BOOK REVIEW

CURSO DE DERECHO MERCANTIL, VOLUME I. By Boris Kozolchyk and Octavio Torrealba. Litografia Lehmann, San Jose, Costa Rica, 1974. Pp. 404. $15.00.

In the civil law world, the branch of legal science devoted to commercial law has been burdened since its inception with the puzzling task of defining for its own an object sufficiently distinct from the objects of other legal disciplines. In their book *Curso de Derecho Mercantil*,[1] Kozolchyk and Torrealba have succeeded in highlighting the hallmarks of such an endeavor in a manner as lucid as it is concise. They present the subject, not as a series of conclusions dogmatically stated or intended to win the reader over to a certain ideological school, but rather as a sequence of flowing legal thought that changes according to time and circumstance, a presentation intended as a challenge to the critical reader who must form his own conclusions. The authors lead the reader to realize that the object of commercial law as a legal discipline can best be discerned by recognizing that an important part of social intercourse takes place in the form of transactions made in vast numbers rather than in an isolated manner. When transactions are designed to be mass-produced, such as the issuing of checks or the marketing of consumer goods, the law must show a special concern for security, simplicity, and uniformity, with a view to harmonizing domestic principles and rules with those of other jurisdictions in order to meet the pressing needs of interchange across boundaries.

Kozolchyk and Torrealba bring the reader to understand that the true protagonist of the commercial law is no longer the traditional merchant, individual or collective, but the enterprise—a delicate compound of assets and resources, human, corporeal, and financial, some as

1. This title can be translated as *Textbook* or *Handbook of Commercial Law*, which suggests a work prepared for the use of law students. That is the purpose of the authors in this case, as expressed in their foreword. In the continental tradition, however, materials prepared for the use of students in a particular course are oftentimes veritable treatises of the pertinent subject to which great authority is attached, as in the case of Demolombe's *Cours de Code Napoléon* (1877) and Josserand's *Cours de droit civil positif francais* (1933). *See* G. STRUMBERG, GUIDE TO THE LAW AND LEGAL LITERATURE OF FRANCE 30 (1931).

concrete as machinery, others as abstract as credit and good will, engaged in the creation, promotion, or circulation of wealth. The notion of enterprise, since it first received legal entity in the Italian code of 1942, has proved to be a fruitful approach to the subject of commercial law. Besides contributing answers to purely systematic questions, this concept has served as a compass to explore new horizons within the ambit of commercial law.[2]

Curso de Derecho Mercantil was prepared pursuant to a special agreement between the University of Costa Rica and the Regional Office for Central America and Panama of the Agency for International Development. The purpose of the agreement was to provide the means for implementing important changes in methods and techniques of legal education at the University of Costa Rica Law School. The effectiveness and success of such a project depends to a great extent on the availability of materials to be used by students in the process of changing their ways of learning. *Curso de Derecho Mercantil* was designed for that purpose, though the importance of the final product exceeds the scope of the original design.

The choice of the commercial law as a first target is amply justified by practical reasons. In a country like Costa Rica—conspicuous in the Latin American context for her people's respect for law and orderly, rational settlement of disputes—a better mastery of commercial law constitutes an important step toward fulfillment of national aspirations for greater economic development.[3] It is no wonder that the first part of this ambitious program has been carried out with such great success, as it has been entrusted to extremely well-qualified authors. Boris Kozolchyk is well-known as an American authority on Latin American law, development law, and commercial law.[4] Oscar Torrealba is a distinguished professor of commercial law at the University of Costa Rica Law School. Their work represents a pioneering effort in the treatment of a difficult subject.

This Review will attempt, first, to give to the American reader a brief background in comparative law needed to better understand the difficulties involved in the subject matter of Kozolchyk and Torrealba's work. Further comments will then be made on the authors' treatment of this subject and their organization of the book.

2. The notion of enterprise, though from a different angle, is certainly not alien to American legal thought. *See* Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947).

3. *See* Gutierrez, *Foreword* to B. KOZOLCHYK & O. TORREALBA, CURSO DE DERECHO MERCANTIL at 5 (1974).

4. Kozolchyk's book, *Commercial Letters of Credit in the Americas*, must be regarded as a final word on this difficult subject. B. KOZOLCHYK, COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS (1966).

Though *derecho mercantil, or derecho comercial,* is the Spanish equivalent of "mercantile law" or "commercial law," the fact is that the overtones elicited by these expressions differ considerably according to whether they are used in a civil or common law context. In the early stages of western law, commercial law was a part of the law of contracts, a part that as a matter of tradition was differentiated from other contract law by a subject matter typified by the short term, finite, and barter-like exchange of money for goods.[5] At some point in history the commercial law was separated from the common law and administered in different courts applying different rules.[6] At the insistence of the English common law courts, however, the mercantile law lost its independence in that country in the 17th century and the ordinary courts of law regained jurisdiction over commercial disputes as well as many maritime causes.[7] As a result, among the nations of Europe, England was the only one in which commercial and maritime law became a branch of the general common law.[8]

