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THE ADEQUACY AND EFFICIENCY OF AMERICAN COMMERCIAL LAW

*Giuseppe Tucci**

I. A REPORT OF AN EXPERIENCE: THE UCC'S POSITIVE RESULTS

In order to understand this opinion keep in mind that it comes from Italy, a civil law country, with a codification influenced by the French tradition of the civil code and with cultural models influenced by the German doctrine, and has been compared with common-law countries, namely with the United States, only since the second half of the 1960s.¹ Commercial transactions and contractual patterns based on the commercial legal experience of the United States have been spreading in Italy, as well as in other civil-law countries.² The Uniform Commercial Code's (UCC) peculiar codification turned out to be particularly useful and has been widely used to introduce new legislative options, even in Italy. For example, the new Italian bank statute³ requires a peculiar kind of moveable security on equipment and inventory in favor of some bank credits.⁴

The above-mentioned considerations confirm my positive judgment on the uniform law technique as well as on the content of the UCC discipline. The adverse criticism towards the technique used to reach a sufficient degree of uniformity among the laws of each state turned out to be wrong.⁵ The technique of codification covered

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1. See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 27-34, 40-49, 65 (1969).

2. For the Italian experience, see GIORGIO DE NOVA, *NUOVI CONTRATTI* 30 (1994).

3. Legislative Decree, Sept. 1, 1993, art. 46, n.385.

4. See GIUSEPPE TUCCI, *LE NORME PER L'ESERCIZIO DI PARTICOLARI OPERAZIONI DI CREDITO: LA NUOVA DISCIPLINA DEI PRIVILEGI NEL FINANZIAMENTO ALLE IMPRESE, IN BANCA, IMPRESA, SOCIETÀ* 303 (1993).

5. See Carl Felsenfeld, *But The Proposed Uniform [?] Commercial Code Was Adopted*, 26 *LOY. L.A. L. REV.* 597, 605-06 (1993).

by the UCC's different books proved to be particularly efficient and has influenced the uniform law experience in different circumstances.

Many American academics have often specified that the UCC is not precisely a code like the civil law codes. This alleged flaw actually has its merit. Total and omni-comprehensive legislation proves to be incompatible with the dynamics of modern social life, as shown by the crisis of the civil law codes whose structures are nowadays overwhelmed by a legislation ever more abundant and chaotic.⁶ The achievements attained by UNIDROIT, the International Institute for the Unification of Private Law, in subjects disciplined by UCC Article 9, such as leasing, factoring, and the more ambitious aim of attaining a disciplined uniform law governing moveable securities, confirms the efficiency of those options.⁷ Even the applied language and the terms introduced by the UCC turned out to be useful, since they permitted the application of the discipline adopted from the code to new commercial transactions.

Let's consider security interests, defined by section 1-102(37) and the corresponding term security agreement, defined by section 9-105(1), as well as the term instrument, adopted from section 9-105(i), or consider the application extent of Article 2 as shown in section 2-102. Section 2-102 prescribes the application of the whole article to all "transactions in goods" and then to conditional sales, chattel mortgages, and even leases under the aspects in which such contracts are assimilable to sale.⁸

In many ways, just because of the adopted language, the UCC is an example of a legislative technique that must be utilized to regulate a market which is continually renewing its commercial transactions. An analogous positive judgment must be given to the content of the discipline adopted in each book. In this respect, the UCC's most positive achievements have been attained in Article 9 concerning conventional moveable securities, but a similar positive judgment must be given to Article 2 concerning sales, and to Article 5 concerning

6. See Rudolf B. Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 *INTER-AM. L. REV.* 11, 25 (1959).

7. See CLIVE M. SCHMITTHOFF, *SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE* 453-67 (9th ed. 1990). See generally *Symposium: Contract Law in a Changing World*, 40 *AM. J. COMP. L.* 541 (1992) (collecting papers from the University of Miami School of Law's Symposium on the codification, harmonization, and unification of commercial law).

8. See generally *Uniform Commercial Code Annual Survey*, 46 *BUS. LAW.* 1449 (1991) (chronicling the annual successes and failures of the UCC in legislatures and courts).

letters of credit.⁹ This limits the analysis to subjects pertaining to my field of study.

