4-1-2007

La Contratación Comercial En El Derecho Comparado (Commercial Contracting in Comparative Law) By Boris Kozolchyk

Dale Furnish

BOOK REVIEWS

La Contratación Comercial En El Derecho Comparado (Commercial Contracting in Comparative Law)

By Boris Kozolchyk*
Dykinson, 2006. 523 pp.

Reviewed by Dale Furnish**

Professor Boris Kozolchyk has created a consummate work of comparative law, in the truest and best sense. This book distills the life work and intellectual odyssey of a redoubtable jurist. It is remarkable for several reasons. First, it is a teaching-text blend of cases (large numbers of them translated from English), placed in context by extensive background materials and questions by the author. The format will be familiar —although it is especially well done — to United States law professors and students, but should strike many jurists, law professors and students in the Spanish-speaking world as exotic. Second, threaded throughout the book, is an excellent running commentary on the development of the world's Roman-Law based systems and of the world's common-law based systems, with incisive identification of points of comparison and distinction fully played out. These portions of the book are a joy, bringing a sure touch to what the key issues are, placing them in contexts that illuminate them, and embellishing them with the details of personalities and circumstance that reveal the deeper, human aspects of the dialog. Third, and perhaps most important, the book benchmarks the quintessential area of contract law, at the center of the Twenty-first Century's tightening commercial community, and demonstrates the uneven development of this crucial field, the reasons for it, and where it should go.

At the outset, Kozolchyk makes it clear that his book pursues law's vitality and complexities through dynamic comparison, or

* Professor of Law, University of Arizona School of Law.
** Professor Emeritus, Sandra Day O'Connor College of Law, Arizona State University; Fellow, National Law Center for Inter-American Free Trade.

the "consequences of the purpose of institutions," and eschews anything approaching an "annotated lexicography" of terms and code sections.[1] With that launching point, the author-compiler begins the chronicle of a pursuit of formality versus vitality in contract law. "Unfortunately, comparatists continue investing too much analytical effort in the sterile search for the perfect concept, without taking into account the purpose of the concepts they study nor the effectiveness of those concepts as solutions to the juridical and socio-economic problems for which they were designed."[2] Perhaps he not need state it, but the method that he condemns may stem as much from the fact that many comparatists lack vision or full grounding in the distinct systems they pretend to compare. Others may have the vision, but not the background to pull it off. Professor Kozolchyk's intellectual journey has fitted him to the task.

Professor Kozolchyk brings to his work, and especially to this work, the best of his formation in the world's two great legal systems — the Romano-European and the Common Law — and projects the convergence of those systems in the globalized commercial world of the Twenty-first Century. His first education in the law occurred in Cuba, where he began his professional studies as a more conventional civilian lawyer, classically educated at the University of Havana Law Faculty and beyond. The impact of that first track has never entirely loosed its hold on his heart, let alone on his studies. Fidel Castro's revolution cut the budding civilian jurist adrift in the United States, where he completed J.D., LL.M. and S.J.D. degrees in the next seven years, and where he has pursued an academic career since.

One should take account that Professor Kozolchyk's experience is not that of a typical academic, however. He lived in Costa Rica in the late 1960's, where he worked on commercial law reform, and over last sixteen years has served as President of the National Law Center for Inter-American Free Trade in Tucson. He also has years of service as a delegate to the United Nations Commission on International Trade Law (UNCITRAL), the Organization of American States' Specialized Conference on Private International Law and other international drafting fora. These experiences have provided a crucible for his intellectual inclinations. He has worked in the field, struggling to forge effec-

1. BORIS KOZOLCHYK, LA CONTRATACIÓN EN EL DERECHO COMPARADO [COMMERCIAL CONTRACTING IN COMPARATIVE LAW] 6-9 (2006) (translation by author).

2. *Id.* at 8 (translation by author).

tive commercial law reforms that bring about economic and social progress.

