

Business law

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MGM412

Lecture 2





مجموعة جامعة
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MIDOCEAN
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Chapter 2 :Definition, Sources and Subject of Business Law:

The most important main themes of the lecture:

- 1- Definition, Subject Matter and Method OF Business Law.
- 2- Sources of Business Law.
- 3-Subjects of Business Law.

1- Definition, Subject Matter and Method OF Business Law:

1- Definition of business law:

- Business law is a systematized set of predominantly dispositive legal norms that regulate property relations of professional transfer of assets aimed at selling and purchasing exchange values of goods rather than their utility. Business law is a branch of law that regulates relations that originate from conducting economic activities or that are in a close subject or functional relation with such activities. Business law is a branch of law that regulates relations from and concerning trade in the broadest sense i.e. professional conduct of economic activities.

1- Definition, Subject Matter and Method OF Business Law:

- **“Trade law”** or **“law of traders”**: a term that originated as a counterpoint to the Roman “ius civile” – “civil law”. In Roman law, it was concealed by the term **“ius gentium”**. Since the tenth century, a specific law that regulates relations among traders has developed, called **“Lex mercatoria”** or “Merchant Law”. In large bourgeois codifications that defined trade business subjectively at first – as a trader’s job, the term **“trade law”** or **“commercial law”** was kept. This was done primarily in the Austrian Civil Code (ACC) of 1811, and the German Commercial Code (GCC) of 1863. In these laws, “trade law” is an absolutely appropriate term.

1- Definition, Subject Matter and Method OF Business Law:

- “**Commercial law**” is a term whose meaning lies in the political need to free the “commerce” i.e. economic activities from guild and administrative control imposed by absolute monarchs. The Napoleonic Code de Commerce of 1807 defined the operations that are objectively, by their nature and characteristics, economic, i.e. “commercial”. Anyone who conducted such activities had the status of a trader, regardless of guild and other administrative conditions. Later developments have brought these two concepts closer together. German law, for instance, knows of “**Musskaufleute**” and “**Kannkaufleute**”.

1- Definition, Subject Matter and Method OF Business Law:

- **“Economic law”** or **“Wirtschaftsrecht”** originated in Germany at the end of the 19th century, with the formation of a large set of coercive regulations that dealt with the legal framework of conducting economic activities. The difference between **“Handelsrecht”** and **“Wirtschaftsrecht”** is primarily in the methodology, and it expresses a contrast: coordination vs. subordination. When the administrative socialism accepted the fact that administrative intervention in economy has its specific characteristics (**“gosudarstvenici”** vs, **“hazjastvenici”**), the term “economic law” was adopted for both economic and state legal relations that deal with economy.

1- Definition, Subject Matter and Method OF Business Law:

- **“Business Law”** originated in the common law system, particularly the one in the United States of America. By its content, it is a counterpart of the term **“commercial law”**. The reasons to adopt the term “business law” are the following:

- 1) in our area, commerce is understood as the exchange of goods for money rather than as an equivalent of all economic activities;
- 2) the term “economic law” is not common in market economies as it reminds of an enforced legal administrative framework of conducting economic activities;
- 3) “social property” as a proprietary basis of “economic law” has disappeared.

1- Definition, Subject Matter and Method OF Business Law:

2- Subject matter of business law:

- Theory is not unanimous regarding the subject matter of business law. Professor Bartoš asserts that it implies all relations that concern trade in legal sense of the word, regardless of who participates in such relations and whether they are regulated by dispositive or coercive norms. Professor Vedriš claims that it only includes legal relations that originate from the dynamics of goods-monetary relations; only the relations that concern commerce in legal sense, involving the subjects that conduct such activities professionally and in order to gain a profit, regardless of the method of regulation.

1- Definition, Subject Matter and Method OF Business Law:

2- Subject matter of business law:

- The subject matter of this branch of law encompasses a set of regulations regarding business-legal relations that subjects establish in order to gain a profit (regulations that concern: companies, bankruptcy and liquidation, intellectual property right, business law contracts, securities, the right of competition and public procurement).
- Carriers of rights and obligations include persons who establish such relations continually and professionally rather than occasionally. Due to the exposure of the relations and the way of acting of the subjects in those relations, all types of companies occur as subjects of business law, including sole proprietors.

