ASPEN CASEBOOK SERIES

CRANDALL
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Cases, Problems, and Materials on CONTRACTS

Sixth Edition

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Law & Business

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CASES, PROBLEMS, AND MATERIALS ON CONTRACTS

SIXTH EDITION

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This book is dedicated

by Thomas Crandall to
my mother, Mary Coy, 1917-2011,

and by Douglas Whaley to
Barbara K. Shipek

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INTRODUCTION TO THE STUDY OF THE LAW OF CONTRACTS

The law of contracts derives its contours from many sources. It is necessary for you, the student, to appreciate the relative weight that is given to any one source so that you can gauge its importance in deciding the issue at hand. What follows is a discussion of the hierarchy of sources of law, plus a short explanation of each.

The foundation of law in the United States is the United States Constitution. All other legal rules must be in conformity with it. Immediately under the Constitution in importance are federal statutes and treaties. No state can pass legislation or announce a rule of law in conflict with these federal enactments. For that matter, state law is also subordinate to regulations passed by the various federal agencies. The Supremacy Clause of Article VI of the Constitution states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Next in line in any given jurisdiction is the state constitution, and under it the laws passed by the state legislature. There will also be regulations passed by state regulatory agencies, and these are the next rung on the legal ladder, followed by the local ordinances passed by municipalities.

That exhausts the legislation that controls our law. Incredible as it may seem, however, that is not the end of it. In spite of all the given structure, there are still many situations unaccounted for that must be subject to rule of law. The development of these rules is left to the courts.

In countries taking their cue from Great Britain (such as the United States), one decision is precedent for subsequent ones, thus building up a

body of *common law,* judicially created and followed thereafter by later courts. This concept is called *stare decisis.* As time goes on and society changes, the precedents may lose their weight and be altered or overruled, but this is not done lightly. Our common law system has great respect for the wisdom of the past. Some of the cases you will study are quite old. One, Kingston v. Preston (see Chapter 7), was decided by Lord Mansfield, the father of commercial law, in 1773 (and we will refer to others even older).

Of course, technically the only decisions that bind a given court are those from the highest court in that particular jurisdiction. Nonetheless, particularly where the issue has never arisen in that jurisdiction (or has not arisen in modern times), courts will look to the decisions of other jurisdictions to see how the matter is being handled. When casting about for guidance, the courts will also look to the learned treatises on point as well as the sections of the so-called Restatements (about which more in a moment).

Uniform Laws. In the specialized field of contracts most (but not all) of the law is created at the state level. For many decades each state had rules both legislative and judicial that were similar but not identical. This worked fine as long as merchants stayed within state boundaries to do their trading, but commerce cannot long be so confined. As time went on and the traffic between the states increased, the need for uniform rules became apparent. Various "model" or "uniform" laws were created by different groups and were submitted to the state legislatures with the recommendation of adoption without change. Some of these proposed statutes had greater success than others. Two widely adopted statutes were the Uniform Sales Act (first proposed in 1906, passed by two-thirds of the states) and the Uniform Negotiable Instruments Law (1896, passed by all of the states).

The Uniform Commercial Code. Eventually even these statutes became outdated, and the same body that had created them, the National Conference of Commissioners on Uniform State Laws, along with the American Law Institute, decided in the 1940s to overhaul these and other related statutes and produce a comprehensive code dealing with the issues central to commercial law. The Chief Draftsman of this statute was Professor Karl N. Llewellyn of the Columbia Law School. Under his stewardship, committees of drafters produced version after version of a work that was eventually called the Uniform Commercial Code. Starting with Pennsylvania in 1953, the Uniform Commercial Code (abbreviated to UCC, or, simply, the Code) was enacted, with some modifications, in every jurisdiction in the United States (although Louisiana, with its French civil law tradition and very different laws, has enacted only parts of the UCC).

The Code, which repealed prior uniform enactments on point, is divided into distinct parts, called Articles. Article 1 is a general article, containing basic concepts (such as the requirement of good faith, see §1-203)

and definitions (see §1-201).[1] Article 1 was revised in 2001, and this new version has been adopted in more than half of the states. In it the requirement of good faith is found in §1-304, but the definitions section is still §1-201.

A major focus of this course is Article 2 of the Code. It deals with the *sale of goods. Goods* are defined in §2-105(1) as follows:

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section of goods to be severed from realty (Section 2-107).

