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Book Review

Bernard Rudden

Contract Law in the USSR and the United States: History and General Concept. E. Allan Farnsworth & Viktor P. Mozolin. Washington: International Law Institute, 1987. Pp. 350. Cloth.

This work represents the first in a series on contract law jointly produced by the International Law Institute in Washington, D.C., and the Institute of State and Law, Academy of Sciences of the USSR. Volume 1 appears in both English and Russian, and promised successors (described as "upcoming" by the publisher) will cover required terms and adhesion contracts[1] and sales contracts.[2] Such a collaborative venture is both novel and exciting, and the first volume—since it "fixes the working methodology for the entire series"[3]—merits serious consideration.

The chosen approach is avowedly doctrinal and non-comparative. The book falls into two halves, in each of which a distinguished specialist describes the law of his own country. Both halves follow the same plan, dividing their treatment into the following five chapters: the concept of contract; its history; the sources of contract law; the characteristics and organization of contract law (i.e. the birth, life, death, and afterlife of a contract); and the settlement of disputes (mainly the court and arbitral systems).

The American contribution constitutes the second part of the volume. It will be treated briefly, certainly not from reasons of disrespect for the Reporter to the great Restatement Second on Contracts,[4] but because this review is of the English-language edition. It can be assumed that most readers are already acquainted with a capitalist system's approach to contract; indeed, the text prepared for this work seems in large measure a precis (with the necessary generalization and re-organization) of Farnsworth's magisterial treatise on contracts.[5] No doubt the reviewers of the Russian-language version will have much to say about what they learn from him, and it is tempting to try to predict their reactions. They likely will note that, in typically common-law fashion, the author devotes only 12 pages to the concept of contract,[6] while

1. T. VUKOWICH, V. YAKOVLEV, & M. SHIMINOV, THE EXTENT OF THE POWER TO CONTRACT: REQUIRED TERMS AND CONTRACTS OF ADHESION. Volume 2 is expected to be published in 1988.

2. V. MOZOLIN & R. SUMMERS, THE LAW OF SALES. Volume 3 is expected to be published in 1990.

3. E. FARNSWORTH & V. MOZOLIN, CONTRACT LAW IN THE U.S.S.R. AND THE UNITED STATES: HISTORY AND GENERAL CONCEPT xi (1987).

4. RESTATEMENT (SECOND) OF CONTRACTS (1982).

5. E. FARNSWORTH, CONTRACTS (1982).

6. *Supra* note 3, at 177-88.

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giving its history 31 pages[7] and its birth, life, death and afterlife 79 pages.[8] Government contracts, on the other hand, are accorded no special treatment. Soviet reviewers would probably be impressed by the common-law's economic rationalization, but profoundly puzzled by some of its legal doctrine. They will see that the author immediately, even eagerly, embraces a definition of contract which obliges him to deny that a swap or a cash sale is a contract.[9] They may think that there is something sad about such an approach; and who can blame them? Having learned on the first page of Farnsworth's account that "the law of contracts is confined to promises that the law will enforce,"[10] they will discover later that "enforcement" is not a literal term at common law, that the law's "preoccupation is not with the question of how promisors can be made to keep their promises"[11] but instead that "the award of damages is the common form of relief. Virtually any breach gives the injured party a claim for damages."[12] At this point the Russian readers' bewilderment will deepen less at the substitution of damages for enforcement than at the explanation that contracts are not strictly enforced. Surely, they will think, some fifty percent of all contracting parties are merely buyers of goods and services or borrowers of cash who undertake only to pay (or repay) money; surely suits for the price of goods sold and services supplied, or for the repayment of money lent, are by far the most numerous, and certainly the most successful, of all contract actions. And surely—above all in a capitalist economy—the defendants are made to pay (and their property is liable for) not damages, but the sum agreed. The American system, they will therefore think, like any other, specifically and routinely enforces most contractual promises.

Mozolin's chapters are written in the rather colorless language of much Soviet legal scholarship. Some of the flavor, of course, may have been lost in translation; however, a perusal of the author's other works in Russian suggests that the English version is fairly faithful to his prose-style. He begins by emphasizing that, to understand the Soviet contract, the reader must understand both its legal conception and its social purpose; and Mozolin soon makes it clear that the latter is by far the more distinctive feature. He summarizes succinctly:

> Commodity-and-money relations nevertheless differ from relations found in market-oriented Western countries and have at least four distinctive features. First, labor is not regarded as a commodity. Second, major

7. *Supra* note 3, at 189-220.