II. MARKET INNOVATIONS AND THE UCC'S INADEQUACY

As we already know, since the 1990s, nearly fifty years after its edition, the UCC has been thoroughly verified and deeply revised. The reasons for this are complex and extensive, since they affect the civil-law countries as well as the common-law ones, even if in the United States such reasons converge on a debate concerning the revisions of the UCC. They concern the development of international trade, the revolution in information technology, and the development of the services sector.¹⁰

The shift from each internal market to a global economy consequently leads to international trade law and to uniform international trade rules. Such an expectation is developed by the activity of the United Nations Commission on International Trade Law (UNCITRAL) and has already led to valuable achievements with the convention of Vienna about international sale contracts, the convention about the uniform law concerning leasing and factoring, and the UNIDROIT principles of international commercial contracts.¹¹ As for every legislator of each internal law, it is necessary to conform the peculiar aims of the UCC to the new uniform law of international trade. Therefore the aims prescribed by section 1-102 will be considered valid anyhow, but today, in order to simplify, clarify, and modernize the law applicable to commercial transactions such as section 1-102(2)(a) and to allow the continuing expansion of commercial transactions through the consuetudinary rules through the customs and through the agreements of the parties as in section 1-102(2)(b), and make the law uniform among the different states, it is

9. See Peter A. Alces, *Roll over, Llewellyn?*, 26 LOY. L.A. L. REV. 543, 549 (1993); Howard Ruda, *Article 9 Works—How Come?*, 28 LOY. L.A. L. REV. 309, 309-11 (1994).

10. John F. Dolan, *Changing Commercial Practices and the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 579, 579 (1993). See generally *Chronology and Commercial Law*, 55 LAW & CONTEMP. PROBS. 1 (1992) (This issue collects articles discussing revisions of the UCC in connection with the development of international trade and the modern revolution in information technology.).

11. See *Outline of the programme of the UNCITRAL Congress: Uniform Commercial Law in the 21st Century*, U.N. Doc. A/CN.9/1992/INF.1 (1992); Amelia H. Boss & Patricia B. Fry, *Divergent or Parallel Tracks: International and Domestic Codification of Commercial Law*, 47 BUS. LAW. 1505, 1507-11 (1992); *Symposium: The UNIDROIT Principles of International Commercial Contracts*, 69 TUL. L. REV. 1121 (1995).

necessary to cross over national boundaries, since such aims do not merely concern each single state of the United States.

The information technology revolution has already induced deep transformations in the UCC since the late 1970s.¹² We must say that even Article 4A, which concerns the electronic transfer of funds via computer, must conform to the new rules of international trade. However, we must add that even the UCC's other mentioned Articles, such as Articles 2, 5, 7, 8, and 9, in addition to the many specific stipulations of Article 1, which necessarily assume the paper form, such as 1-201(46), must be conformed to the new technology.¹³

As for the development of the services sector, there is clearly a need to transform UCC Articles 2 and 2A. While delimitating the extent of application of Article 2, section 2-102 is related to contracts whose objects are "goods" according to the materialistic definition provided by section 2-105(1)(2).¹⁴ This definition is perhaps more restrictive than that one applied by some civil-law codes, like article 810 of the Italian Civil Code. Such an option leaves out of the code discipline a whole area of contractual relationships of great relevance in the modern economy, such as service contracts and the transfer of material goods.¹⁵ The thorough revision of Article 2 does not mean abandoning the edition style which inspired its first draft, since the text which is outdated because of subsequent events has revealed a great capability of conforming itself to new commercial transactions.

III. UCC DISCIPLINE DEFICIENCIES AND PROPOSALS FOR A REVISION

In addition to the revisions imposed by market transformations and new information technology, there are some aspects of the UCC which must be modified because experience has proven their inadequacy. In its general provisions, section 1-102(3) states that its stipulations may be modified on the basis of an agreement of the parties or if it is explicitly stated in the text of the Articles. Modification is also proper within the limits of the general principles of good

12. See Patricia B. Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 LOY. L.A. L. REV. 607, 609-10 (1993).

13. BARKLEY CLARK & BARBARA CLARK, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS* § 1.02[1][b][ii], at 1-6 (rev. ed. 1995).

