FOUNDATIONS OF COMMERCIAL LAW

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PREFACE

When we were invited to prepare this reader on commercial law, we thought about its appropriate scope, and its place among other readers in this series. The most straightforward approach is to follow the definition of commercial law that is adopted in most law school curricula, which reflects the Articles of the Uniform Commercial Code. This scope, however, falls somewhat short of being coherent in functional terms. It is underinclusive because commercial enterprises enter into a much wider range of contracts. It also seems overly broad because parts of the UCC (particularly, secured transactions and guaranties) address core features of business finance and the capital structure of corporations.

We chose nevertheless to stick with the conventional understanding of commercial law and embraced the opportunity to present this field as an informative arena for applying and testing scholarly theories of contract and of contract law. We have used this approach on several occasions in the past, teaching upper-year, law school seminars in the theory and practice of commercial transactions. Our goal in these seminars, and now in this reader, is to examine a selection of foundational contributions to commercial law scholarship and invite readers to consider whether these articles offer insights into the contracting patterns and issues of the real world. We prepared this book as a text for an advanced contracts or commercial law seminar, or a companion to a course in commercial law. In light of the book's application of contract theory, it may also be assigned in an undergraduate or graduate law-and-economics course.

We examine four bodies of law in the UCC: sale of goods, payments, letters of credit and suretyship, and secured transactions. Sale of goods law is the most similar to mainstream contract law and should be familiar to students who are taking or have taken the basic contracts course. Indeed, a comparison of the legislative provisions governing sales and the common law governing service contracts can offer insights into institutional competence and biases in law making.

Transactions involving security interests and/or guaranties (or sureties) are more closely allied with finance. Although consumer finance is an important topic, we focus on the core question of how to employ these transactions to minimize the cost of financing a business enterprise. This has been a very active area for investigation by both financial economists and lawyers, and we have reproduced many of the important insights. Payments law, in contrast, attracts very little attention in law school curricula and scholarship. Yet, we are in a period of rapid

technological change, toward paperless payment instruments such as debit and stored value cards, and forms of e-cash. This raises the question of whether the framework in Articles 3 and 4 continue to be useful in designing the regulation of the newer mechanisms.

Our perspective in this book might be characterized as predominantly economic, but we emphasize its applied approach. An important feature of this approach is to appreciate the interconnectedness of contracts and of contract law. Clients ask lawyers to draft their contracts at least partly because lawyers know the governing law: particularly, the terms that courts are not willing to enforce and the terms that the courts will add to an incomplete contract. Lawmakers, in turn, are guided by the needs of transacting parties and they should be informed as to contracting patterns. Although this reader focuses on commercial law, it repeatedly asks whether the law, and the scholarly commentary, fully appreciates the realities of commercial practice. In our seminars, we ask students to look at actual commercial contracts, now available in electronic databases such as *cori.missouri.edu* and *onecle.com*.

Throughout this reader, we urge the student also to consider the institutional structure of commercial law making, beginning with an introduction to these factors in Chapter 2.3. In our legal system, law is made by courts, legislatures and regulators. Given the significant differences in their information and biases, readers might speculate about the different rules that would emerge from each of these institutions to address any given legal issue. This analysis becomes even more interesting and complicated when one allows for a choice of processes within each institution: such as the legislative drafting process of the NCCUSL and the ALI.

We thank our series editor, Roberta Romano, for her helpful comments on an earlier draft. We also benefitted from the reactions and comments of students in a number of seminars in commercial transactions that we have taught at Columbia, Harvard, Miami and Virginia. We thank George Pence for his research assistance. We have made every effort to keep the excerpts from selected articles brief, while distilling in a comprehensible form the important insights from each. We indicate deletions from the original texts by ellipses, but have deleted footnotes and subheadings without indication.

Robert E. Scott

George G. Triantis

October 2009

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