decline to entertain any involvement in such schemes, even if its attitude is consequently described as inconsistent, paternalistic, or quite plainly wrong.

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Contract Law in the USSR and the United States: History and General Concept

By E. Allan Farnsworth and Viktor P. Mozolin. Washington D.C.: International Law Institute (in cooperation with the Parker School of Foreign and Comparative Law, Columbia University School of Law), 1987, pp. 350, $35.00.

The role and influence of contract law in society, in economies, in trade, and in the world order have come under acute scrutiny in recent years.[1] *Contract Law in the USSR and the United States: History and General Concept* is an intriguing new entry into this realm of contracts scholarship. It represents the first volume of a promised three-volume series devoted to the study of American and Soviet contract law.[2] The series is being jointly published in English in the United States and in Russian in the Soviet Union and is devoted to a description of important aspects of, in turn, Soviet contract law and American contract law. Thus, the series will provide the obvious benefit of an English language treatment of Soviet contract law and a Russian language description of U.S. contract law.[3]

This first volume is co-authored by Allan Farnsworth, the noted American contracts scholar[4] and Viktor Mozolin of the Soviet Institute of State and Law, each of whom was responsible for coverage of the law of his

1. *See, e.g.*, P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); C. FRIED, CONTRACT AS PROMISE (1981); G. GILMORE, THE DEATH OF CONTRACT (1974); I. MACNEIL, THE NEW SOCIAL CONTRACT (1980).

2. Forthcoming volumes are tentatively subtitled *The Extent of the Power to Contract: Required Terms and Contracts of Adhesion* by William T. Vukowich, Veniamin Yakovlev, and Margarita Schiminova and *The Law of Sales*, by Viktor P. Mozolin and Robert S. Summers.

3. English language accounts of the contract law of foreign non-English speaking countries are somewhat sparse. *See, e.g.*, B. NICHOLAS, FRENCH LAW OF CONTRACT (1982).

4. Professor Farnsworth served, beginning in 1971, as the Reporter for the Second Restatement of the Law of Contracts. *See also* E. FARNSWORTH, CONTRACTS (1982).

country. As the work is divided into two equal parts, one dealing with the history, structure, and organizational framework of Soviet contract law and the other with the same features of American contract law, it is admittedly not comparative in the traditional sense. (pp. 335–36) Rather each part is self-contained. As a result much of the comparative work is left to the reader, not a serious detriment since readers will largely be lawyers and scholars familiar with the law of one of the jurisdictions. The authors do present a jointly authored afterword in which they describe some of the differences and surprising similarities in the contract law of the two countries. (pp. 335–40)

Part I details the history and concept of contract law in the Soviet Union in the contextual framework of the Soviet system and economy. Thus, an American lawyer may not be surprised to learn that freedom of contract, as that concept is understood in the United States, is restricted in the Soviet Union. The limitation, however, stems not so much from a general curtailment of individual freedoms as from the lack of marketability for many types of commodities, due to the state control of many parts of the economy. (pp. 13–15)

We also learn that Soviet contract law is a civil law with a civil code, the *Fundamentals of Civil Legislation of the USSR and the Union Republics*. In addition to the traditional common law–civil law dichotomy over the importance of case law and statutory law, the Soviet civil law system emphasizes in every contract the interests of society as well as the involved individuals. (pp. 19–20) "In general, the state determines the terms of the contract by law in those cases where the interests of society have a well-established and durable character." (p. 25) The effect of this "third party" interest also appears to restrict notions of freedom of contract since important terms like price and quality of performance are often established by the state rather than by the parties.[5] (pp. 20–25)

The planned management of the Soviet economy also restricts the freedom of individuals to control the terms of their contracts. Since all aspects of production and distribution are planned by the state as part of state-controlled economic and social development of the country as a whole, there is often little room for individual initiative or negotiation in entering into "commercial" contracts. (pp. 27–28) The contract is viewed as an instrument to the accomplishment of the principal societal goal of a planned

5. The price as well as the order of payment is externally set for contracts involving socialist organizations. However, there is apparently an increasing tendency to permit the parties to a contract to negotiate their own price in certain classes of contracts, such as goods or services supplied to consumers on an individualized basis or for which the demand is great. (p. 21) Likewise state mandated quality of performance terms apply to some but not all industrial or manufacturing or processing contracts. (pp. 23–24)

society. In the socialist scheme of ordering priorities, individual contractual freedoms necessarily are less consequential than in a capitalist society.[6]

Mozolin provides a historical perspective to Soviet contract law that is helpful in understanding contemporary Soviet contract status. The important role of contract law in the planned and structured nature of the Soviet economy is even more apparent when one is exposed to the breadth of legislation developed since the Bolshevik Revolution to regulate contracts in important areas of the economy such as transportation, the production and supply of agricultural products, and the "delivery" of industrial, technical, and consumption products.

While the contrast with our common law, judge-made system of contract law seems rather dramatic, perhaps the difference in the two systems is not so great when one considers the underlying principles and the impact of article 2 of our Uniform Commercial Code. Certainly the uniformity and predictability envisioned by the drafters of the Code and achieved by its adoption in all fifty states provides a significant planning function for the commercial actors in our free market economy,[7] just as the Soviet codification supports the planning function for the actors within their socialist economy.

Interestingly, the historical account dates only from 1917, the time of the "Great October Socialist Revolution." In contrast, Farnsworth's historical treatment of American contract law dates from distinctly pre-American Revolutionary times, which is perhaps a commentary on the relative impact that the two revolutions had on each country's legal system. Nonetheless, some consideration of the pre-revolutionary Russian civil law tradition on the post-revolution Soviet socialist legal system would be welcome.