In Continental Europe a system of separate commercial courts and commercial codes prevailed. Civil law, as developed and taught in those countries according to the Roman model, did not govern the transactions of the itinerant merchants who carried on the commerce of the Middle Ages. Commercial life was ruled by a distinct custom, the law merchant, under which disputes were settled by special commercial tribunals.[9] In the era of codification, therefore, separate civil law commercial codes were enacted, maintaining a tradition from which the common law countries departed. The countries of Latin America, the vast majority of which gained independence in the 19th century when the codification movement was quite young, aligned their legal systems with the continental tradition.[10]

The differences between the two systems regarding commercial law were at one time so marked that any attempt to set up within the common law a category of commercial law corresponding to that of the civil law countries would have been impossible.[11] Owing to important contemporary developments, however, these two legal systems have been undergoing changes in the area of commercial law. At common law,

5. H. GUTTERIDGE, COMPARATIVE LAW 34 (2d ed. 1949); E. PETERS, COMMERCIAL TRANSACTIONS 1-2 (1971).
6. E. PETERS, *supra* note 5.
7. 5 R. POUND, JURISPRUDENCE 74 (1959).
8. W. HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 208-16 (1925); 5 R. POUND, *supra* note 7.
9. 5 R. POUND, *supra* note 7; L. GOLDSCHMIDT, 1 HANDBUCH DES HANDELSRECHT 10 (1891). *See generally* W. HOLDSWORTH, *supra* note 8; J. MERRYMAN, THE CIVIL LAW TRADITION 14 (1969).
10. B. KOZOLCHYK, *supra* note 4, § 2.01[1].
11. 5 R. POUND, *supra* note 7, at 73-74.

the advent of the Uniform Commercial Code gave rise to an intense movement for revision of traditional concepts. At civil law a similar trend has started toward the unification of the private law, that is, toward the elimination of barriers between the civil law, in a proper sense, and the commercial law.

The Uniform Commercial Code is the most important step so far taken in the way of gradual codification in the common law world. The product of a joint undertaking by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, its purpose was to bring the commercial law up to date and to provide uniformity for all the American jurisdictions.[12] That great changes in economics and in business methods and practices called for a modernization of the common law version of the commercial law is beyond question. However, it must be noted that the response elicited by the Uniform Commercial Code falls short of universal enthusiasm.[13] A noted authority, Dean Roscoe Pound, states that it would be a mistake to set off that part of the law dealing with commercial matters from the rest of the law.

> I have grave doubts as to the wisdom of those who drafted the proposed code in conceiving that they could abandon established legal terminology and introduce a new set of terms with no established legal meanings and by no means assured meanings in detail to lay men of business. Atttempts to make every business man, manufacturer, and banker his own lawyer are likely to produce confusion out of proportion to good results.[14]

Turning to the civil law world, good reasons have been offered in support of the idea of unification of the private law. A century and a half ago it was perhaps accurate to say that there was a distinct area of legal life where transactions and activities were properly civil, that is, more static than dynamic, and aimed primarily at the preservation of properties and estates. It was likewise accurate to say that at the same time there existed another area where transactions and activities were properly commercial, that is, more dynamic than static, and aimed primarily at securing profit through exchange and intercourse. For as long as this sharp distinction between preservation and circulation of wealth was a feature of legal reality it made sense to think in terms of

12. *See* Goodrich, *Conflicts Niceties and Commercial Necessities*, 1952 WIS. L. REV. 199, 201; Schnader, *The New Commercial Code: Modernizing Our Uniform Commercial Acts*, 36 A.B.A.J. 179 (1950); *Symposium—The Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 1 (1951). Neither in coverage nor in style, however, is the Uniform Commercial Code a code in the continental tradition.

13. *See* Beutel, *supra* note 14, at 334-63.

14. 3 R. POUND, *supra* note 7, at 722.

two sets of rules, one for the civil law which was basically conservative and another for the commercial law which was basically progressive. Such a distinction is no longer realistic, however. Today, estates consisting of immovable property can be preserved only through active operation and exploitation; wealth consisting of movable property and securities can be preserved only by the constant increase resulting from an endless series of transactions. Even those engaged in agriculture or the practice of liberal professions, activities traditionally regarded as civil in a proper sense, presently find themselves performing acts of the same kind and thinking in the same terms as merchants habitually do. Credit and financing, extremely important activities which until not long ago were confined to commercial transactions, now permeate most aspects of legal life. A glance at the universal contemporary problems of housing and distribution and financing of consumer goods suggests the depth which commercial methods and practices have carved into transactions traditionally regarded as civil. A commercialization of civil legal life has taken place, a fact that can neither be ignored nor remain unaccounted for by the law.[15] In response to a changing reality, Italy—the country in which commercial law was born—abolished the two traditional codes of private law and in 1942 enacted one single code to govern civil and commercial aspects of legal life. Earlier in the century, Switzerland enacted a Code of Obligations, which was purposely separate from the civil code so that it would be clearly understood that the principles and rules contained were equally applicable to civil and commercial transactions. Although it cannot yet be said that the civil law world has achieved unification of the private law, developments such as these in Italy and Switzerland are important strides in that direction.[16]

