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Selections For Contracts

Uniform Commercial Code

Restatement Second

UN Sales Convention

UNIDROIT Principles

Forms

2001

SELECTIONS FOR CONTRACTS

UNIFORM COMMERCIAL CODE,
RESTATEMENT SECOND,
UN SALES CONVENTION, UNIDROIT
PRINCIPLES, FORMS

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SELECTIONS FOR CONTRACTS

UNIFORM COMMERCIAL CODE,
RESTATEMENT SECOND,
UN SALES CONVENTION, UNIDROIT
PRINCIPLES, FORMS

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*

UNIFORM COMMERCIAL CODE

(Articles 1 and 2)¹

COMPILERS' NOTE

The law of contracts has been much affected by the Uniform Commercial Code. Relevant parts of the Code, Article 1 (General Provisions), Article 2 (Sale of Goods), and an important section from Article 3 (Negotiable Instruments) are reproduced below, together with a few representative comments. A little background is important to an understanding of this unique piece of uniform legislation.²

History. Until the seventeenth century contracts dealing with commercial matters were governed largely by the law merchant, a specialized body of customs made and administered by merchants themselves. Thus courts of merchants decided controversies that developed—at the fairs that were the centers for much of early trade. Large bodies of mercantile practice were carried into the English common law of negotiable instruments and insurance. In substantial part this was the work of Lord Mansfield, who became Chief Justice of the King's Bench in 1756. In controversies between merchants, he made it a point to ascertain and apply the customs of the trade, sometimes using for this purpose a special merchants' jury to advise him on commercial practices. But as Professor Karl Llewellyn pointed out, it is one of the ironies of the law that mercantile custom was not fully imported into the law of sales.³ Llewellyn contended that this was an accident: the decisive sales cases did not come to Mansfield but to judges of a different bent who were content to decide mercantile disputes on the basis of concepts developed for a static land economy. At any rate, a complex body of common-law doctrine developed to govern sales of goods.

The British law of sales was reduced to statutory form in the Sale of Goods Act of 1893. The National Conference of Commissioners on Uniform State Laws entrusted to Professor Samuel Williston the task of producing a similar statute for the American states. His draft, to be known as the Uniform Sales Act, was approved by the Commissioners in 1906 and was eventually adopted by more than thirty states. However, like its British cousin, it had relatively little to do with contractual problems arising out of the sale of goods and these remained largely

1. Along with UCC 3-311.

2. The following is adapted in part from E.A. Farnsworth, J. Honnold, S. Harris, C. Mooney & C. Reitz. *Cases and Materials on Commercial Law* 3-11 (5th ed. 1993).

3. Llewellyn, *Across Sales on Horseback*, 52 Harv.L.Rev. 725 (1939).

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governed by common-law rules. During the half-century after the Uniform Sales Act, a number of proposals were made for change, and some states passed amendments to certain sections. A federal sales act was proposed in Congress in 1940, but the Commissioners succeeded in having it postponed. Work began in that year on a Uniform Revised Sales Act and in 1945 this project was expanded to concentrate upon a comprehensive Uniform Commercial Code, to replace not only the Uniform Sales Act but other uniform acts dealing with commercial matters as well. The American Law Institute joined forces with the National Conference of Commissioners in this effort, with Professor Llewellyn as Chief Reporter, and Soia Mentschikoff as Associate Chief Reporter. A final Official Draft with extensive comments was approved by the two sponsoring organizations in 1952, and was promptly enacted by Pennsylvania in April 1953, effective July 1, 1954.

In many areas the Code took an entirely new approach to problems. The most important of these for our purposes was the reduction to statutory text and inclusion of many rules of contract law relating to sale of goods that had previously been left largely to the common law. The New York Law Revision Commission began to study the Code in 1953 and, in response to criticism, the sponsors of the Code published a number of amendments in 1955. The Commission held public hearings and retained consultants to study the draft, and in February 1956, after three years, it reported to the state legislature that the Code was not satisfactory. Contemporaneous revision produced the 1956 Recommendations for the Uniform Commercial Code and these Recommendations became the 1957 Official Edition, which was published with Comments and minor revisions early in 1958.

