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Alberto L. Zuppi

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BOOK REVIEW

THE FUTURE OF CONTRACT LAW IN LATIN AMERICA: THE PRINCIPLES OF LATIN AMERICAN CONTRACT LAW, by Rodrigo Momberg & Stefan Vogenauer (eds.), Bloomsbury, 2017, ISBN 978-1-50991-427-2, 352 pp, £81.

One of the most surprising facts when studying Latin American contract law arises from its fragmented legal history and its consequent inability to speak the same language: despite having legal codes sharing common origins, contemporary Latin American contract law has not succeeded in achieving any workable union or cross-system harmonization. All efforts—at least when compared with the European Union—have so far been unsuccessful: Andean Pact, ALADI, ALBA, and UNASUR. Even MERCOSUR, since its establishment in 1991, has failed to bring to life a related tribunal. Without a court, the projected Southern Common Market has not moved beyond platitudes and a few commercial agreements. Rodrigo Momberg and Stefan Vogenauer's edited volume proposes another attempt at analysis. A group of legal academics, with the support of the French "*Fondation pour le droit continental*" and the Chilean "*Fundación Fernando Fueyo*" (attached to the Universidad Diego Portales), joined in a private project. They were concerned with the Principles of Latin American Contract Law (PLACL)'s potential to provide—as Momberg describes in his contribution—"a source of inspiration for the reform and modernization of contract law in Latin America."[1]

The initial question that arises reading this book is whether such a well-intentioned private project still has the same degree of necessity. The problem is not a theoretical one—especially having in

1. Rodrigo Momberg, *The Process of Private Law in Latin America: An Overview*, *in* THE FUTURE OF CONTRACT LAW IN LATIN AMERICA: THE PRINCIPLES OF LATIN AMERICAN CONTRACT LAW (Rodrigo Momberg & Stefan Vogenauer eds., Bloomsbury 2017).

mind the recent reforms produced with the new Civil and Commercial Codes of Argentina and the Civil Code of Brazil, two major players in Latin America, as well as Latin American law's broad acceptance of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which has now been adopted by 19 countries in the region, leaving aside until today only Bolivia, Haiti, Nicaragua, Panama and Venezuela. Guatemala, which belonged to the same list until recently, will begin to apply for CISG in 2021. But, more important than the wide acceptance of the CISG, on February 22, 2019, during its regular session held at its headquarters in Rio de Janeiro, the Inter-American Juridical Committee (CJI) approved the final version of the *Guide on the Law Applicable to International Commercial Contracts in the Americas*.[2] The *Guide* takes into account at all times the main existing instruments on the subject of international contracts such as the EU's Rome I regulation and, in particular, the OAS' 1994 Inter-American Convention on the Law Applicable to International Contracts (the "Mexico Convention") and the Hague Conference on Private International Law's 2015 Principles on Choice of Law in International Commercial Contracts (the "Hague Principles"). The provisions of these instruments and even some comments on the Hague Principles are often copied literally in the *Guide's* text. It is exciting work, but although approved in 2019, two years after the publication of this volume, the *Guide's* antecedents go back as far as 1994 with approval of the Mexico Convention, and they were considered by the book here discussed, as a failed project. Later, Professor Vogenauer, one of the book's editors, was part of the project initiated in March 2019 by the Hague Conference on Private International Law's Council on General Affairs and Policy to submit a consolidated draft *Legal Guide to Uniform Legal Instruments in International Commercial*

2. *See* Organization of American States Inter-American Juridical Committee, *Guide on the Law Applicable to International Commercial Contracts in the Americas* (2019*), available at* https://perma.cc/349J-9Z22.

Contracts, itself a joint project of the Hague, UNCITRAL, and UNIDROIT.