After this cursory glance at the contemporary vicissitudes of the commercial law, a contrast of the common law and civil law systems yields a sort of paradox. American common law seems to have engaged in a process of separating the two branches of private law that the civil law now insists on merging, almost as if each system had traded its original position for the other's. Such a conclusion cannot be carried

15. See R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 71-72 (1968).

16. See J. HAMEL, 2 LE DROIT PRIVÉ FRANCAIS, *Droit civil de droit commercial en 1950* (1950); H. MAZEAUD, 2 PROBLÈMES CONTEMPORAINS DE DROIT COMPARÉ, *L'unification du droit civil et du droit commercial* (1962); M. ROTONDI, STUDI DI DIRITTO COMMERCIALE, *La questione del codice unico delle obbligazioni e il Progetto di riforma del codice di commercio* (1961); A. TUNC, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE, *L'unification interne du droit privé* (1953); Frédéricq, *L'unification du droit civil et du droit commercial: essai de solution pragmatique*, 15 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 203 (1962).

too far, however. In American law the Uniform Commercial Code has not done away with the wealth of decisional law that preceded it and against which it is still interpreted. Similarly, the civil law trend towards unification will never succeed in doing away with almost two centuries of doctrine imbued with the idea of a science of commercial law as an independent legal discipline. Even the ideal curriculum of a civil law school of the future is unthinkable without special courses on commercial law.

Be this as it may, from the viewpoint of classification in a civil law context, a marked dichotomy within the private law exists. A sharp distinction is drawn between civil law proper and commercial law, a distinction which has become one of the most characteristic features of the civil law as a system. The civil law is usually reflected in a civil code and is the reservoir of basic principles and rules intended to govern those aspects of everyday social intercourse in the community that constitute the private life of its members. From birth to death, everyone's life is guided and accompanied by the law of persons, family, property, obligations, and inheritance. Because of that inherent basic nature, the civil law is actually a common law—*droit commun, derecho comun*—to which principles and rules intended to govern less general spheres of social intercourse may conform, when consistency is justified, or from which they may depart when reality so demands.[17]

Within this civil law framework, departure from the *derecho comun* by the commercial law is traditionally justified by two reasons. First, it is said that certain rules are applicable to commercial transactions only, that is, to the special kind of act called acts of commerce. Such rules constitute a body of law that is commercial because of its object, like the special rules governing proof and formalities in business transactions. There are other rules which partake of the same nature because they are exclusively applicable to persons, either individuals or groups, who engage in acts of commerce, as is the case with the rules of bankruptcy. As a result, some rules are deemed to be objectively commercial because they govern acts which have a commercial object, while others are subjectively commercial because they govern the professional conduct of persons engaged in commerce. So far, the necessity or, perhaps, the practicality of a separate code for such rules seems justified. There is, however, another category of rules the application of which is limited neither to acts of a special nature nor to persons with certain qualifica-

17. For an explanation of the civil law as common law—*droit commun*, see R. DAVID & J. BRIERLEY, *supra* note 15, at 69.

tions or engaged in certain activities, though rules in that category are nevertheless regarded as commercial. That is the case of rules governing negotiable instruments, stock market transactions, banking, insurance, transport, joint stock companies, and limited liability companies. Although, as a matter of practice, such rules are usually included in commercial codes, the fact is that they are applicable to commercial as well as to noncommercial transactions, to persons qualified as merchants, and to private individuals or groups not so qualified. The rules governing certain types of companies, for instance, are applied even when a company of that kind has not been established for a commercial purpose. The ever-increasing importance of transactions governed by the last category of rules has furnished the strongest argument to the supporters of the unification of the private law.

These comments are perhaps sufficient to show that Kozolchyk and Torrealba have dealt with a subject that is far from being merely a part of the law of contract, as it is at common law, but is rather a system within a system: a vast panorama of scientifically organized principles and rules intended to govern a whole dimension of social activity. Such is precisely the idea of the commercial law that prevails in the civil law world.

In organizing the presentation of the different subjects covered in this first volume, the authors have been faithful to the purpose of making their work a useful device for the implementation of important changes in the process of legal education as conducted at the University of Costa Rica Law School. Each subject receives first a doctrinal treatment from as many angles as possible, without overlooking contradictions when these are historically relevant. Second, the importance of each subject is shown through the elaboration and application of its pertinent concepts in landmark decisions by Costa Rican courts. In a third and last step, the authors provide the reader with a series of questions inviting him to examine the jurisprudence in the light of doctrine. This excellent approach achieves an intelligent balance between a traditional civil law treatise and a functional common law casebook.

In three carefully subdivided chapters this first volume covers acts of commerce, merchants, mercantile things, sources of commercial law, business establishments, unfair competition, trademarks, patents, brokers, commission merchants, factors, business agents, and business clerks. One cannot but look forward to the next volume of the work where, no doubt, greater emphasis will be placed on comparative aspects.

The reform of legal education in the Latin American scene could not have started under better auspices. It is to be hoped that this brilliant example will be followed in other law schools and in other subjects.

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