Glosas* to art. 126, appears to construe this article in a restrictive manner. Therefore, it might be held that if the agreement has been reduced to *escritura pública* but not registered, the legal consequence would be loss of juridical personality, but not unlimited liability. The Venezuelan Code of Commerce, art. 219, states that if the formal written agreement is not registered, the managers, the promoters and any other person who acted on behalf of the partnership will be unlimitedly liable. In Costa Rica, by virtue of art. 8, statute No. 6 of November 24, 1909, the promoters (*socios fundadores*) become unlimitedly liable.

93. Thus, for instance, certain codes provide that if a person engages in the performance of acts of commerce in a haphazard way, he will not be considered as a merchant, although the acts of commerce performed are subject to regulations of the code of commerce. See, e.g., Argentina, Cod. Com. art. 6; Chile, Cod. Com. art. 8; Costa Rica, Cod. Com. art. 2; El Salvador, Cod. Com. art. 5; Guatemala, Cod. Com. art. 5; Panama, Cod. Com. art. 30; Paraguay, Cod. Com. art. 6; Uruguay, Cod. Com. art. 6. The Honduran Code obviously requires habituality in the performance of acts of commerce, for that is the basis of its definition of commerce as such. The Mexican Code appears to arrive at the same conclusion, in spite of what might seem to be a provision to the contrary in art. 4 of the Code of Commerce. See 1 Rodriguez, *op. cit. supra* note 51, at 37-38.

94. This generally applies to corporations and limited liability partnerships (see Argentina, Cod. Com. art. 8; El Salvador, Cod. Com. art. 3; Honduras, Cod. Com. art. 13; Paraguay, Cod. Com. art. 8; Uruguay, Cod. Com. art. 7; Mexico, Ley General de Sociedades Mercantiles, art. 1).

the inspiration of the French Code of Commerce, is the objective one. The subjective test is applied by following different techniques. The first, and perhaps the most important, is to consider as commercial the activities of certain types of enterprises without any further qualifications.<sup>95</sup> Thus, the Codes of Commerce of Argentina, Uruguay and Paraguay declare as commercial the transactions and negotiations, within their specific scope of business, of factories, storehouses, carriers, insurance companies, and enterprises specializing in commercial agencies and commissions.<sup>96</sup> The Chilean, Colombian, Ecuadorian, Salvadorian and Venezuelan Codes of Commerce do the same with regard to factories, manufacturing concerns, stores, groceries, coffee shops, carriers, storehouses, enterprises devoted to commercial agency and commissions, insurance companies, and theatrical enterprises.<sup>97</sup> The Civil Code of Mexico lists the following: wholesale stores, building enterprises, factories, manufacturing concerns, carriers, bookstores, printing companies, enterprises devoted to commercial agency and commissions, theatrical enterprises.<sup>98</sup> The second procedure whereby the subjective test becomes material is to declare that the activities of merchants in the carrying out of their businesses are subject to the regulations of the code of commerce.<sup>99</sup> In other words if a merchant is a party to a certain transaction and a question arises as to the formalities required in the making of the transaction, the type of evidence available, the rules of construction applicable, or the significance of customary usage, it will be wise to resort to the code of commerce for an answer in those countries where

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95. The list which follows is not all-inclusive; the text is limited to the most important examples.

96. Argentina, Cod. Com. art. 8; Paraguay, Cod. Com. art. 8; Uruguay, Cod. Com. art. 7.

97. Chile, Cod. Com. art. 3; Colombia, Cod. Com. art. 20; El Salvador, Cod. Com. art. 3; Venezuela, Cod. Com. art. 2; Ecuador, Cod. Com. art. 3. Ecuador does not include theatrical enterprises.

98. Mexico, Cod. Com. art. 75. Article 632 of the Code of Commerce of the Dominican Republic lists the following enterprises: manufacturing, commission, transportation, agencies, theatrical activities, etc.