In the volume's first chapter, Rodrigo Momberg begins by studying the process of harmonization of private law in Latin America. One standard structure and vocabulary is in the French *Code Civil* copied by five Latin American nations and quoted as a source by several more. The Chilean *Código Civil* prepared by the Venezuelan Andrés Bello was adopted by six other countries of this subcontinent and taken into consideration by other drafters such as the Brazilian Texeira de Freitas. Momberg finds that harmonization (unification) happened in Latin American private law through the codification of principles of private international law, first with the work of the Montevideo Conference of 1888 and the 1926 Bustamante Code, and later with the Inter-American Specialized Conferences on Private International Law (CIDIP). Beginning in 1975, seven CIDIP conferences drafted twenty conventions, three protocols, two uniform documents, and one model law. Reviewing the PLACL, Momberg, with a clear sense of reality, recognizes that acceptance of PLACL by private parties would require the concomitant consolidation of a relevant body of doctrine and case law.

Pizarro Wilson, another scholar who took an active part in the project, offers a general introduction to the PLACL. He mentions that one challenge faced by the group was determining which legal culture represents Latin America. He understands that the group moves forward with a text that "respects our traditions." However, recognizing that the law on contracts in South America varies widely, the author admits that the project's objective was to offer a model for reforms in those countries that needed it or, in the remaining jurisdictions, an inspiration for better solutions for courts. Despite such good intentions, the group engaged in conflictive discussions (such as including in the Principles the concept of *cause*) that will produce resistance from well-established legal points of view throughout the region. The PLACL did not offer a complement of existing legal instruments applied in the region like CISG, as

happened with UNIDROIT Principles, and beyond the scholarly interest in such a project, it seems that it helps more to determine where conflictive points exist, rather than offering a model or inspiration.

In chapter 3, Agustín Parise refers to the harmonization of private Law in Latin America and the emergence of third-generation codes. Parise understands that Latin American participation in a globalized economy requires new solutions and a new generation of codes that must provide a *lingua franca* for juridical relations. He explains that three generations of codes exist in Latin America: secessionists—codes adopted during the post-independence period; differentials—new codes that projected differentiation among regions; and globalists—codes looking to address the realities of new global settings. In Parise's opinion, harmonization efforts must start in areas with common ground, and from there may proceed to specialized areas of private law. Contract law could provide the first path to achieve the "typical" Latin American flavor, whatever that means. Harmonization efforts such as PLACL must aim to a degree of universality that respects particularities.

In the next chapter, Jan Peter Schmidt offers a European perspective on the PLACL against the background of Latin American legal culture. In the beginning of his contribution, Schmidt recognizes that there is no such thing as "the" Latin American private law culture. This comment is a breath of fresh air because, being Latin American, I was beginning to wonder whether I have lost something in the meantime. Schmidt subtly remarks that Latin America had been identified with the magical realism of its literature, the skill of its soccer players, and its history of military coups, but not its legal contributions. Latin American codes have been produced in imitation of the codes of the French or Romanistic legal family, and the legal order could be classified as "mixed" because of the coexistence of French, German, Spanish, Portuguese, and Italian ideas within one legal order. The frequent recourse to foreign legal sources does

not follow any clear methodological criteria. It has in fact diminished the value of domestic legislation and reveals a passion in Latin America for quoting foreign authorities. Schmidt produces an exciting and intelligent array of examples in support of these conclusions. He accepts that the PLACL might serve as a kind of "background law" which could also help to increase the visibility of Latin American jurists.

In chapter 4, Gerardo Caffera is concerned with the economic conditions of contracts in South American Law from a historical perspective. He recognizes that the PLACL's provision on the gross disparity between contractual parties does not match the recent trends in South American legal systems, which have been characterized by rampant inflation.