8. *Supra* note 3, at 233-312.

9. *Supra* note 3, at 178. Farnsworth relies on the Restatement's future-regarding element of an enforceable contract: "Because no promise is given in either of these exchanges, there is no contract. No question of the law of contracts arises unless the dispute is open over a promise—a commitment as to future behavior." *Id.*

10. *Supra* note 3, at 178

11. *Supra* note 3, at 296-97.

12. *Supra* note 3, at 302. *See also id.* at 306 where Farnsworth discusses the remedy of specific performance.

> resources, such as land, water, timber, minerals in the ground, industry, and communications are excluded from commodity-and-money relations. Third, prices are in most cases fixed not by the contracting parties but by the state. Fourth, commodity-and-money relations are constrained by a planning system.[13]

This last feature needs to be stressed. "Under socialism," Mozolin writes, "by its very essence, the economy can only be a planned one."[14] The Western reader who buys a pencil takes for granted that the path from the forest to the object on the desk has traveled through free markets in land, timber, transport, labor, insurance, and countless other things. Indeed, it is in these scores of "upstream" contracts that the traditional model holds most true for Western law (a point well illustrated by Farnsworth in the early pages of his account).[15] In the Soviet Union, however, the land and the forest are state property, the undertakings involved are all state enterprises, the workers are state employees, and the pencil's path is planned up to its arrival at the local store, where it sells at a retail price fixed by the State. Only the final act of purchase cannot be imposed by "the Plan"[16] on a Soviet citizen: Article 4 of the USSR Fundamentals of Civil Legislation 1961 provides that civil-law rights and duties (in this example, contract) can arise from planning only for State, cooperative, and public bodies.[17]

Yet the USSR no longer relies on plan alone to achieve the collaboration required at the upstream stages of production. Contracts are made between the manufacturing, service, and distribution enterprises involved, penalty clauses are written into them, and breach is penalized. The parties, however, cannot make unplanned contracts and must make those which the plan requires. This inter-relationship of plan and contract is difficult to understand and Mozolin's account[18] is not particu-

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13. *Supra* note 3, at 13.
14. *Supra* note 3, at 30.
15. *Supra* note 3, at 181-183.
16. Mozolin defines the "Plan" as
> an administrative document that serves as the basis for making the contract. . . . This is not the same as a production plan of an integrated unit (or enterprise), which is formed on the basis of contracts made and orders received by the integrated unit (or enterprise) and affirmed by superordinate agencies. These plans are related, however, and they are coordinated by ministries, agencies, and other administrative organs, which carry out supervision of the integrated units and enterprises.

Supra note 3, at 28 n. 39.

17. *Supra* note 3, at 116-18. Article 4 of the U.S.S.R. Fundamentals of Civil Legislation codifies the "Grounds from which Civil Rights and Duties Arise." The grounds are "provided for by the legislation of the U.S.S.R. and the Union Republics, and also from the acts of citizens and organizations which, while not provided for by law, give rise to civil rights and duties in virtue of the general principles and meaning of civil legislation." FUNDAMENTALS OF CIVIL LEGISLATION OF THE U.S.S.R. AND THE UNION REPUBLICS, at 12, art. 4 (1968) (translated from the Russian text into English). As pertains specifically to contracts, the Article states that rights arise "from transactions provided for by law and . . . which, while not provided for by law, do not contradict it." *Id.*

18. *Supra* note 3, at 26-36.

larly illuminating, but then neither are those of the authors whose works he summarizes.[19] Much clearer, for an insight into the content of contract in a planned economy, is his description of the terms inserted by legislation into the vast majority of contracts. These normally include the price, the warranties of quality, the manner of payment, and almost all other matters in state-imposed standard contracts involving the ordinary citizen in long-term legal relationships.[20] The work was presumably written too early to include discussion of the recent (1986) amendment to the Fundamental Principles of Civil Legislation which seems to suggest a shrinking of the contractual autonomy of ordinary people. Article 40(2) provides that where two private citizens make a contract they can fix the price themselves; to this has now been added the phrase "except as otherwise provided by legislation."

