The purpose of commercial law

In medieval times the community of merchants was a very small but powerful community. As a matter of fact a lot of principles of modern commercial law are based on the lex mercatoria ruled and developed by merchants in special courts with special judges. These judges, drawn by mercantile community, decided cases quickly and in accordance with the customs and the practises of trade. This is one of the reasons why a lot of principles of lex mercatoria differed from general common law principles. However it was thanks to Lords Chief Justices Holt and Mansfield that the harmonisation of the principles of common law with the needs of the merchants’ community has been well realised. Thanks to their great work the marriage between lawyers and traders and, consequently, between common law and commercial law survived until these days.

Recently Lord Irvine of Lairg, talking about the historical development of commercial law with a particular attention on its predictability assumed that the commercial law must be an “engine for trade”[1]. In this wonderful piece of work, Lord Irvine, talking specifically about the role of Lord Mansfield assumes: “Commercial law was transformed from propositions of fact in to a rational corpus of law, capable of consultation by businessmen, lawyers and judges alike”[2].

This, in an historical point of view, is very important to understand why in modern times the first purpose of the commercial law is to accomplish the needs of the commercial community and, in consequence of this, to facilitate commercial activity. Actually, as we have noted, commercial law was created and developed by merchants to facilitate commerce between the members of this “aristocracy”.

According to Lord Irvine predictability plays an important role in this matter: “The very first need of the business community is legal predictability. An unpredictable legal climate is unacceptable to business, forcing traders into necessary legal advice and insurance cover to secure against the risk of their deals being defeated”[3].

This is one of the reasons why merchants’ customs became so important. In recent times, Lord Lloyd assumed that “The English common law is not confined to decided cases. In the field of commercial law, for example, the custom of merchants has always been fruitful source of law. It is true that a custom can be challenged in a court of law. But it does not need a court of law to establish a custom. Custom is binding on the parties irrespective of any judicial decision”[4]. As a matter of fact sometimes in modern commercial law trade usages can become a real and very important part of common law offering the perfect balance between predictability and flexibility. In point of fact law must be ready and prompt to accept the innovations of the commercial community. Atkin J, talking about contracts said: “The object of the Courts in construing commercial contracts is to try to give effect to the intention of both the contracting parties and not to impose upon business men terms which they never contemplated. If old forms are now used to express different meanings from those read into them in earlier days the Courts should be prompt to recognize the altered use if they are satisfied that there is in fact a change”[5]. The law of contracts in particular offers a vast proof of what we have been talking about: the rule of “freedom of contract” and the respect for party autonomy is a powerful instrument for the facilitation of trades. As Lord Wright said: “The law, in determining what
is reasonable, is not concerned with ideal truth, but with something much less ambitious, though more practical”[6]. Again pragmatism plays an important role in the field of commercial law and pragmatism always means facilitation. According to Lord Irvine: “The law of contract gives traders the flexibility to establish business arrangements tailored to their own requirements... English law achieves this objective in two ways: by creating legal rules based on realistic trade customs, and by recognising that traders often wish to incorporate standard terms and practises into their agreements”[7].

Commercial law must be particularly flexible and some rule can be manipulated in order to facilitate trades. Pragmatism is the key word for the interpretation of the decisions of commercial judges. But it’s not just about the courts: a legislative reform of commercial law is usually preceded by a representation of the commercial community. Again, the needs of the community come first and the primary scope of the commercial law is adapting the rules to serve these requirements.

The law of agency is one of the most useful devices in order to realize the requirements of the commercial community: this entire field of commercial law (but we know that agency doesn’t refer solely to this context) has been created with the scope of helping merchants in theirs day by day activities and it’s been created to give a legal control to such a custom. This means, in other words, that as often happens in commercial law, the agents were born before the law of agency. By the way an agent is a person who has the power to act on the behalf of another person (the principal) and the concept of authority, is a very flexible model in order to assist traders in their operations. The implied actual authority gives the possibility to create a relationship between the agent and the principle “even if they don’t recognise it themselves and even if they have professed to disclaim it”[8]. Can you imagine something more flexible?

