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

By Boris Kozolchyk*
Dykinson, 2006. 523 pp.

*Reviewed by José Manuel Pallí***

Many years ago, after recently arriving to the United States, I bought my children a book that I ended up devouring in a couple of nights. That book was *The Way Things Work*, by David Macaulay, and its simple but brilliant description of physical and mechanical phenomena was an eye-opener for someone like me, a “civil lawyer” in the process of becoming a “common lawyer,” with a keen interest in the so-called social sciences.

I had a similar eye-opening experience while reading Professor Kozolchyk’s *Commercial Contracting in Comparative Law*, but now in a context much more familiar to me. Professor Kozolchyk’s book could easily be titled *The Way Laws Work in the World of Commerce*. Through its empirical analysis of the world’s different legal systems’ approach to commercial laws and contracts, I came to see clearly what, until then, was for me an incomplete picture of international commerce. This book succinctly explains the many nuances and angles of commercial law from which different societies arrive to similar results. The book is also a superb summation for what Professor Kozolchyk has spent a life-time doing: building bridges between different legal cultures. My only regret is not having this book at hand back when I read Mr. Macaulay’s book, while I made my own transit between two cultures and between two different legal environments.

The three parts in which the book is divided share the author’s overall pragmatic approach to the legal underpinnings of commerce. In the first part, which covers the evolution of the laws on commercial contracts, Professor Kozolchyk’s bridge spans not just different legal cultures, but also different ages where he explains the key elements that connect today’s commercial laws. From the importance of possession rights under old Roman law, to

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the bold move towards abstraction in modern German law, the underlying theme is how, persistently, commercial laws break away from conceptual strictures or dogmas and strive for the practical solutions that the markets demand. With bold and firm strokes, the author vividly paints a picture where it becomes clear that the value of today's property rights is solidly tied to their marketability, and that the latter hinges on the protection commercial laws give to third parties.

The second part of Professor Kozolchyk's book focuses on the present march towards cross-border standardization and harmonization of commercial laws. This process is one that Professor Kozolchyk and the National Law Center for Inter-American Free Trade, which he heads, has played a leading role through active and fruitful participation in the international fora, such as in the UNCITRAL and the CIDIP, where uniform commercial laws are drafted. The author shows us how, despite the importance of local culture, which, especially in the Americas, sometimes magnifies the value of autochthonous solutions, the law of commercial contracts carries the seal of an ever more global market. He convincingly makes the argument that national commercial laws cannot properly function unless they are loyal to the national, regional, and universal commercial uses and customs born out of the best practices followed in different markets. It is in these mercantile uses and customs where we find the foundation of sound and solid commercial law. This book richly illustrates how those uses and practices normally point to the more effective, just and equitable solution to most problems presented in the realm of commercial contracts. The book's use of contrasting decisional law as a comparative law tool is refreshing, and its frequent appeal to the reader's engagement in the search for the best possible solution to a particular problem makes it an indispensable teaching resource for Professor Kozolchyk's colleagues in the Academic Bar, today and for years to come.

The third part of the book addresses procedural remedies available to the parties to a commercial contract in the event of controversy. Of particular interest, because of what it tells us about cultural differences, is the chapter dealing with the *culpa in contrahendo*, or the level of good faith, that parties should bring to the negotiation of commercial contracts. It also discusses the legal consequences of errors or mistakes induced by a party acting without such good faith—including the consequences of one of the parties' decision to walk away from a deal still in its embryonic stage.

Although civil law holds good faith as a important behavioral requisite for the parties while negotiating a contract, even at its preliminary stages, Anglo-American law does not. Rather Anglo-American law recognizes the prevalence of the parties' adversarial position when negotiating a commercial transaction: no duty of good faith should limit each party's right to pursue his or her own interest. Cultural nuances like this may be at the root of the perceptions of those who see the market as a zero-sum environment, where the richer you are the more power you wield, and where the brighter can take advantage of the duller when negotiating a commercial contract. But this book provides the antidote to such misperceptions by establishing the crucial role of good faith and fair dealing throughout the development of sound commercial contracting rules, and by showing how the market itself, through its customary uses and best practices, proves to be an efficient police agent against those who abuse them.

Professor Kozolchik's book is not only a true feat of legal engineering, bridging different legal institutions in a diversity of countries and legal environments, but also a great example of the importance of reverse engineering when analyzing and measuring the effectiveness of foreign legal institutions as a function of the ends those institutions pursue. This book is comparative law at its best.