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## Boris Kozolchyk, Ph.D., *El Derecho Comercial Ante el Libre Comercio y el Desarrollo Economico*

Maria del Pilar Perales Viscasillas

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# **EL DERECHO COMERCIAL ANTE EL LIBRE COMERCIO Y EL DESARROLLO ECONOMICO**

**By Boris Kozolchyk, Ph.D. Mexico:  
Mc Graw Hill, 1996**

**Reviewed by Maria del Pilar Perales Viscasillas†**

*El Derecho Comercial ante el Libre Comercio y el Desarrollo Economico* is the result of many years of scholarly work by Professor Boris Kozolchyk. Each chapter is an essay on the relationship between commercial law, free trade and economic development. Each chapter was also written at different times while the author was researching or lecturing in many countries. All the essays share the same concern: the role of commercial law and its underlying morality in facilitating free trade and economic development. For this reason, the notion of fairness plays a crucial role in Professor Kozolchyk's book and, particularly, in his analysis of legal institutions. This analysis is enriched by comparisons between the "civil" and "common" law.

The book is divided into two main parts: The Commercial Law under NAFTA and GATT, and Commercial Law as a tool of economic development. Keenly aware of the need to study legal institutions in light of their economic, political and social determinants, the author begins his analysis by focusing on the post-World War II turn towards free trade. He outlines the history of free trade in its socio-economic and commercial context, starting with the medieval "peace of the marketplace," twentieth century treaties (such as the 1947 General Agreement on Tariffs and Trade (GATT)), and the 1993 North American Free

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† Adjunct Professor of Law, Pace University School of Law. Doctor in Law, 1996, University Carlos III of Madrid.

Trade Agreement (NAFTA).<sup>1</sup> Focusing on the latter, Dr. Kozolchyk reviews the legal and cultural or attitudinal obstacles that must be overcome to achieve uniformity and standardization of practice among Canada, Mexico and the United States.

Of particular interest for both civil and common law lawyers are the different national and culturally bound approaches by the United States and Mexico on issues, such as formal contractual requirements and drafting and interpretation of procedural and substantive rules. The author's approach is not to simply expose the differences, but to provide a deep insight into the roots of both legal systems. He devotes special attention to the respective methods and styles of commercial codification<sup>2</sup> and to the systematic and methodological disparities in judicial adjudication. This approach highlights *stare decisis* and reasoning by analogy or example, *versus* "defined jurisprudence" (*jurisprudencia definida*) and literal interpretation. It also focuses on preeminence as a source of law of commercial usage and custom, and of standards of behaviour of businessmen in Canada and the United States *versus* the preeminence of doctrine in Mexico. Having outlined the disparities, Dr. Kozolchyk focuses on several methods for achieving regional and global harmonization. In addition to the traditional "top down" methods of law-making through treaties and model laws, Dr. Kozolchyk suggests new "bottom up" methods for achieving legal uniformity.

One theme that emerges is that, despite the presence of universal and regional treaties, traditional methods of unification of international commercial law need to be complemented by "bottom up" unification of trade usages and international practices in accordance with principles of fairness that govern

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<sup>1</sup> North American Free Trade, 17 December 1992, U.S.-Mex.-Can., entered into force Jan. 1, 1994, reprinted in 32 I.L.M. 289 and 32 I.L.M. 605 (1993). Professor Kozolchyk is the Director of the National Law Center for Inter-American Free Trade, headquartered in Tucson, Arizona. The Center is part of a network of national law centers in the NAFTA region and in the Western Hemisphere created to help implement NAFTA and other free trade agreements.

<sup>2</sup> Mexican Commercial Code (1989) and the Uniform Commercial Code, The American Law Institute, The National Conference of Commissioners on Uniform State Laws, 1994 Official Text, with comments (West Publishing Co, 1995, 13th ed.). Actually, the Uniform Commercial Code is subject to a process of revision.

local as well as international commerce. These are principles that both inspire and legitimize commercial law, in general, and trade usages and practices, in particular. The reader should find of great interest the research and analysis that led Dr. Kozolchyk to formulate these principles which embody the standards of commercial behaviour that make markets, individual contracts and commercial associations work successfully. One of the principles, to which the author devotes special attention, is that of equal treatment among merchants, a key norm of both GATT and NAFTA, and one whose roots can be traced to medieval times. In Chapter IV the author deals extensively with the seminal principles of national and international commercial law-making as the legal models of fairness. He uses his comparison of commercial adjudication in Latin America and the United States as his main empirical source for the establishment of fairness standards.

The second part of Dr. Kozolchyk's book begins with an illuminating study<sup>3</sup> and evaluation of the behaviour of four legal institutions in Costa Rica: industrial development,<sup>4</sup> capital investment in corporations,<sup>5</sup> consumer credit,<sup>6</sup> and economic development. Readers will find the study's novel approach to analyzing important developmental institutions revealing, but the significance of the study lies in its vantage point. Dr. Kozolchyk analyzes the law as a "living creature" (*derecho viviente*). This is an aspect of the law seldom analyzed and yet one that plays a crucial role in the economic development of Costa Rica and of other developing countries. Thus, the conclusions of this study may be applied to other developing nations. These studies led to the formulation of a legal theory which can be used to achieve a more efficient role for legal institutions in the development process. In order to accomplish this task, the author elaborates on the use of two economic principles: the

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<sup>3</sup> This essay is the product of a study "Proyecto de Reforma Jurídica binacional" conducted at the School of Law of the University of Costa Rica from June 1967 to June 1969. This project included the participation of lawyers and professors from Costa Rica and the United States.