If the function of contract in the Soviet Union remains hard to grasp, its purely legal constructs are much more familiar, bearing a close relationship to the Roman-derived systems of the Civil Law. The author accepts that "the legal concept of contract retained its basic features, similar to those found in the legal systems of other countries,"[21] and inevitably his description of the very basic legal notions stirs many a memory of other, older systems. Contracts arise "by the will of the parties, on the basis of an agreement between them;"[22] they create relations *in personam*, not *in rem*.[23] They comprise a sub-set of juridical acts ("transactions" in the book, but not in the index) described as "actions of individuals and organizations directed toward establishing, modifying, or terminating rights and duties"[24]—the phrase could have come straight from a 19th-century German textbook. From similar sources comes the distinction between legal capacity and legal ability; indeed the Russian words are calques of the useful German terms (e.g. *Rechtsfähigkeit/pravosposobnost'*), and are none the worse for that.

Soviet law does not define the legal concept of a contract. Instead, it defines obligation in terms which reproduce the essence of the California Civil Code[25] (enacted in 1872), but are no doubt derived from the civil code of Germany: The legal situation where one person (the debtor) is bound to another person (the creditor) to perform in favor of

19. *See, e.g.*, Kravtsov, *Planovye obiazatel'stva* [Planning Obligations] (1980); Agarkov, *Obiazatel'stvo po sovetskomu grazhdanskomu pravu* [Obligations Under Soviet Civil Law] (1940); Kykov, *Plan i Khoziaistvennyi dogovor* [The Plan and the Economic Contract] (1975).

20. Examples of such long-term relationships are the residential lease, the rental of household appliances, and the whole range of insurance policies.

21. *Supra* note 3, at 47. *See also id.* at 114 n. 6, for Mozolin's list of commentators on this point.

22. *Supra* note 3, at 9.

23. *Supra* note 3, at 9-10 ("A contractual obligation . . . establishes legal ties only between the parties participating in the contract.").

24. *Supra* note 3, at 5.

25. California Civil Code § 1427 defines obligation as "a legal duty, by which a person is bound to do or not do a certain thing." CAL. CIV. CODE § 1427 (West, 1982).

another some defined action or to refrain therefrom, with the creditor having the right to require performance.[26] Having defined obligation, Soviet law, using a technique ultimately derived from Gaius' *Institutes* 3.88 (c. 160 A.D.), states that obligations arise from contracts and from other grounds.[27] The law then defines what makes a contract, enumerating a number of perfectly sensible rules covering the details of offer and acceptance and the various vices of mistake, duress, and the like.[28] The main distinction between the formal rules of the Soviet system and those of other civil-law countries lies in the remedies—payment of a penalty *plus* specific performance[29]—and here Mozolin lucidly explains the Soviet rationale:

> [U]nder the conditions of a planned economy, and in the absence of a free market, the sums of money received by the obligee in place of performance of the contract . . . will not, as a rule, protect the property interests violated by the nonperformance of the contract. The obligee is not in a position to purchase elsewhere the goods that the obligor should have supplied. . . .[30]

To the Western lawyer, the most important feature of the doctrine of freedom of contract is that the law simply gives its subjects a kit—agreement, capacity, and (in some countries) consideration—and says "go ye and stay licit." Provided the parties do just that they may make any kind of contract they like. This is presumably the basic position in the USSR but it is not entirely clear whether Mozolin accepts this or thinks there is only a *numerus clausus* of permitted contractual figures (the index is no help). As an illustration of his ambiguity, Mozolin states that "Soviet civil law takes the position that contracts are to be openly listed;"[31] however, the gist of his observations in several other places suggests that, if a particular type of contract is not provided for by legislation, then it is not allowed. He thus seems doubtful of the validity of a contractual obligation *not* to do something[32] (if he is right, then the Soviet system was described about A.D. 200 by the Roman jurist Julius Paulus: D 44.7.3.pr.). Similarly, he points out that "the character of contractual relations is in many respects predetermined by the system of legal regulations that is established for individual forms of property."[33] In discussing contracts between individuals and socialist organizations, he says that "only individual types of such contracts are laid down in

26. German Civil Code § 241 ["Verpflichtung zur Leistung"] states that "by virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance can also be forbearing to act." Das Bürgerliche Gesetzbuch § 241 (1960) (translated from German).

27. *See supra* note 3, at 8. *See also* FUNDAMENTALS OF CIVIL LEGISLATION, *supra* note 18, at 31 (art. 33). Note that although Mozolin discusses this point, it is not listed in the index.

28. FUNDAMENTALS OF CIVIL LEGISLATION, *supra* note 18, at 31-35 (arts. 33-38).

29. *Supra* note 18, at 33-34 (art. 36).

30. *Supra* note 3, at 148.

31. *Supra* note 3, at 116.

32. *Supra* note 3, at 10.