Chapter 3 of Mozolin's treatment of Soviet contract law considers the sources of the law and provides some insight into the administrative and judicial structure of the Soviet system. Particularly enlightening is a section entitled "Court Practice" and a description of the judicial resolution of a lawsuit involving the purchase of a faulty television set that caught fire and damaged the purchaser's property.[8] (pp. 98–100)

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6. Even so, author Mozolin identifies significant theoretical and practical conflicts in the Soviet system stemming from the planned nature of the Soviet economy and contracts, which, even though used as an instrument of the planning function in a socialist society, are still vehicles for the ascertainment of individual rights and obligations. (pp. 28–36)

7. *See, e.g.*, Gilmore, *Codifying Commercial Law*, 56 YALE L.J. 1341 (1948), Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291.

8. The People's Court (the appropriate trial forum) ruled the retailer liable on a breach of contract theory and held that the manufacturer had no liability to the purchaser. This decision was upheld on appeal by the Civil Judicial Panel of the Supreme Court, who noted the retailer's right of recourse in a suit against the manufacturer. Mozolin notes that while the case seemingly makes new law, case decisions are not considered sources of law in the

Chapter 4 is entitled "Characteristics and Organization of Contract Law" and covers a broad range of concepts such as validity, capacity, form, and performance. Some striking similarities to American contract law are revealed in, for example, the capacity to contract doctrine (pp. 122–26), and one learns that common law avoidance principles such as mistake, misrepresentation, duress, impossibility, and *force majeure* are features of the Soviet system. Interesting differences do surface; for example, an illusory contract in Soviet law is one that is used to conceal another transaction, whether legal or illegal (pp. 112–14), in contrast to the common law use of the term referring to promises supported by apparent rather than actual consideration. Formation rules appear to be similar, with one difference that the Soviet rules on offer and acceptance are detailed in its Civil Code. The concept of consideration is not mentioned, however, and does not appear to have any role in Soviet contract law, as is the case in most civil law systems. (pp. 128–30) Further, Soviet law categorizes and applies special formation and performance rules to many types of contracts, particularly those having an important role in the planned economy. For example, offers cannot be revoked in "delivery" contracts.[9] (p. 130)

With respect to performance, more general differences appear. Under Soviet law, the contracting parties are obligated not only to the other side of the transaction but also to the state. Thus, "the principle of economy" requires that each party perform its obligation so as to benefit the economy of the country as a whole. (pp. 142–43) In addition, "the principle of cooperation" requires each party to aid the other in its performance of the contract. As a result, the socialist economy as a whole will theoretically benefit in a way that is not possible where the parties are antagonists.[10] (pp. 143–46)

Specific performance also has broader currency in the Soviet system because alternative or substitute performances are often not available due to the planned and centralized nature of their economy. (p. 148) Again the difference is not as extreme as one might initially believe because

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Soviet system. Courts function to enforce the laws; thus judicial decisions do not create legal rules but "principles of judicial application to be followed in similar cases." The distinction is between a judicial decision creating a new legal rule and its explaining an already existing rule "by establishing a definite rule for applying rule of law in analogous cases." (p. 100)

9. The reference there is to the Statute on Deliveries of Goods for Industrial and Technical Purposes.

10. In contrast, the concept of cooperation in U.S. contract law is present only where one party's cooperation is necessary to enable the second party to perform. In those instances U.S. courts will often imply a constructive condition of cooperation into the contract. *See, e.g.*, Kehm Corp. v. United States, 93 F. Supp. 620 (Ct. Cl. 1950); R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc., 219 Va. 111, 244 S.E.2d 774 (1978).

Soviet law considers money damages received in the place of performance of an obligation as a type of performance. Thus, money damages are commonly awarded. (pp. 148, 157)

Lastly, chapter 5 succinctly and usefully sets forth the Soviet judicial and arbitration systems and their relative impact upon the settlement of contractual disputes. (pp. 165–74)

Part II of the book, which, as noted, covers contract law in the United States, is organized by chapter just as part I. In lucid prose, Professor Farnsworth succeeds in 140 pages in describing in surprising depth and breadth the history and general concepts of American contract law. Irrespective of Soviet interest in the work, Farnsworth's account of American contract law should have great utility here, whether it be for nonlegal scholars interested in understanding one of the foundational parts of our common law system or for lawyers seeking a review of the basics or a grasp of the historical roots of contract law. First-year law students should find if very useful because of its clarity and content. Needless to state, Soviet readers should find Farnsworth's work equally enlightening.

In sum, the book does an admirable job of covering the basics of the law of contract in two very different legal systems. While the reader is naturally struck by many of the differences, beginning with the definition of contract,[11] the similarities, some of which have been noted, are equally noteworthy. And it is important to remember that many of the differences, such as over the concept of consideration and the inclusion of contract as part of the broader law of obligations in Soviet law, are merely those that are present in comparing the common law to any civil law system.[12]

This is not meant to gloss over the magnitude of the differences in contract law in the two systems. Both, however, seem to serve a similar function within their vastly dissimilar economic structures: that of facilitating the necessary exchange of goods and services in society. The value of the book is in its description of just how that is done in the Soviet Union and the United States.

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11. While the term in the United States typically refers to promises to perform, in the Soviet Union contract encompasses both promises for future performances but also present performances, as for example in a cash sale for goods. (p. 6)

12. As one general example, the Soviet section of the book is almost devoid of case references; statutory authority predominates, even for seemingly minor issues. In contrast, the American portion of the book contains many case-oriented discussions, with references to statutes limited to article 2 of the Uniform Commercial Code. A similar difference in focus would occur with most civil law systems, with Scotland and South Africa perhaps the main exceptions.