By late 1961, thirteen states, including Pennsylvania, had adopted the 1958 Official Text of the Code, and the New York Law Revision Commission recommended its adoption in New York. It was enacted in 1962, to be effective on September 27, 1964. New York made, as had other states, a number of changes in the 1958 Official Text. In order to curb this tendency away from uniformity, a Permanent Editorial Board for the Uniform Commercial Code had been established in 1961. The Board passed upon the amendments made or proposed by each of the states and those of which it approved were incorporated in the 1962 Official Text. (It has since issued Commentaries on Code provisions that have proved troublesome.) The Code has now been adopted in all states except Louisiana, and in the District of Columbia. The Code is divided into the following substantive articles: Article 1, General Provisions; Article 2, Sales; Article 2A, Leases; Article 3, Negotiable Instruments; Article 4, Bank Deposits and Collections; Article 4A, Funds Transfers; Article 5, Letters of Credit; Article 6, Bulk Transfers⁴; Article 7, Ware-

4. The sponsors of the Code now recommend that Article 6 be repealed, and most states have repealed it.

house Receipts, Bills of Lading and Other Documents of Title; Article 8, Investment Securities; Article 9, Secured Transactions, Sales of Accounts and Chattel Paper.

Continuing Code Revision. As this list indicates, the original nine substantive articles have been significantly changed. In 1987 the sponsors of the Code promulgated a new Article 2A (Leases), and in 1990 amended it. A major purpose was to resolve “dissonances” between Article 2 (Sales) and Article 9 (Secured Transactions). The Article applies to a transaction in personal property that is a lease rather than either a sale or a security interest as such. Article 2A resembles Article 2 (Sales) in its structure and much of its text. Revisions of Articles 1 and 2 have been nearly completed as this book goes to press.

Use of the Code and Comments. The Code makes much less of an attempt than did the earlier codifications in Britain and the United States to follow existing formulations of the law. Very little of the language of the Uniform Sales Act was retained, and in some respects the Code takes a drastically new approach to the law. We shall have a chance to consider the soundness of some of the changes made by the Code.

One question in working with the Code is the extent to which recourse is to be had to prior drafts as an aid to interpretation. The 1952 edition of the Code attempted to close the door on such legislative history by providing: “Prior drafts of text and comments may not be used to ascertain legislative intent.” This language was, however, deleted from the Code.

A comparable question is the extent to which, in interpreting the Code, recourse should be had to the Comments that follow each section. A hazard for the lazy mind, and a help for the responsible lawyer, the Comments raise troublesome problems about their place in the Code system. (Because of their bulk, only a few representative Comments have been reproduced here; the Comments run several times as long as the statutory text.)

The most obvious point about the Comments is often overlooked: The text to the Code was enacted by the legislature; the Comments were not. One is tempted to ignore this point because the Comments, written in an explanatory and non-statutory style, are easier to read. *Facilis est descensus Averno*. But the tempter will whisper: The drafters wrote these Comments, didn’t they? If they say what the Code does, that’s bound to be right, isn’t it? Why bother then with this prickly statutory language?

The role of the Comments is discussed in the Comments themselves. Thus, the Comment to the Title of the Code (1962 Official Text, page 1) in part reads:

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This Comment and those which follow are the Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction these Comments set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.

This Comment does not, however, indicate to what extent the revision of the Comments was brought before the sponsoring organizations or reviewed by the drafters. Apparently this revision of the Comments was considered part of the final editorial work and entrusted to the faithful few who were carrying the Code project to its conclusion. Furthermore, in some states the revised Comments had not yet been drafted at the time of the Code's adoption. In others it is highly doubtful that the Comments were laid before the legislators in the form of a committee report explaining the legislation that the legislators were asked to adopt.

