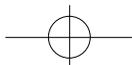
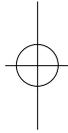
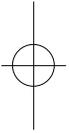
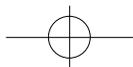
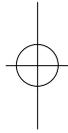
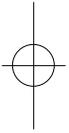




Perspectives on the Uniform Commercial Code

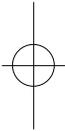




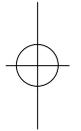
Perspectives on the Uniform Commercial Code

Douglas Litowitz

CAROLINA ACADEMIC PRESS
Durham, North Carolina



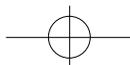
Copyright © 2001
by Douglas Litowitz
All rights reserved.



ISBN: 0-89089-630-5
LCCN: 2001089664

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America



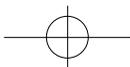
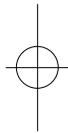
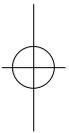
Contents

Preface	ix
Introduction for Law Students	xiii
Chapter One. Commercial Law before the Code	3
The Progressive Development of Commercial Law <i>by Charles Bane</i>	4
The Genesis of the Uniform Commercial Code <i>by William Twining</i>	13
Taking Commercial Law Seriously <i>by Dennis Patterson</i>	17
Chapter Two. Drafting the Code and Getting it Enacted	23
Legislative History of the Uniform Commercial Code <i>by Robert Braucher</i>	24
Statement to The New York Law Revision Commission <i>by Karl N. Llewellyn</i>	31
Reflections of a Drafter <i>by Soia Mentschikoff</i>	40
Chapter Three. A Look at Karl Llewellyn	49
Biography of Karl Llewellyn <i>by David Ray Papke</i>	49
In Memoriam: Karl Llewellyn <i>by Grant Gilmore</i>	53
Alcoholism and Angst in the Life and Work of Karl Llewellyn <i>by James J. Connolly, Peggy Pschirrer, and Robert Whitman</i>	57
Chapter Four. Methodology of the Code	61
The Jurisprudence of the Uniform Commercial Code <i>by Richard Danzig</i>	62
U.C.C. Methodology: Taking A Realistic Look At The Code <i>by John L. Gedid</i>	69

VI Contents

Karl Llewellyn's Fading Imprint on The Jurisprudence of the Uniform Commercial Code <i>by Gregory E. Maggs</i>	73
Chapter Five. Interpretation	79
Some Comments on The Comments to The Uniform Commercial Code <i>by Robert H. Skilton</i>	79
Brief Comments on the Comments <i>by Soia Mentschikoff</i>	85
Purposive Interpretation Of The Uniform Commercial Code <i>Julian B. McDonnell</i>	86
Chapter Six. Federalization	91
A Modest Solution? <i>by Neil B. Cohen and Barry L. Zaretsky</i>	92
Uniformity and State-by-State Enactment: Contradictions <i>by E. Hunter Taylor, Jr.</i>	98
Is There an Alternative to the Code? <i>by Fred H. Miller</i>	105
Chapter Seven. Critiques of the Code: Form and Substance	109
The Language of the Uniform Commercial Code <i>by David Mellinkoff</i>	110
The Law Wishes to Have a Formal Existence <i>by Stanley Fish</i>	115
Commercializing Marriage <i>by Martha M. Ertman</i>	120
Is the Code A-Political? Some Lessons from Buying a Klan Knife <i>by Douglas Litowitz</i>	125
Chapter Eight. Politics of the Code	131
The Principles Underlying the Drafting of the Uniform Commercial Code <i>by Homer Kripke</i>	131
Thinking like a Lawyer, Acting like a Lobbyist <i>by Edward L. Rubin</i>	138

Interest Group Politics, Federalism, and the Uniform Laws Process <i>by Kathleen Patchel</i>	146
Chapter Nine. Commercial Law and Literature	153
On Rigor in Science <i>by Jorge Luis Borges</i>	153
Eating Out <i>by Irvine Welsh</i>	154
The Company <i>by Thomas Wolfe</i>	157
The Negotiable Cow <i>by Sir Alan Herbert</i>	166
Depositing The Junk Mail Check <i>by Patrick Combs</i>	170
Chapter Ten. Concluding Assessment of the Code	175
Student Responses to the Question “What is Your Opinion of the UCC?”	176
Assessment of the Uniform Commercial Code <i>by Grant Gilmore</i>	178
Uniform Commercial Code Romanticism (and Realism) <i>by James White and Robert Summers</i>	180
Index	183



Preface

This book is a supplemental teaching tool for courses on the Uniform Commercial Code (the “Code”). The readings in this book refute the widely held belief that commercial law is boring and mechanical.