In the final chapter of the first part, Pilar Perales Viscasillas compares the PLACL with CISG and argues that, considering the CISG's direct application to the international sale of goods contracts, PLACL could be seen instead as a complementary rather than competing instrument. She offers a fascinating series of tables comparing both instruments; first, offering a general comparison about the origin, the scope of application and issued covered; and then a list of principles and some duties of both instruments. Finally, she compares their main differences concerning the essential elements of an offer, the offer to the public, the withdrawal, revocation, the expiration of the offer, its irrevocability, its acceptance, and a comparison between the performance and non-performance of contractual obligations. Despite the broader remedies adopted by PLACL, Perales Viscasillas finds that the principles do not provide a solution related to the interest rate in case of non-performance, a frequently debated matter under the CISG.

The second part of the volume offers a comparative analysis of the PLACL. In chapter 7, Iñigo de la Maza Gazmuri explores the PLACL's notion of contract and its essential elements. Interestingly, given a project like PLACL that looks for harmonizing principles of Latin American contract law, de la Maza Gazmuri begins pointing

out that for PLACL, according to its article 9 consent, subject matter and cause are the essential elements to form a contract. The latter is especially interesting in a project of this nature. *Cause* as a contractual element, which originated in France but was later erased in the French reform of the *Code Civil*, was nevertheless resurrected somehow in the new Argentine Civil and Commercial Code (Articles 281 to 283) on juridical acts, while Article 1013 explicitly declares under the title "Necessity": "The cause must exist in the formation of the contract and its conclusion and subsist during its execution. The lack of cause gives rise, depending on the case, to the nullity, adaptation, or termination of the contract."[3] It will be interesting to follow the Argentine jurisprudence in this sense, and if *cause* will be interpreted as "consideration." Inclusion of cause as an essential element for a contract will be protested and refused mostly in the same countries where supposedly the PLACL was trying to harmonize its rules.

Earlier, Rodrigo Momberg analyzed from a comparative perspective the rules on formation of contract contained in PLACL, and, in his second contribution (chapter 8), he again studies the concept of cause in Latin American codes, which was not included in the codes of Brazil, Paraguay, Ecuador, or Mexico. He remarks that some important issues, not usually considered in Latin American civil codes, were not considered by the PLACL. Examples include the letter of confirmation, merger clause, and standard terms, matters that have been analyzed in a substantial body of case-law issued by tribunals and arbiters dealing with CISG. Although Momberg suggests that the matter deserves further attention given that these issues commonly arise in commercial contracts, none of them is familiar in Latin America.

Next, John Cartwright analyzes the question of defects in the formation of contracts when the parties are acting under a mistake, or one of them has acted under fraud, pressure, or some other form

3. ARG. CIV. & COMM. C., Art. 1013 (2016).

of misconduct. The PLACL tries to establish a balance of protections for claimant and defendant based on a compromise with the rules contained in the different national traditions and the "soft law" systems found in Europe.

In chapter 10, Jean-Sébastien Borghetti studies performance and non-performance under the PLACL. He understands that, compared to the Napoleonic tradition embedded in many Latin American civil codes, the drafters of the PLACL chose to modernize the approach to performance and non-performance. In his opinion, the PLACL shows some interesting diversions from the *Code Civil* including, for instance, its rules on defective performance or correction of defective performance, which were overlooked in the French text but included in the CISG. Borghetti expresses surprise that the PLACL did not consider some issues of importance like the fate of the contract when a change of circumstances happens.

Sabrina Lanni also deals with the provision of non-performance in the PLACL. In chapter 11, Lanni underlines that the principle of good faith, of the kind found in several Latin American civil codes, dominates the legal content of the PLACL. The new Latin American civil codes also include references to due diligence similar to the ones incorporated into the PLACL. Lanni looks for the pattern of comparison for measuring good faith and due diligence. The PLACL avoids any reference to the standard conduct of a reasonable person.

Finally, Hugh Beale offers an outsider's response to the PLACL, asking seven questions about the PLACL's purposes, aims, guiding philosophy, and intended users. He recognizes the academic work performed by the PLACL drafters, but he also underlines that several decisions remain to be made concerning the intended purposes of the PLACL.

The book has an appendix with the PLACL text in Spanish and English, as well as a thematic index.

Alberto L. Zuppi