33. *Supra* note 3, at 16.

[legislation]" while "detailed regulations are given in subordinate rules."[34] Finally, he says (and it is interesting that it should need saying) "contracts not provided for by subordinate rules are also considered enforceable if they do not contradict the law, but they are not often used."[35]

Mozolin's half of the book has three main weaknesses. First, the author often obscures the book's structure by giving too much detail in many places. Thus, at one point he provides a lengthy list of objects which are *extra commercium*,[36] while at another he spells out the long names, dates, and references of some 30 pieces of subordinate legislation on contracts.[37] Second, Mozolin frequently covers a number of the difficult areas, including much of the historical survey (which begins in 1917), by merely recounting brief, and somewhat arid, summaries of competing professorial arguments (once again, with lists of citations).[38] Moreover, Mozolin cites many authorities, but all are in Russian. To the reader without knowledge of the language, they are useless; to the reader who knows Russian, they are unnecessary since he or she ought to be able to find the references in the standard Russian-language works. Presumably, they are included in the English-language version of the volume in the expectation that someone will use them; the attempt by one reader to follow up some of the authorities quoted, however, revealed the third weakness of Mozolin's half of the book: its inaccurate citations, of which this reviewer found many.[39]

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34. *Supra* note 3, at 109.

35. *Supra* note 3, at 117. *See also supra* note 7 and accompanying text.

36. *Supra* note 3, at 15-16.

37. *Supra* note 3, at 93-94.

38. A noteworthy omission, by the way, is the great jurist Olimpiad S. Ioffe. Happily, he is now a professor at the University of Connecticut Law School at Hartford, and his recent book, *Soviet Civil Law* (1988), bids fair to become a classic.

39. Among the more noticeable were the following. The case discussed at pp. 6-7 is cited to a non-existent number of the RSFSR Law Reports. The correct reference to the provision cited at p. 14 line 3 is 21; the number given by the author is that of the corresponding article in the RSFSR Civil Code. The legal provision quoted in full at p. 21 is not from the legislation given (and itself incorrectly cited—it is item 120). The actual source is the Government Decree of 15 May 1986 (SP SSSR 1986 No. 21, item 121). The year whose Plan is discussed at p. 38 n. 62 should be 1987. The sub-title of Pashukanis's book mentioned at p. 63 n. 45 should be englished as "An Essay in Criticism" rather than "An Expert Critique." At pp. 98-99 Mozolin discusses a case whose "reasoning is . . . of fundamental importance," but he does not explain why it was held by the RSFSR Supreme Court that the customer injured by a defective product cannot sue the manufacturer in tort until the contractual action against the store is barred by expiration of the guarantee period (neither does the judgment); and the correct citation to the USSR Supreme Court's ruling on contractual warranties and products liability is to the 1985 BULL. VERKH. SUDA SSSR (No. 3) p. 13, at p. 17, # 19. At p. 105, contracts between citizens are dealt with by article 35 of the FUNDAMENTALS OF CIVIL LEGISLATION; the effect of mistake on transactions is covered by article 57 of the RSFSR Civil code, not the number given at p. 114; and conditions are dealt with by article 61, not that cited at p. 119. On p. 115 the final reference in the text should be to the FUNDAMENTALS OF CIVIL PROCEDURE, not of CIVIL LEGISLATION.

An attempt to follow up some of the author's references led to one most interesting example of the present tensions in Soviet contract law and of the interaction between these tensions and the constitutional organs of power in the USSR. The Gorbachev doctrine of *perestroika* seeks to stimulate domestic initiative and enterprise, two areas of human activity which have traditionally made wide use of the contract, whether of collaboration (partnership, the firm) or of exchange (sale of goods, supply of services). Thus the USSR Supreme Soviet (the constitutional legislator) enacted a Statute on Individual Labor Activity.[40] The statute addresses "socially useful activity for the production of wares and supply of remunerated services, not connected with the supplier's labor relation" (i.e., his or her steady job), and asserts that "the state encourages citizens to enter into contracts and to form voluntary societies and associations."[41]

Notwithstanding *perestroika*, other organs are working in the opposite direction. The dangers to the socialist economy of unbridled contractual initiative are evident and are vividly illustrated in Issue No. 21 of the 1986 USSR Government Decrees, *Sobranie Postanovlenii Pravitel'stva SSSR*. The Issue contains three texts, each from a different source: the Party Central Committee, the legislative "standing committee," and the executive. The number is devoted to a single topic: "Strengthening the Struggle against Unearned Income" (where the adjective "unearned" (*netrudovoi*) means literally "untoiled-for"—acquired, that is, outside the officially authorized ways of earning a living).