1- Definition, Subject Matter and Method OF Business Law:

3-Method of business law:

- Professional conduct of activities in order to gain a profit has determined basic characteristics of the method of business law.
- Business law is a dynamic category in which a large number of legal affairs are concluded, with high speed and generally a high value. As a result, professionalism is assumed to be a feature of each participant in business transactions, as well as relations based on trust and business ethics. In the field of business law, state intervention is present, as well as the formation of special courts and arbitration.

3-Method of business law:

- The method of business law is a set of principles and rules that regulate business relations of professional subjects. Special characteristics of business law method are:

- 1) legal equality of parties in a relation and the equality of their wills, including the specific position of individual subjects (monopolistic and oligopolistic);
- 2) freedom of parties' initiative and the autonomy of their wills with significant limitations in business law;
- 3) form contracts and general business conditions;
- 4) property sanctions, with the application of non-property sanctions of non-contractual character;
- 5) a possibility of transfer of right onto another subject;

1- Definition, Subject Matter and Method OF Business Law:

3-Method of business law:

- 6) a general predominance of dispositive norms;
- 7) sources of law that suit the needs of economy and customs;
- 8) a stricter responsibility of participants in business relations;
- 9) dispute resolution (special courts and arbitration) and a simplified proof procedure.

- Correspondingly, the hierarchy of business law sources is: constitutions, ratified international contracts, laws, other mandatory general acts of legal bodies, bylaws, general acts of companies, contracts, customs, usances, civil law, and decisions of supervisory and court authorities.
- Sources of business law may be substantial and procedural sources of law. Business relations include various facts, conditions, and actions in the conduct of business. They represent substantial sources of business law. Procedural sources of business law are legal acts that contain legal norms that regulate business legal relations. The main classification of procedural sources of business law is into: general sources (constitution, law and bylaws) and autonomous sources (custom, usances, form contracts and general conditions of doing business).

1-General sources of business law:

- As the source of business law, the constitution functions to the extent of which the social and economic systems are the subject of constitutional regulation. The history of constitutionality confirms this. The Constitution of Bosnia and Herzegovina, which is incorporated in the Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Constitutions of Entities, considers property to be a natural human right. Hence, out of all provisions which are relevant for the regulation of property relations, the constitutions incorporate only certain legislative authorities. This means that the constitutions do not represent indirect sources of business law. As the sources of law, the constitutional principles are implemented by the law.

1-General sources of business law:

- The laws are the most important and the most numerous sources of business law. As the sources of business law, the laws usually regulate property relations among companies in a general and uniform manner, thus meeting the needs of legal security in business transactions in the market in the best way. The most important legislation in the area of business law is the following: The Law on Business Entities, The Law on Obligations, The Law on Banks, The Law on Bankruptcy Proceedings, The Law on Liquidation Proceedings, The Law on the Securities Market, The Law on Internal Trade, the Law on Bill of Exchange, The Law on Cheques, and so forth.

2-Autonomous sources of business law:

- Practice as a source of law has a far greater role in business law than in civil law. Throughout centuries, the role of trade practices and their effect on business law have been significant. Rationality and practicality of commercial/economic practices have made them an important source of comparative law. The reason for this is the dynamics of the turnover of goods which does not take any prolongation in finding adequate legal solutions for new circumstances. Nowadays, business practices are formed promptly and on the basis of the acts of autonomous business law (forms, general terms of business), and hence they are easily and quickly accessible to everyone. The Law on Obligations defines the term of practice and the basics of its implementation in the area of civil and business law.

2-Autonomous sources of business law:

- Commercial business practices represent business practices in a narrower, legal-technical sense. It is a commercial practice which is so widely implemented that the participants in business relations expect the contracting parties to act in accordance with it.⁴⁸ In order for a particular behaviour to become a commercial business practice, it needs to be rational, assertive, generally known, in accordance with the company's spirit and legal order, and accepted by the majority of participants in business relations.