14. See Amelia H. Boss, *Developments on the Fringe: Article 2 Revisions, Computer Contracting and Suretyship*, 46 BUS. LAW. 1803, 1808-11 (1991).

15. See Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725, 725 (1993).

faith, diligence, and reasonableness, whose standards can be established on a contractual basis, provided that they prove to be clearly reasonable. In many civil-law systems such as Italy the acknowledgement of new contractual transactions, while useful for the economy, is opposed due to the inflexibility of the systems. Consider the limits established by article 2744 of our Civil Code, which corresponds to Articles 2078, co.2°, and 2088 Code civil, and 93, co.4°, Code de commerce, concerning the purchase of goods given in security by the creditor in case of default of the debtor and the unacknowledgement of the lease back by our courts.¹⁶ In the UCC the acknowledgement of contractual freedom seems exaggerated because it does not fulfill the aim of uniformity stated by section 1-102(2)(c) or protect the weaker party in the contractual exchange.¹⁷

Related to such a feature is another aspect of UCC Articles 2 and 9 which is expected to be corrected by the forthcoming revision. Contracts between entrepreneurs, as well as contracts between entrepreneurs and consumers, are included among commercial contracts in sections 9-109(1) and 9-203(2). In every system it is considered unfair to state the same rules for contracts which are different as regards the economic importance of the parties, their way of being concluded, and the protection that must be offered to the weaker contracting party. Such a differentiation between the two sectors is spreading all over the civil-law countries, namely the EEC countries, following the European Community directives. It is modifying the law of contracts as stated in the codes.¹⁸ An analogous phenomenon is occurring to the UCC which, even if it does not have the same features as the European codifications, must conform itself to the new requirements of regulation of the market for the sake of equity of the contractual exchange.¹⁹

In addition to those general reasons, there are some specific reasons to reform particular sections of UCC Article 9. As we know, section 9-305 states that for certain goods therein indicated, the security may be perfected by the secured party's taking possession of

16. See DE NOVA, *supra* note 2, at 299.

17. Daniel A. Gecker & Kevin R. Huennekens, *Waiving Goodbye to the UCC: A Proposal to Restrict the Continuing Erosion of Rights Under an Imperfect Code*, 28 LOY. L.A. L. REV. 175, 175-77 (1994).

18. GUIDO ALPA, DIRITTO PRIVATO DEI CONSUMI 15 (1986); P. STEIN, IL FUTURO CODICE EUROPEO DEI CONTRATTI 33 (1994).

19. See Gail Hillebrand, *The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191, 192-93 (1994).

the collateral. This is a remnant of the ancient pledge of common law, which was the oldest and the sole moveable security, but which is now completely outdated thanks to the application of the nonpossessory moveable security generally accepted by the UCC. Today we are inclined to think that improvement of the security through possession is an anachronistic concept, which no longer has any place in modern commercial legislation and is a hidden trap for the secured creditor.²⁰ It would be convenient to eliminate the improvement through the tenure.

Article 9's other deficiency, perhaps more relevant, concerns Part V, dealing with the remedies granted to the creditor after the debtor's nonfulfillment. Part V is certainly Article 9's most flawed section, because even the law preceding the code did not acknowledge many means of protecting the secured creditor during the realization of the credit, means well known instead by the tradition of civil law codes.²¹ Therefore, the protection of the first secured creditor compared to the creditors who afterwards purchase securities on the same good is particularly flawed, especially when the following securities have been given without the first creditor's awareness, so that he cannot claim the proper waivers by the successive secured creditors.

20. Robert A. Zadek, *The Uniform Commercial Code's Misplaced Emphasis on Possession*, 28 *LOY. L.A. L. REV.* 391, 392-93 (1994).

21. See C. Edward Dobbs, *Enforcement of Article 9 Security Interests—Why So Much Deference to the Junior Secured Party?*, 28 *LOY. L.A. L. REV.* 131, 131-45 (1994); Fred H. Miller, *Is Revision Due of UCC Article 9, Part 5?*, 44 *OKLA. L. REV.* 125, 125-49 (1991).