The Communist Party, defined in Article 6 of the 1977 Constitution as "the guiding and directing force of Soviet society and the nucleus of its political system and state and social organizations," has a similar Decree (*postanovlenie*, Item 119). The Party's message follows a stylistic pattern found in much Soviet law-making: first the good news; then—introduced by "however" or some such phrase—the bad; and finally the exhortation to numerous other bodies to put things right. So we read that

> the toilers of the Soviet Union have assumed as their heartfelt concern (*kak svoe krovnoe delo*) the tasks laid down by the 27th Party Congress of speeding up the socio-economic development of the country, and, by self-denying toil in all sectors of the national economy, of steadily ensuring the increase of the social inheritance. . . . Throughout the country there is manifest a constant care for increasing the standing of honorable highly-productive toil . . . and for the further strengthening of state and social control of measures of toil and consumption.[42]

Alongside this, however,

> there are not a few situations where people acquire unearned income, engage in pilferage, speculation, bribery and other types of unlawful

40. Enacted on Nov. 19, 1986.

41. VED. VERKH. SOV. SSSR 1986 No. 47, § 964, art. 1 (abridged quotation) [translated by author].

42. SP SSSR, Item 119 (translated by author).

> activity. Some of them use state resources for gain . . . or exact extra payments for their services in trade, communal, and medical services. In some Soviet families money-grabbing is not condemned.[43]

Almost four pages of instructions follow, to the legislative Presidium, the Government, the Ministries, local authorities, the Procurator, the MVD, in short the whole gamut of Party, State, regional and other official organs.[44] These bodies are to take the appropriate concrete measures to "use the whole force of the law against those living beyond their [official] means (*ne po sredstvam*)."[45] As well as the law, all other means of "propaganda and agitation" are to be deployed: thus Goskino, the State movie industry, is told to make films which will "foster in Soviet hearts implacable hostility to the psychology of private property and other antitheses of Communist morality."[46]

Even the highest reaches of the Government have responded to the Party's call. According to the 1977 Constitution, article 128, "the USSR Council of Ministers [the Government] is the highest executive and administrative agency of state power of the USSR."[47] In implementing the Party directive quoted above, the Government Decree (Item 121) proceeds to pass on the message to lower agencies, instructing factories to tighten work discipline, auditors to scrutinize books, the State Bank to handle all contracts between citizens and State organizations for over 5,000 rubles, and so on.

Finally, the "Standing Committee" of the Supreme Soviet has made the necessary changes to the legislation in force in Item 120, an Edict (*ukaz*) of the Presidium of the Supreme Soviet.[48] Most of the Edict is concerned with other matters,[49] but one provision deserves special attention in this review, as it vividly illustrates the problem of fitting individual enterprise and freedom of contract into the context of the socialist system. All basic prices are planned and, for entirely virtuous reasons, those of important consumer products are kept very low: the troublesome result is that bread costs less than cattle-cake and henfood.

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43. *Id.*

44. The only institution not addressed by the Party is the Courts; thus scrupulously observing constitutional propriety, since article 155 of the 1977 Constitution lays down that judges are "independent and subject only to law." This limitation does not, of course, stop the courts themselves from spontaneously taking the Party line to heart, and the 1986 volume of the USSR Supreme Court Reports contains a lengthy (though abridged) account of an address to the Full Bench by its President on the importance of the 27th Party Congress for the work of the judiciary. BULL. VERKH. SUDA SSSR 1986 No. 3, p. 4.

45. SP SSSR, Item 119 (translated by author)

46. SP SSSR, Item 119 (translated by author)

47. Konst. SSSR Art. 128.

48. Under the Constitution, legislative power belongs to the (bi-cameral) directly elected Supreme Soviet; but, as this body meets infrequently, it elects a Presidium of some 40 members which, among many other things, makes laws in the intervals between "parliamentary" sessions; they are then presented to the legislature for confirmation, but in practice this always occurs.

49. Imposing or increasing administrative and penal sanctions for failure to file income returns, use of State vehicles for private gain and similar matters.

If, for some reason, this happened in the West, the market would solve the problem, however imperfectly. The Soviet Union instead uses the criminal law. Article 5 of the Edict penalizes (with up to two years corrective labor for the worst cases) "the purchase of bread to feed to cattle and fowl; and also feeding cattle and fowl on bread bought in the shops."