It would be very wrong, however, to conclude that the Comments are without value to lawyers and to courts. Courts have repeatedly quoted the Comments in construing the Code. Surely the Comments may be given at least as much weight as an able article or treatise construing the Code. But if the statutory provisions adopted by the legislature contradict or fail to support the Comments, the Comments must be rejected. The point is significant, for there are instances, easily understood in light of the Comments' bulk and the many successive revisions of the Code, where the Comments contradict the statute. More frequent are instances of enthusiastic discussion of significant problems on which the statute is silent. (See, e.g., the Comment to the Title quoted above.)

A word of caution is also in order concerning the "Definitional Cross References" which are contained in the Comments and which are set out in these Selections. A careful lawyer will not rely on the completeness of these references in the Comments. For a thorough job, the lawyer will check Article 1, which contains important provisions applicable to the Code as a whole; UCC 1-201 contains the definitions of many terms used throughout the Code. In addition, the lawyer will check the definitions specially applicable to the article involved; nearly every article contains a helpful section, e.g., UCC 2-103, containing an "index of definitions."

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2000 OFFICIAL TEXT¹

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ARTICLE 1. GENERAL PROVISIONS

PART 1

**SHORT TITLE, CONSTRUCTION, APPLICATION
AND SUBJECT MATTER OF THE ACT**

§ 1-101. Short Title

This Act shall be known and may be cited as Uniform Commercial Code.

§ 1-102. Purposes; Rules of Construction; Variation by Agreement

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement

determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words “unless otherwise agreed” or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires

- (a) words in the singular number include the plural, and in the plural include the singular;
- (b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

§ 1-103. Supplementary General Principles of Law Applicable

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

§ 1-104. Construction Against Implicit Repeal

This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

§ 1-105. Territorial Application of the Act; Parties' Power to Choose Applicable Law

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402 . . .

§ 1-106. Remedies to Be Liberally Administered

(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if

the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

Definitional Cross References:

“Party”. Section 1-201.

“Action”. Section 1-201.

“Remedy”. Section 1-201.

“Aggrieved party”. Section 1-201.

“Rights”. Section 1-201.

§ 1-107. Waiver or Renunciation of Claim or Right After Breach

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

Definitional Cross References:

“Signed”. Section 1-201.

“Aggrieved party”. Section 1-201.

“Written”. Section 1-201.

“Rights”. Section 1-201.

§ 1-108. Severability

If any provision or clause of this Act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Definitional Cross Reference:

“Person”. Section 1-201.

§ 1-109. Section Captions

Section captions are parts of this Act.

PART 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

§ 1-201. General Definitions

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

(1) “Action” in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

- (2) “Aggrieved party” means a party entitled to resort to a remedy.
- (3) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). (Compare “Contract”.)
- (4) “Bank” means any person engaged in the business of banking.
- (5) “Bearer” means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.
- (6) “Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. “Airbill” means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.
- (7) “Branch” includes a separately incorporated foreign branch of a bank.
- (8) “Burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.
- (9) “Buyer in ordinary course of business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
- (10) “Conspicuous”: A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is “conspicuous” if it is in larger or other contrasting type or color. But in a telegram any stated term is “conspicuous”. Whether a term or clause is “conspicuous” or not is for decision by the court.

(11) “Contract” means the total legal obligation which results from the parties’ agreement as affected by this Act and any other applicable rules of law. (Compare “Agreement”.)

(12) “Creditor” includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor’s or assignor’s estate.

(13) “Defendant” includes a person in the position of defendant in a cross-action or counterclaim.

(14) “Delivery” with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(15) “Document of title” includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee’s possession which are either identified or are fungible portions of an identified mass.

(16) “Fault” means wrongful act, omission or breach.

(17) “Fungible” with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) “Genuine” means free of forgery or counterfeiting.

(19) “Good faith” means honesty in fact in the conduct or transaction concerned.

(20) “Holder,” with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. “Holder” with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

(21) To “honor” is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) “Insolvency proceedings” includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.