<sup>4</sup> The study was made by Lorin S. Weisenfeld and David A. Gantz, and was published in 14 *Revista de Ciencias Jurídicas*, December 1969.

<sup>5</sup> The main authors of this study are David A. Gantz, Blake T. Franklin and Boris Kozolchyk.

<sup>6</sup> The main author of this survey is Charles Foster Knight.

principle of scarcity of resources and the principle of marginal cost. An elaboration of legal strategies for a better use of statutory law, case law, and of trade, complements the legal theory developed by the study.

Dr. Kozolchyk's developmental studies reveal the central role of fairness in instilling public trust in legal institutions which have been historically distrusted. This reassurance of a fair outcome is an essential function of law when facilitating economic development. The question then becomes, what is fair in the context of commercial transactions? The author tackles this question by providing a brief analysis of usury (as a measure of the fair price of money). By highlighting the more important aspects of this institution, three different standards of fairness emerge. These standards are used later by the author to describe and compare modern versions of commercial law fairness in both the United States and Mexico. The conclusion is that what the courts consider as fairness in their commercial cases does not depend on the affiliation to a civil or a common law system. Instead, fairness is related to type of marketplace.

In a marketplace of widely distributed, mass produced goods, to be fair means, most often, to treat the other party to the transaction in the same way a regular participant in that marketplace transaction would expect to be treated. Occasionally, when a high degree of trust needs to be instilled by a key participant, to act fairly means to act in a "brotherly" fashion, i.e., watching out not only for a regular participant's advantage but for the other party's best interests. A marketplace where goods and services are produced and distributed widely is incompatible with the third, or "stranger," standard of fairness. This is the standard common to many developing nations. According to this standard, it is fair to treat a stranger neither as a brother nor as a regular market participant; the stranger's fairness is simply what the commercial traffic will bear and what the contracting party can get away with. Again, the conclusions are easily applicable to other countries and not only to those taken as models.

The reader will find especially revealing the chapter on the commercialization of civil law and the civilization of commercial law. An understanding of the dichotomy of two discreet but interacting branches, civil and commercial law, is imperative to

understanding the private law of civil law systems. Dr. Kozolchyk presents a fascinating picture of the diversity of legal institutions unique to both systems. His objective is, again, to identify the standards of behaviour embodied in the Civil and Commercial Codes, statutes and decisions of both systems.

The contrast between those systems in fundamental aspects of the law in both commercial and civil transactions is particularly important. Using the French Civil Code of 1800 and the Uniform Commercial Code of the United States (1952 version) as the archetypal versions of each type of code, the author compares: statute of frauds and formalism (*formalismo*); parol evidence rule (*regla de restricción probatoria*); consideration (*causa*); the reasonable man or person (*el buen padre de familia*, "the good father of family"); standards of third parties' protection; economic duress; just price and abuse of right. Finally, he compares the commercial adjudication in both codes and legal systems. After this analysis, Dr. Kozolchyk provides his conclusions on the interaction between commercial and civil law, highlighting once more the life of the law as a "living creature." Of tremendous importance for the civil law reader is the realization of how much more proximity to the real needs of market place flexibility can be obtained by applying the standards of fairness associated with the process of commercialization of the law. It inevitably leads to an increase in cooperation and reliance between the parties and to the protection of larger numbers of third parties, such as good faith buyers or creditors. Dr. Kozolchyk's explanation of how civilization of commercial law leads to an increase in cooperation and reliance between the parties and to the protection of larger numbers of third parties, such as good faith buyers or creditors. Dr. Kozolchyk's explanation of how civilization of commercial law leads to an increase in the market's moral standards and to more active markets will be of great interest to commercial lawyers.

Chapter VI contains an analysis of the sales of goods by a non-owner. The study intends to clarify the concept and role of ownership law in today's commercial law. The author again begins his study with a deep historical and comparative analysis of ownership law in its legal and economic environment, Roman law, Spanish law during the tenth to fourteenth centuries, English law in the seventeenth century, and U.S. law from the end

of the nineteenth century to today. A gradual contrast leads to the present market place, epitomized by the marketplace for goods and services, the largest and most active on earth. The experience and practice of the United States reveals that an increasing commercialization of transactions leads to a legal system in which ownership of personal property is fragmented, and no one knows or cares to know who is the true "historical" owner of personal property. It is a world of non-owners dealing with non-owners, a world in which rights to the possession of personal property reign supreme. In such a world, uniformity of law and practice becomes an absolute necessity.

The last chapter focuses on the role of commercial law today. The author sets forth, for the first time in commercial legal literature, the principles governing the development of commercial law. Those principles are first examined from a perspective historical development, including, medieval Rome, the Arabic and Jewish merchants of the ninth to twelfth centuries and European and North American commerce of the nineteenth century. The author then elaborates on three principles: the assumption of commercial risk and the limitation of responsibility; equality among merchants; and the freedom to contract as well as the seriousness of contractual intention.

In his conclusions, Dr. Kozolchik identifies many significant aspects of the twentieth century market. It is a globally open market, with an ever-increasing number of participants and volume of commercial investment. A second characteristic is the accumulation of the production of high technology by a small number of producers. It is also a market in which the participants are free to establish the terms and conditions of their transactions, including formalities as well as prices. Of special importance is the globalization of the finance and transportation markets. In relation to the former, the author highlights the creation of new forms and types of contracts as a result of the advancement of new technologies.

All in all, this work demonstrates prodigious research and contains much significant historical and comparative thought, giving the reader important insights on commercial law in both civil and common law countries.