Things in action refers to intangible property, such as insurance policies. Thus the definition of goods refers to *personal* (as opposed to *real*) property, the items that your course in Property will call *chattels.* What is excluded by the preceding definition is land or interests in land, service contracts (such as contracts with a health spa), the sale of paper rights (such as stocks or bonds), and the sale of intangibles (again, insurance). As you study this course, be sensitive to the possible application of the Uniform Commercial Code's Article 2. If a problem involves a sale of goods, then this statute applies. Application of the common law rules, to the extent they differ from the UCC, will mean that your answer is wrong unless you make it clear that you are applying Article 2 only by analogy (which is often done by the courts).

Article 2A of the Uniform Commercial Code deals with the leasing of goods. Its rules are copied from those in Article 2 on the sale of goods, so that anyone who is familiar with the provisions of Article 2 will find Article 2A reassuringly familar.

The United Nations Convention on Contracts for the International Sale of Goods. Effective January 1, 1988, the United States became bound by a new treaty: the United Nations Convention on Contracts for the International Sale of Goods (hereafter "CISG"). The Convention only covers issues of contract formation and the rights and duties of the parties thereto. It excludes coverage of products liability issues, as well as matters touching on contract validity, such as fraud, illegality, and so on. CISG's rules are divided into different sections called Articles.

1. Incidentally, the symbol "§" means "section." Two together ("§§") signify the plural: "sections." The citation "§1-201" refers you to Article 1 of the Uniform Commercial Code with the first digit, and the three numbers after the hyphen refer to the section within that Article that you should consult in your statute book. If the citation contains additional numbers or letters, such as "§2-201(3)(a)," the parenthetical items are references to subsections within the larger section. Look up §2-201(3)(a) to see what is meant by this.

Most of the major commercial powers in the world have ratified the treaty (at this writing Great Britain, Japan, Korea, and Taiwan are the biggest exceptions). CISG applies if the contracting parties are located in different countries (called "States" by the treaty) and they do not agree that the law of some particular jurisdiction applies. Article 6 clearly allows the parties to avoid the application of CISG by choosing instead to be bound by some other body of law.

Although the law reflected in CISG has some variations from the rules we will study in this book, for the most part its provisions are very similar to those of the common law and the Uniform Commercial Code. This book highlights some of the major changes.

The Restatement. Throughout this book you will also see citations to the Restatement of Contracts. The Restatement, promulgated by the American Law Institute, is one of many similar works created by experts in the various fields of law that attempts to reduce the rules of the common law to set and uniform descriptions. The Restatement of Contracts was first approved by the American Law Institute in 1932; its Chief Reporter was the leading Contracts expert of his day, Professor Samuel Williston of the Harvard Law School. It is important to understand that the Restatement is *not* a statute. It is mere advice to the courts on what the common law *should* be. Thus it is not on the same level as the Uniform Commercial Code, which is a statute and *must* be followed if relevant to the dispute. But even though the Restatement is not binding law, drafted as it was by the then leading commercial authorities, it has been very influential in shaping the development of the common law.

Like the early uniform statutes, the original Restatement became outdated as time passed, so the American Law Institute promulgated a new version in 1979: the Restatement (Second) of Contracts. The late Professor E. Allan Farnsworth of Columbia Law School was the Chief Reporter for the final version.

UNIDROIT Principles of International Commercial Contracts. The International Institute for the Unification of Private Law (UNIDROIT using the French initials) is similar to the Restatement but created by an international body of legal experts who studied all of the world's legal codes and reified them into definite rules (with comments and illustrations). International contracts often adopt its terms, and even where the contracting parties do not do so, courts faced with international contract disputes frequently look to UNIDROIT principles for guidance.

Treatises. Contract law also benefits from a number of well-written learned treatises on point. Williston wrote one in 1920 and it was very influential. Another important one was written by Professor Arthur L. Corbin of the Yale Law School, published in 1950. These two works are often cited by the courts, and we refer to them (particularly the later work by Corbin) throughout the book (and all Corbin references are to the 1952 version of his treatise). In recent years, other helpful treatises on the law of

Contracts have also appeared: J. Murray, *Murray on Contracts* (5th ed. 2011), J. Calamari and J. Perillo, *Calamari and Perillo's Hornbook on Contracts* (6th ed. 2009), and E. Farnsworth, *Farnsworth on Contracts* (4th ed. 2004). The leading treatise on the Uniform Commercial Code is J. White and R. Summers, *Uniform Commercial Code* (6th ed. 2010).

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