The world's two principal legal systems have come together in Boris Kozolchyk's formative years and had practical application since, and that happy circumstance may have lodged the issue of their comparison and reconciliation firmly in his persona, at the same time that it prepared him exceedingly well to address that issue. Over more than four decades, Boris Kozolchyk has pressed his inquiry into commercial law in all of its aspects into every corner of the world. His curiosity and enthusiasm for the substance and application of commercial law and custom know no bounds. He has an unquenchable interest in how it works . . . not just the letter of the law, but its effects, measured by its cultural context and the markets in which it operates.

Even more impressively, however, Professor Kozolchyk displays an amazing ability to assimilate all the curious data discovered to his broad interests into a conceptual universe in which everything fits. Nowhere does he demonstrate the breadth and depth of his grasp more certainly than in this book. It is a teaching book, made for use in law classrooms throughout the Spanish-speaking world, but it has a great deal to teach not just the students whose fortune it may be to study from it, but those who would teach from it or simply read it. This is not a standard subject matter. Professor Kozolchyk has made it, not from the whole cloth but from his own intellectual development. Perhaps we all do that when we put together teaching materials, but few of us have the wealth of experience and perspective upon which to draw that he demonstrates in this book. This is a book for teaching comparative law, but it transcends comparative law, or at least takes it to its highest application.

Professor Kozolchyk begins his analysis in pre-commercial society, and tells us why we should study that (because "dense" societies may enforce obligations by means other than contracts; and we have not yet totally moved from status to contract, nor will we).[3] He proceeds to the Roman Law of Contracts, and tells us why we should study that (because its sophisticated judicial processes introduced market aspects of fact and custom into the system and into the body of the law as derived by Roman jurists).[4] He takes up Medieval Law, and tells us why we should study that (because its burgeoning commercial milieu introduced new forms

3. *See id.* cap. II.
4. *See id.* cap. III.

and formalities of contract, at the same time that its scholastic reasoning imposed rules estranged from commercial reality, and contractual issues found application in seminal religious thought regarding obligations between colleagues in faith).[5] With that background and its lessons for modern contracts established, Kozolchyk sets out the basics of European codification and its subsequent world-wide influence[6] and then sets out the basics of Anglo-American law of contracts,[7] all culminating in the contemporary law of contracts as played out in international fora like UNCITRAL, CIDIP and UNIDROIT.

Early on, Professor Kozolchyk gently introduces his Spanish readers to the enigma of the tautological definition of "consideration" in Section 75 of the Restatement Second of the American Law of Contracts and other choice, dialog-defining issues.[8] Perhaps most revealingly, after the preliminaries are out of the way, he focuses his treatment of "formation, formality and solemnity" as they bear on the basic nature of contract through the lens of two pre-Socratic Greek philosophers — Parmenides and Heraclites — and their opposing concepts of the nature of being.[9] Since the opposing concepts carry throughout the analysis from here forward, it is worth thumb-nailing them here. Parmenides, in Kozolchyk's use, stated that since nothing could be equal to its opposite, the nature of any being was immutable.[10] Kozolchyk sees Heraclites, who proceeded Parmenides by about a generation, as a poet and metaphysician to Parmenides' mathematical logician.[11] Heraclites sees the nature of being in "not being," since in our world "everything flows . . . nothing remains fixed."[12]

Professor Kozolchyk sets up the contrast by comparing a contract for the sale of real estate, under the French Civil Code, against a contract for the sale of movable goods, under the Uni-

5. *See id.* cap. IV.

6. *See id.* cap. V.

7. *See id.* cap. VIII.

8. *See id.* at 37.

9. *Id.* at 199 (translation by author).

10. *See id.* Perhaps best expressed in the aphorism from his Way of Truth, "For never shall this prevail, that things that are not *are*." Parmenides also believed that not sensory perception, but only pure reason, could ever lead to truth.