99. Chile, Cod. Com. art. 1; Ecuador, Cod. Com. art. 1; El Salvador, Cod. Com. art. 1; Honduras, Cod. Com. art. 1; Venezuela, Cod. Com. art. 1. This does not of course mean that all the activities of a merchant will be considered commercial, nor that every business transaction will be considered commercial. For instance, in most of the Latin-American countries the purchase of a building to install a shop will be considered a civil transaction. But it does mean that where transactions and business on movables relate to the main activity of the merchant (provided that this main activity is objectively commercial), they will usually be considered as commercial. This shows the typical combination of the objective and subjective tests in Latin America. Article 632 of the Code of Commerce of the Dominican Republic considers as commercial the transactions entered into between merchants.

the commercial code subjects the merchant to its regulations. And even in countries whose commercial codes are silent on activities of merchants, there are strong indications that a lawyer's course of action should be the same, taking into account the control of the activities of merchants as a profession, by all the codes.<sup>100</sup> The third procedure is to declare as commercial the acts performed by merchants within the scope of, or as incidental to, the carrying on of their businesses;<sup>101</sup> and the fourth, and

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100. In this connection the reader should recall what has been said above about the duty to register, and the duty to carry account books adhering strictly to the provisions of the codes of commerce, and about the value of such books as evidence.

101. Honduras, Cod. Com. art. 3. See also, *Exposición de Motivos* at 6; Venezuela, Cod. Com. art. 3, excluding the cases in which it is apparent from the act itself that it is not commercial or that it is essentially civil in its nature. This provision, which the reader may realize is not clear, has been construed by the Superior Court of the Federal District, Caracas, by decision of August 14, 1936, in the following terms: "All the acts and obligations, deriving either from contracts or extracontractual sources, performed by a merchant or binding a merchant are commercial, unless the contrary conclusion flows from the act itself, or if the contracts and obligations are essentially civil by their very nature." This means that all the juridical activities of a merchant are presumed by the law to be commercial, exception being made as to acts or obligations essentially civil. Thus, a loan made to a merchant will not be commercial if from the terms of the contract it is apparent that the money is to be invested in an activity which is not commercial. The adoption or recognition of children by a merchant, or the division of an inheritance are not commercial, even if performed by a merchant, because of the essentially civil nature of such acts. The duty of a merchant of furnishing support for his descendants, or his obligation of accounting and of paying the balance due if he has been the guardian of a minor, are essentially civil and alien to commercial law. What criterion should be followed with illicit acts (*hechos ilícitos*)? A merchant, like any other person, may commit delicts and quasi-delicts. Case law and doctrine agree that if a merchant commits an illicit act, the act itself should be considered commercial provided it has certain relationship to his commerce; this doctrinal principle has been accepted by the Code of Commerce in art. 1074, § 9 (it corresponds to the present Cod. Com. art. 1090, § 9). In other words, if a merchant commits an illicit act, it is indispensable to find out whether the merchant was acting within the scope of his trade or profession, or, on the other hand, as a common individual, in order to determine if the action to recover damages is commercial or civil. A few instances will clarify the matter: if a merchant is guilty of unfair competition or if he forges a signature, or if the seller of foods altered them causing damages to the health of his customers, or if a banker issues a false draft, it is beyond doubt that these cases and others of a similar nature can be tried before the commercial courts (*jurisdicción comercial*) because of the relationships of such actions with the commercial activities of the wrongdoers. On the other hand, the acts of a merchant who is guilty of homicide, or of seduction, or of libel or slander, assuming that these acts are not related in any manner whatsoever with the commercial or professional activities of the merchant, and that they are executed while he was acting as a common individual, are civil in character and subject to the jurisdiction of civil courts (*jurisdicción civil*). A similar conclusion, with regard to illegal acts has been reached in France and Argentina, although there is a split of opinion in those countries. (See 2 Siburú, *op. cit. supra* note 24, at 55-59, and 1 Fernández, *op. cit. supra* note 33, at 46, for an abridged state-

final subjective test is to presume that acts performed by merchants are commercial, unless sufficient contrary evidence is furnished.<sup>102</sup>

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ment of case law and doctrine in both countries.) On this matter, see the article by Bolaffio, *Degli atti di commercio accessori* 1 R.D. Co. 1 (1909). With regard to Brazilian law, in matters of quasi-contracts, delicts and quasi-delicts, their commercial nature is recognized when they are ancillary or incident to the exercise of the mercantile profession, see 1 Martins Ferreira, *supra* note 55, at 102.

102. Argentina, Cod. Com. art. 5; Colombia, Cod. Com. art. 21; Mexico, Cod. Com. art. 15, § XX; Paraguay, Cod. Com. art. 5; Uruguay, Cod. Com. art. 5.