2-Autonomous sources of business law:

- Commercial business practices can be classified according to various criteria. Regarding the territorial coverage, they can be classified into: general, regional and local. In terms of the sectors that the practices are applied in, they can be general (horizontal, which are valid in all economic activities) and special (vertical, which are implemented only in certain sectors). If there is a conflict of different rules of practices, then the practices which arise from a narrower territory or sector are hierarchically stronger.
- As a source of the business law, a business practice can have two roles. It can be a primary source if there is no regulation. If there is a regulation, then the practice has an interpretative role. In such cases, a business practice supplements the law, i.e. facilitates the interpretation of the law in accordance with the needs of the time.

2-Autonomous sources of business law:

- Depending on which practices are the subject of systematization, usances can be classified into general (those which pertain to all economic activities) and special (those which are only implemented in certain sectors). If there is a conflict of usances, then those coming from a narrower area are to be applied.
- Economic chambers, professional associations of economists, and institutions of public and semi-public character adopt usances. State authorities perform a limited control over the adoption of usances. The control is performed at the time of authorization for the adoption of usances or their formulation. The protection of public interests is the primary goal of such control. The General Usances for Trade with Goods dating 1954 are the most important source of business law.

3-Subjects of Business Law:

1- Definition of subjects of business law:

- A subject of law is any person who has the capacity to be a carrier of rights and obligations. Generally, natural and legal persons occur as subjects of law. For that reason, the subjects of business law need to be searched for within the framework of natural and legal persons that have certain characteristics when compared to other persons. Classic theory generally determines the subjects of business law via the term of trade business and the characteristics of persons who conduct business activities. Such approach implies the existence of three basic criteria for the determination of business law subjects: objective, subjective and mixed.

3-Subjects of Business Law:

1- Definition of subjects of business law:

- According to the objective criterion, which is based on French law (Code de commerce, 1807), a trader's characteristic is derived from the objective definition of trade business – such activities have strict legal definitions. Ergo, the trader (a subject of business law) is a person who conducts trade activities as his regular occupation (profession). Objective (absolute) trade activities include: banking, issuing a bill of exchange, purchasing goods in order to resell it, agency and other activities. A person, who commences such activities, even if for the first time, has the characteristic of a trader.

3-Subjects of Business Law:

1- Definition of subjects of business law:

- The subjective criterion, based on German law (Handelsgesetzbuch, 1897), takes the characteristic of a person rather than the nature of business / activities. A trader is a person who “conducts trade profession” and the conditions for this are determined by the law. A trader is a person who conducts such activities: as his profession, or that he is a trader by the method of establishment or the form, or to conduct activities in the way and scope that require his determination as a trader. All activities conducted by traders are trade business and the regime of trade law is applied to them.

3-Subjects of Business Law:

1- Definition of subjects of business law:

- According to the mixed criterion, a series of characteristics determine a trader, which gives this term a wide meaning. A typical example is American law. Using mixed criteria in the process of defining a trader, American law alternatively takes these characteristics into consideration: doing business with certain goods (a subject of transaction); the profession of the person who exhibits knowledge or a skill specific for actions or goods in transactions (relation toward the total transaction); and a profession or employment of a person (agent, broker, other intermediaries) who, by doing their job, show that they possess the knowledge or skill necessary for such activities. One of these criteria may be fulfilled by an individual or a legal entity and then it is a subject of business law, i.e. has the status of a business subject.

3-Subjects of Business Law:

2-Classification of business law subjects:

- Both contemporary comparative laws and our law contain various criteria according to which subjects of business law can be classified. Bosnia and Herzegovina adopted the mixed system of classification. Persons from the cycle of business law subjects regularly meet several criteria. The criteria are listed below:

- 1) the objective of establishment and existence of a particular entity;
- 2) mandatory registration at authorized state bodies (a court or management body);
- 3) performing a registered activity in the form of a registered profession and the method of performing this activity;
- 4) the nature of jobs that a certain subject performs.

3-Subjects of Business Law:

2-Classification of business law subjects:

- Subjects of business law are established and conduct business in order to make a profit (lucrative goals).⁶¹ Entities established and operating on the regulations of business law are always assumed.



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