The doctrine of the undisclosed agency, for example, has no equivalent in civil law jurisdictions and, even in England, has been illustrated in contrast with the crucial principles of the law of contracts[9]. Nevertheless Lord Lindley, in Keyghley Maxsted & Co v Durant, assumed that: “Middlemen, through whom contract are made, are common and useful in business transactions... If he exists, it is to say the least, extremely convenient that he should be able to sue and be sued as a principal, and he is only allowed to do so upon terms which exclude injustice”[10]. Undisclosed agency is not only inconsistent with common law principles in general but, as we said, it is conflicting with the doctrine of the law of contract as well. Although middlemen are so helpful in commercial transactions that a modification of ordinary rules has been found indispensable. As a matter of fact the concept of agency in civil law countries (such as Italy and France) is very different and they don’t have anything similar because the commercial law of these countries is unfortunately not so elastic. This is why “English law... is highly regarded in the international commercial community”[11].

But one of the greatest examples about how the law of merchants changed commercial law comes from the concept of negotiability and, as a result of this, from the doctrine of the bill of exchange. “Although assignment provides the legal basis... its limitations would severely restrict its utility as a means of transferring intangible property in a commercial context and would have obstructed the development of modern commerce. Fortunately, mercantile practice recognised a second means of transferring certain types of intangible property, superior to assignment in most respects, which forms the basis of many modern commercial transactions and, in particular, much of the modern banking system... The law merchant recognised commercial practice and therefore admitted the concept of negotiability into law”[12].

A bill of exchange is an unconditional order given by the drawer of the bill to the drawee, to pay a definite amount of money. The importance of this instrument derives from the notion of negotiability: actually the creditor can transfer his rights to third parties. As we said the order of payment is unconditional and this means that there’s no need of consideration. In actual fact “a bill of exchange ... is to be treated as cash”[13] because “When one person buys goods from another it is often, one would think generally, important for the seller to be sure of his price: he may ... have bought the goods from someone else whom he has to pay. Bills of exchange are to be taken as deferred instalments of
cash”[14]. The point is that bills of exchange are to be treated as cash because this is very useful and accomplish the needs of the commercial community and this has been a good reason to modify, relatively to this subject, the concepts of consideration. As a matter of fact the basis of the concept of negotiability has been developed in Italy but civil law jurisdictions cannot permit the creation of new negotiable instruments. Due to the flexible characteristics of English commercial law principles this could be done in common law and, for example, it should be possible to treat a direct debit in the same way as a cheque[15]. In civil law jurisdictions the possibility of creation of new negotiable instruments is denied because negotiable instruments are typical[16] and their courts cannot extend the doctrine of negotiability to different instruments.

Talking about the bill of exchange gives me the possibility to introduce one of the most useful instruments invented by merchants and accepted subsequently by common law: the concept of money. In a legal point of view notes and coins are issued by the state with reference to a particular unit of account (Italian Lira, US Dollar, Pound Sterling) and used as a universal means of exchange; furthermore money “represent legal rights to claim” its “nominal value”[17] and is fungible. In effect when you deposit notes and coins with a bank you loose the property of those particular notes and coins to achieve, in return, a right of refund from the bank. In effect, the all banking system is based on trust and we know, for example, that relationships created by payment with credit cards are not well regulated in common law. Notwithstanding credit cards are very used in our daily transactions because it is recognised as very useful. Even the English courts agree with this because it “…provides advantages to both seller and purchaser. The seller is able to attract custom by agreeing to accept credit card payment. The purchaser, by using the card, minimises the need to carry cash and obtains at least a period of free credit during the period until payment to the card company is due”[18].

We have been talking about money and credit cards as methods of payment. In real commercial transaction, by the way, payment obligations are often delayed and the commercial community had to study some way to protect the payment obligation by securing it. I don’t want to make an exhaustive explanation of what is a security interest and how many types of security arrangement can be created by common law. I just want to focus that a security interest is created to facilitate transactions between the members of the commercial community by improving their chances of being paid for obligations. In fact, focusing on its scope, Professor Diamond assumed that real security is: “A right relating to property, the purpose of which is to improve the creditor’s chance of getting paid or of receiving whatever else the debtor is required to do by way of performance of the contract”[19]. Even if in 1989 Professor Diamond suggested a complete reform of this field the abolition of floating charges wasn’t taken in consideration by the commercial community. In other words the floating charge “has become so fundamental a part of the financial structure on which the commercial and industrial system of the United Kingdom depends that its abolition can no longer be contemplated”[20].

As we have seen the most representative judges of the United Kingdom agree with the following statement: law must serve the needs of the commercial society. But what is the modern characterization of the commercial community?