This book is also a reaction to the traditional method of teaching commercial law. Virtually without exception, professors of commercial law eschew outside readings that might raise broader ethical and conceptual questions about the Code. Instead, they require students to purchase only a casebook and a statutory supplement. Class sessions are typically devoted solely to mastering and applying various provisions of the Code, with no attention paid to the history and controversies that surrounded the Code and its enactment, amendment, and enforcement. The results have been predictable: students treat the Code precisely as they find it presented in the classroom—a static and apolitical monolith that is not worthy of outside discussion. And so we find that our students typically emerge from courses in commercial law with a grudging respect for the Code but with little understanding of its place within the larger framework of American law. The readings in this book should provide a broader and more humanistic backdrop for the Code, allowing students to see that commercial law (just like constitutional law and administrative law) raises important moral and political questions of its own. At the very least, students will understand that the Code is an ongoing construction that mediates between competing social, political, and economic interests.

The readings in this book are deliberately short, in part to match the attention span of a typical (that is, busy) law student. The original texts have been edited mercilessly to focus attention on one or two key issues at the expense of all the other issues raised by the authors, so readers are encouraged to consult the full articles for a more complete treatment. In choosing the selections for this book, I have drawn heavily from classic texts on the Code, supplementing these readings with a few cutting-edge selections. In addition to editing for content, I have omitted footnotes to provide for greater readability,

x Preface

and I have included only a single discussion question following each reading.

This book can be integrated into the standard commercial law course without much difficulty. I suggest that professors assign the Introduction and the first two chapters as background reading prior to the first day of class, to give students a conceptual and historical overview of the Code. Once the course has begun, I suggest that every other class period, one or more students should be assigned to present a selection to the class, capping the presentation by answering the discussion question following the selection. A ten-minute session during alternating class periods will likely suffice to instill a more comprehensive understanding of the Code without making the book seem an intrusion into traditional Code pedagogy. Additionally, this book can be used as a device for assigning extra credit to students who take the time to prepare short opinion pieces assessing the selections.

Karl Llewellyn, the principal architect of the Code, once wrote that the Code stood a good chance of adoption by the several states because its subject matter (namely, transactions involving personal property and payments) was “very largely non-political in character.” This claim was untrue when it was made, and has become even less credible over time, especially in an intellectual climate where legal scholars rightfully view every area of law as an inherently contested and political arena for engaging in social construction. To the extent that law shapes social ontology and constrains legal actors by allocating benefits and burdens, every arrangement of law is an active *choice* among many possible worlds, each with its own moral, political, and economic landscape. The same is true for the Code—it does not merely hover above a pre-existing world of commercial practices, but represents a commitment to bring a particular commercial world into existence. As the default architecture for commercial practices, the Code is infinitely contestable and subject to constant adjustment. Yet despite its dynamic character, the Code often appears to students as a closed text that could not assume any other form. Therefore, we need to guard against reifying the Code as a final, totalizing document, and instead see it as a social construction that can be *deconstructed* in the interests of justice. This book is intended as an initial step toward creating a generation of law students who are not content with merely mastering the Code, but who are capable of thinking critically about it.

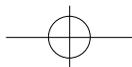
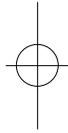
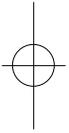
* * *

All of my work, including this project, draws upon the strength and encouragement of my parents Bonnie and Norman Litowitz, and my brothers Alec and Malcolm. Through countless discussions spanning a series of difficult years, they redirected my negative energy into positive channels and encouraged the pursuit of my intellectual vision, despite an interminable parade of relocations, disappointments, and institutional absurdities. Unfortunately, there was one member of my family who did not live to see the completion of this project, and that was my grandmother Betty Litowitz, with whom I lived while assembling the book. A complicated woman who was by turns maddening and hilarious, she will forever live inside of me. This book is dedicated to her, and also to the memory of Dr. Ralph Leischner, the father of my sister-in-law Jennifer and a pillar of our extended family. He will be missed by more people in more ways than it would be possible to mention.

Finally, thanks to the lovely Vicki Chen of Savannah, Georgia, for designing the original book cover.

Douglas Litowitz

Jacksonville, FL
December 2000



Introduction for Law Students

You are probably reading this book because you are a law student who is taking a course on the Uniform Commercial Code (the “Code”). If so, this will be one of three books assigned by your professor—the other two books are a casebook and a statutory supplement. The casebook will introduce you to various provisions of the Code and it will supply hypothetical problems that you will attempt to solve using the Code. The statutory supplement contains the full text of the Code and related statutes. The purpose of the book that you are holding is to give you a broader understanding of the history, evolution, and overall philosophy of the Code. Toward that end, this Introduction will get you started with a very brief guide to the Code, a picture that will become clearer throughout the semester.