11. *See id.*

12. Heraclites' most famous aphorism is the one Kozolchyk cites, although the translation from the Greek (here through the Spanish) presents some problems, as it does with Parmenides. Perhaps the most common English translation is, "Everything flows and nothing stands still."

form Commercial Code.[13] The discrepancy is striking, Parmenides against Heraclites among the legal norms, requiring a publicly-registered act of rigid formality and application (to the exclusion of extrinsic proof) as against an obligation that permits informal creation, and great flexibility in the application, liberally abetted by extrinsic proof. The book then runs the student through a gauntlet including a 1990 case opinion from Uruguay (insurance policy),[14] two 1994 opinions from Spain (sale of a commercial site, exclusive distributorship),[15] a 2002 case from El Salvador (carriage of goods),[16] three Mexican cases (a 1956 sales contract, a 1996 assignment, and a 1954 purchase option),[17] and three cases from the United States (a 1982 auto sale, a 1985 supply contract, a 1979 sale of grain).[18] Some of these ten opinions from five countries are quite formal and inflexible, others quite willing to recognize informal contracts and to permit extrinsic proof. Is it because the applicable written sources are different? The nature of the contracts? The judicial attitudes? What is the difference between effects *ad probationem* and *ad solemnitatem*? The countries? By the time a student has worked through the thirty-seven pages of Chapter X, entitled "Formality and Solemnity in Comparative Judicial Opinions,"[19] she or he may not have the answers to those and a lot of other questions, but he or she earnestly will have wrestled with them and they will reappear constantly throughout the rest of the book. The tone — transcendent and substantive and conceptual comparison — is set.

From this point to its conclusion, the book works the most troublesome, subjective areas of substantive contract law, dedicating chapters to: good faith, course of performance, custom and usage in the Uniform Commercial Code and in German and Spanish Civil Codes;[20] interpretation of terms in Mexico, the United States and Germany;[21] expectancy damages in seven Civil Law jurisdiction, the United States, and international sources;[22] and

13. *See id.* at 199.
14. *See id.* at 215.
15. *See id.* at 219, 222.
16. *See id.* at 223.
17. *See id.* at 228-29.
18. *See id.* at 241, 243, 247.
19. *See* id. at 214-51. The author has translated *"jurisprudencia"* as "judicial opinions."
20. *See id.* cap. XI.
21. *See id.* cap XII.
22. *See id.* cap. XIV.

Excuses for Non-Compliance.[23] The last three chapters deal with enforcement and damages, with due attention to the controversial issue of self-help, or extra-judicial execution.[24] Along the way, there is a chapter on basic civil procedure and the way a plaintiff goes about seeking judicial enforcement of a contract, again achieving true comparison of the Civil Law with the Common Law style, and variations.[25]

Overall, then, this book demonstrates superb grasp of its topic and an indefatigable scholarship. It is a gold mine of provocative and incisive thought, begging to be taught and discussed. One wonders if in Spanish-speaking countries, where careful class preparation is not the tradition, students will dedicate the time to reading and sorting out the materials so that they can discuss them in each class period. The book is attractive enough that once they begin, intellectual stimulation should carry them the rest of the way. But any commercial law jurist will derive great benefit from this book, if the experience is no more than reading it alone and appreciating the bridge it presents between two great legal systems, their approximation in the world marketplace, the way people make contracts, and the way courts enforce them.

At the end, the book does have a vision of the best way to good law, and what that law consists of in the field of contracts. Professor Kozolchyk is a poet and a metaphysician on the order of Heraclites, firmly on the side of flow and change. The argument plays a persistent undertone, and often surges to the surface. His book demonstrates ample examples of the good and the bad, and makes an irresistible, inevitable argument for the good. There are lessons here for a generation of professors and students and beyond. Parmenides would be convinced, could he read Boris Kozolchyk's book.

23. *See id.* cap. XV (providing an especially well-cobbled chapter built around the Italian Civil Code's Arts. 1467, 1453, 1454, and 1456, and their impact on Salavadoran Commercial Code's Art. 994 through the Honduran Commercial Code's Arts. 750 and 755, which is then compared with German and Argentine sources, and finally with the United States' approach).

24. *See id.* cap. XVI-XVIII.

25. *See id.* cap. XIII.