We will find a couple of problems in trying to define the concept of commercial community. First of all: are consumers members of the commercial community? We have to note that if the answer is yes their needs might be a part of the needs of the whole community: if this is true consumer law (becoming a part of commercial law) might facilitate the commercial activity. On the contrary if the answer is no: consumer law and commercial law might be regarded separately and the aspects concerning the regulation of commercial transactions and the protection of the participants of the market who are in disadvantage might not be considered commercial law topics. By the way, in accordance with Robert Bradgate, “If consumer law is concerned with the protection of those who are in disadvantage in the market, it becomes apparent that is not enough simply to draw a line between ‘commercial’ and ‘consumer’ transactions”[21]. In effect even if the main function of consumer law is assumed to be regulatory, the protection of consumers can help them to play a part in the market and consequently can facilitate the commercial activities. It is well recognized that consumer law to some
extent is a brand of commercial law and that consumers sometimes act as members of the commercial community; anyway, even if the answer is yes, the main scope of commercial law remains the facilitation of commercial activity.

Another problem concerns the internationalisation of commercial law and the question is: are international traders and organisations a part of the commercial community? Effectively the origin of commercial law is “multinational”: the medieval fairs were shaped from merchants from different countries and the special courts were ruled from international judges. We can with no trouble assume that nowadays, in accordance with international treaties and with EU legislation, an international commercial community has been formed. The national courts must at the present consider that the needs of the international commercial community are the needs of the national commercial community as well.

In his conclusion of the article “The Law: An Engine of Trade” Lord Irvine of Lairg believed “… that the unique English system, without any distinct corpus of commercial rules, has proved an outstanding success… The law has facilitated trade by recognising the effect of commercial agreements and practices, giving effect to the intentions of contracting parties to support the free market economy. The law has integrated key mercantile customs into its structure, establishing coherent and predictable legal frameworks in a number of areas important to business, from bill of exchange to sales of goods… Facilitation and integration were early objectives, as the common law courts had to reform their rules and procedures to accommodate a body of mercantile custom which had for centuries regarded as a separate institution”[22].

I will not be very original on saying that I totally agree with the conclusion of Lord Irvine of Lairg. To defend my not very creative position I have presented a sufficient amount of arguments that are in harmony with the conclusion that we have been talking about.

First of all we have seen that the origin of commercial law is the law of merchants and that the rules developed in medieval times have been created to protect this class. Then we have observed that these rules are still alive nowadays and that are practically the fundamentals of modern commercial law; this means that commercial law is based on rules that have been created by merchants and that obviously have been created with the scope of facilitating. Then, going through the rules, we have seen how important the law of contract is and how the “freedom of contract” can help merchants in their transactions. We have further analysed how agency plays an important role in the facilitation of commerce, in particular how flexible is the concept of authority. We have also seen how some instruments such as bills of exchange and letters of credit have been modified to permit the integration with the new needs of the commercial community. We have seen that the concept of security interest has been created taking into consideration the needs of the creditors. We have seen how floating charges can be a wonderful instrument for commercial activities and how the convenience of this instrument has been taken into consideration. In general we have seen how the entire concept of money depends on trust and we have noted that these procedures are still working after many hundred years simply because they are convenient. We have further regarded how the balance between predictability and flexibility can be very important and how the usages of merchants can be a functional source of law.

In the light of what we have seen, even if it is not an innovative way of thinking I have to assume that the very first purpose of commercial law is the facilitation of commercial activity.

I won’t be creative either if you ask me if “legal rules and doctrines are merely tools to be used in order to fulfil this purpose”. In conformity to this way of thinking Lord Justice Goff in Clough Mill Ltd v Martin observed that “In performing this task, [facilitation of commerce] concepts such as bailment and fiduciary duty must not be allowed to be our masters, but must rather been regarded as the tools of our trade”[23]. I have to consider that this is certainly not just about bailment and fiduciary. Furthermore this is not the only example I could prove[24][25]: every commercial judge in England agrees with LJ Goff and, in the light of all we have talking about, I don’t have any good
reason to say anything different. I personally think that the main scope of commercial law is the facilitation of commercial activities and that commercial rules have been created with this particular extent in every occidental jurisdiction. Notwithstanding I think that English commercial law, thanks to its particular capacity of adaptation and to its undeniable flexibility can wonderfully fulfil this purpose and this is the reason why it’s well used around the world[26] to regulate international transactions.

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[12] Bradgate, Commercial, at 615.
[14] Per Lord Wilberforce in Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 2 All ER 463 at 470, HL.


[16] Negotiability, for example, is strictly regulated with articles 1992 - 2027 of the Italian Civil Code.
[25] Per Lord Wilberforce in Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 2 All ER 463 at 470, HL.

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(scritto nel 2002)