Let’s start with each of the words in the phrase *Uniform Commercial Code*. The word *Uniform* signifies that the Code is a model law that was drafted by experts who sought to have the same set of provisions adopted in every state. Similar uniform acts would include the Uniform Probate Code and the Uniform Partnership Act. Like all uniform statutes, the version of the Code in your statutory supplement is not “the law” unless and until it gets enacted by a state legislature. Luckily, most states have enacted the entire model version of the Code without shocking alterations, so in large measure the Code lives up to the word *Uniform*: a given Code section is likely to be the same in Illinois, Florida, Texas, Kansas, etc. You should be aware, however, that some states made significant non-uniform changes to the Code before enacting it into law, a process that is discouraged because it destroys uniformity of the Code from state-to-state. It would perhaps be more accurate for law students to study the specific version of the Code that was enacted in the state where they intend to practice law, but since law professors have no way of knowing where students will end up, the safest tactic is to teach the model version of the Code, and to let students pick up the idiosyncratic state deviations when they begin practicing law. So when your professor refers to the Uniform Commercial Code, you may assume that she is referencing the model statute contained in your statutory

XIV Introduction

supplement, which may differ slightly from the version enacted in your state.

The word *Commercial* designates that the subject matter of the Code is commercial transactions, namely transactions dealing with personal (moveable) property and payments. Such transactions include the sale, lease, consignment, transport, storage, and granting of security interests in goods as collateral, as well as payments in the form of promissory notes, checks, and wire transfers (plus investment securities as well). In terms of the persons brought within the Code, you should know that the Code covers transactions by businesses and individuals alike, from gigantic department stores and national banks all the way down to door-to-door sales and rental car leases. In fact, the Code covers many transactions that affect your life on a daily basis, including the products and food that you buy, the car that you lease, the furniture that you buy on credit, the checks that you write, and the promissory note which you signed for your student loan, just to name a few transactions.

The word *Code* designates that the Code is a unified and coherent statute which was intended to cover the entire field of commercial law. Remember that a *code* is different from a *statute* in much the same way that a pair of pants is different from a patch sewn over one of the knees: while both are legislative enactments, a *code* is an internally consistent series of provisions that creates a total framework for an area of law, while a *statute* merely regulates one aspect of an area that is already governed by common law. The Code is not a piecemeal statute that remedies a problem area within the general law of contracts (for example, many states have special laws regulating the sale of health club memberships, thereby supplementing the general law of contracts that would otherwise govern such transactions). Instead of merely supplementing the law of contracts, the Code covers the entire area of commercial law, from the formation of a contract to remedies for breach. When a dispute breaks out over a commercial transaction, the Code is the first place to check, and the common law of contracts will be relevant only if the Code permits us to consult it. Naturally, courts have interpreted the Code in various ways, and therefore it is necessary for lawyers to consult not only the Code but also the case law decided under it. Still, there is significance in the fact that the Code takes the form of a unified *code* and not merely a *statute*: it means that you will be spending lots of time moving from one Code provision to another, and spending less time on case decisions.

Now that you understand the term *Uniform Commercial Code*, you will need to understand the Code's place within the framework of American legal history. Simply put, the Code project was the most ambitious attempt at codification in American legal history: It began in the early 1940s and led to a final draft of the Code in the early 1950s, although the Code was not widely enacted until the 1960s. The Code project was a joint effort by two organizations that had long been trying to clarify and unify American law: the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). Prior to the Code project, the NCCUSL had produced a series of uniform acts, and the ALI had produced the *Restatements*. To this day, both organizations remain actively involved with the Code.

The Code project began as an attempt to put in one place all of the relevant laws concerning commercial transactions and payments. To understand why this was thought to be a pressing need, remember that American law followed the common law tradition inherited from England, where precedent-setting decisions are built up like grains of sand until they form a coherent body of law. By the latter half of the Nineteenth Century, commercial law was largely non-statutory and developing piecemeal from state to state. This arrangement proved deeply problematic for business enterprises (banks, corporations, finance companies, manufacturers) because it created a patchwork quilt of unstable law. For example, a national bank might use a standard-form promissory note that was enforceable in one state but unenforceable in the neighboring state. This would require the bank to wade through the law of each state and adjust its standard-forms accordingly, thereby raising legal costs that were passed onto customers. So there were two key problems that the drafters of the Code wanted to fix. First, the law of commercial transactions was an uncertain mixture of case decisions and occasional statutes, and second, commercial law was not uniform from state to state. On a more abstract level, there was a growing concern that the increasingly fast-paced world of commercial transactions in America could no longer be governed by the old English rules of contract law, with its rigid requirements of offer/acceptance, consideration, writing requirements, the 'mailbox rule,' and so forth.

For a long time, the solution was thought to lie in convincing each state to adopt a predetermined package of uniform laws covering the same subareas within commercial law—one statute for sales, one for

xvi Introduction

negotiable instruments, and so forth. This was the approach that the NCCUSL took during the late Nineteenth Century and early Twentieth Century, as it churned out a series of uniform laws with the hope that the same package of laws would be adopted by all of the states, creating *de facto* uniformity. This plan didn't work. Not all states adopted the same uniform laws, and many did so with changes, creating another patchwork of inconsistent laws from state to state. Another possible solution explored at this time was the enactment of federal law governing commercial transactions, which would ensure uniformity by virtue of federal supremacy over state law. For reasons that will become clear in the following chapter, this solution failed as well. So as late as the 1940s, the law of commercial transactions was piecemeal, fragmentary, and non-uniform among the states. This didn't stop commercial transactions from taking place, but business persons were rightfully skittish since the law was inconsistent across state lines, and it still reflected common law principles of contract law that were increasingly outdated.

Ultimately the Code was hit upon as the solution—a gigantic uniform law encompassing and supplanting all of the prior uniform laws, to be adopted whole cloth by each state, thereby ensuring the two magic ingredients sought by business enterprises, namely a modern statement of the law in statutory format, plus uniformity among jurisdictions. The idea behind the Code was to put in one location all of the laws relevant to a commercial transaction, thereby condensing, simplifying, and modernizing the entire area of law. A major impetus was to create a legal framework that could evolve to reflect changing commercial practices in the marketplace instead of conforming to the strictures and formalities of black-letter contract law. After reading the selections in this book, you will be able to judge for yourself whether the Code project has been a success.

You should now open your statutory supplement and spend about two minutes skimming the very short “General Comment” preceding the text of the Uniform Commercial Code. This General Comment was written by the NCCUSL and the ALI, the two groups that sponsored the Code project and which remain responsible for it. The General Comment briefly explains the reasons why the Code was created and it lists the uniform acts which the Code was intended to replace (it also lists most of the key players involved in the financing and drafting of the Code). After reading the General Comment, you should spend a few minutes leafing through the text of the Code so

that it becomes less mysterious. To get a feel for how the Code works, I suggest that you turn to section 2-202 (the parole evidence rule for contracts involving the sale of goods) and compare this version of the parole evidence rule with the version that you learned in your first-year Contracts course.

Now turn to the table of contents in your statutory supplement. You will notice that the Uniform Commercial Code consists of a series of Articles dealing with different areas of commercial law; together the Articles take up approximately the first half of the statutory supplement. The subsequent one-quarter of the statutory supplement consists of prior versions and proposed amendments of various Articles; these are included to show you how the Code has been amended in the past and how it will likely be amended in the future. You should know that each time the model version of the Code is amended by the NCCUSL and the ALI, the amendments are then brought up for adoption in each state legislature.

If you glance at the remaining material in your statutory supplement, you will see a long list of uniform acts, federal laws, and federal regulations. These have all been included because the Code is not capable of standing on its own as the single source for all laws governing commercial transactions. Take a brief look at these supplemental materials and you will notice a series of uniform state laws that have been enacted by various states to complement or modify the provisions of the Code (for example, your statutory supplement probably contains the Uniform Consumer Credit Code, which has been enacted in a small number of states to provide greater consumer protection than the Code). Apart from these uniform state laws, you will see a long list of federal statutes and regulations that apply to commercial transactions. These statutes represent an attempt by the federal government to preempt inconsistent Code provisions (which are state law) by virtue of the supremacy clause of the Constitution. For example, your supplement will contain the Magnuson-Moss Warranty Act, a federal law that is more strict than the Code on the labeling of warranties. All of this material is supplemental to the Code but it is nevertheless important because it demonstrates that the Code is not the sole source of law for commercial transactions, which means that the diligent lawyer must also consult outside statutes at the state and federal levels. Rest assured that your course will focus primarily upon the text of the Code itself, passing to supplemental materials only when you are discussing Code provisions that have been affected by outside laws.

xviii Introduction

You are now ready to begin your journey into the Code. Let me remind you that many (perhaps most) lawyers see the Code as a blunt instrument to be mechanically applied to conflicts that arise in commercial settings. Such people can become quite adept at making their way through the Code, just as a builder can become adept with a hammer yet have no appreciation for architecture. But without a deeper comprehension of the philosophy, structure, and methodology of the Code, such people are not capable of formulating policy arguments and interpretations that pass beyond mere ‘Code-crunching.’ The first step toward getting a deeper understanding of the Code is to place it in historical perspective, which is the topic of Chapter One.