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BOOK REVIEW

ADDING COMMERCIAL FUNDAMENTALS, TERMS AND TRANSACTIONS TO CONTRACT AND COMMERCIAL LAW

HAROLD R. WEINBERG†

FUNDAMENTALS OF COMMERCIAL ACTIVITY: A LAWYER'S GUIDE. By John F. Dolan. Boston, Massachusetts: Little, Brown and Company, 1991. Pp. xxxvi, 789. \$95.00.

UNIFORM COMMERCIAL CODE: TERMS AND TRANSACTIONS IN COMMERCIAL LAW. By John F. Dolan. Boston, Massachusetts: Little, Brown and Company, 1991. Pp. xxiv, 542. \$18.95.

Some students come to law school knowing little more about the world of commerce than Kenny Lee Puckett:

I mean, all I know about the real world—or what you call your commerce—is that some guys sell little ones, some guys sell big ones, some of it comes in on trains and some of it goes out on barges, a guy named Irving is locked up in a closet somewhere to figure it all out, most of it adds up to an argument in a courtroom¹

Others arrive with business degrees or substantial practical experience in business or banking. All law students, however, regardless of their background, need to have a solid foundation in commercial context and to understand its importance to contract and commercial law.

Contract or commercial law teachers such as myself employ a variety of means to convey an appreciation of commercial context. For example, students are taught the significance of trade usage or course of dealing to the content or interpretation of agreements.² Commercially published teaching materials employed by many of

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1. D. JENKINS, *DEAD SOLID PERFECT 10* (1974).

2. *See, e.g.*, U.C.C. §§ 1-201(3), 1-205(1) & (2), 2-202. Citations are to the 1989 Official Text of the Uniform Commercial Code.

us include descriptions of markets, business, or banking practices and contain sample commercial documents such as security agreements, checks, promissory notes, and bills of lading.³ These materials typically also note that Karl Llewellyn, Chief Reporter for the Uniform Commercial Code ("Code" or "U.C.C."), insisted that the Code be drafted in light of the everyday happenings in the market place.⁴ Instructors frequently inform their students that one attribute of the lawyer who practices commercial law poorly is a lack of knowledge of general commercial background concerning a client's market or internal business practices or affairs.⁵ Attorneys may reasonably be expected to give nonlegal advice concerning the structuring of commercial transactions when counseling clients or negotiating agreements.⁶

While these or similar means of teaching commercial context and its importance to contract or commercial law are probably indispensable components of the law school curriculum, they may be insufficient to raise the commercial consciousness of many law students. New law graduates, having learned more about the real world of commerce than Kenny Lee Puckett, often do not know enough about it when they seek their first professional employment. I find evidence of this in bluebooks and in conversations with former students. One recently told me that, despite what she believed was an excellent U.C.C. course in which she received an "A" grade, she did not really appreciate secured financing until she purchased a dining room suite on credit. I take some solace

3. See, e.g., J. EDDY & P. WINSHIP, *COMMERCIAL TRANSACTIONS: TEXT, CASES, AND PROBLEMS* 113-17, 546-47, 732 (1985).

4. See D. EPSTEIN, J. MARTIN, W. HENNING, & S. NICKLES, *BASIC UNIFORM COMMERCIAL CODE: TEACHING MATERIALS* 1-5 (3d ed. 1988). For a more recent advocacy of the importance of a practical understanding of business or financing realities to the understanding of commercial law, see Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929, 984 (1985).

5. R. SPEIDEL, R. SUMMERS, & J. WHITE, *COMMERCIAL AND CONSUMER LAW: TEACHING MATERIALS* 25-26 (3d ed. 1981). The authors did not profile the poor commercial lawyer in their current edition, but I doubt that they have changed their opinion concerning his or her attributes. See *id.* at 25-26 (4th ed. 1987).

6. See generally D. BINDER, P. BERGMAN, & S. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 201-03, 320-22 (1991). The authors state that while there is no duty to provide nonlegal advice, a lawyer need not confine him or herself to purely legal considerations. See *id.* at 202 n.19. When counseling commercial clients, it may not be easy to define the line between legal and nonlegal considerations.

in the fact that she did not buy the furniture until after she became associated with the firm in which she, in due course, became a partner. At least I did no irreparable damage to her career.

Most contracts or commercial law teachers cannot require students to purchase furniture or experience other real life transactions in order to more fully appreciate commercial context. Neither field trips to observe commercial creatures such as lenders, buyers or bailors in their natural habitats, nor bringing live specimens of these beasties to the classroom, are efficient teaching methods.⁷

Thanks to John Dolan, however, attorneys in need of additional grounding in commercial context can purchase a treatise intended "to provide sufficient introduction to commercial activity for the practicing lawyer to be able to use the [U.C.C.]."⁸ Also thanks to Professor Dolan, law students now have the opportunity to study a supplemental text intended "to provide sufficient introduction to commercial activity to enable students taking law school courses in commercial law or contracts to study the Uniform Commercial Code efficiently . . ."⁹ Each work meets its stated goals admirably, something which will come as no surprise to anyone familiar with Professor Dolan's previous books and law review articles.¹⁰ The supplemental text is an adaptation of the treatise, and my comments in this review are relevant to both

7. There are many reasons for this, some of which I have learned through experience. The commercial landscape is so lush and complex that multiple field trips would be necessary to view and understand representative creatures and their transactions. The prospect of groups of law students traipsing through their lairs may be more than enough to scare commercial creatures who, unlike animals in a zoo, control access to their habitats. A program of bringing commercial creatures into the classroom is more manageable. The beasties, however, sometimes prove unable to convey their experiences to law students, and often are not fully aware of the dimensions of their activities most relevant to the curriculum. Even a limited program of "visits from the commercial wilds" is very time consuming, and class time is always at a premium.

8. J. DOLAN, *FUNDAMENTALS OF COMMERCIAL ACTIVITY: A LAWYER'S GUIDE* xxxi (1991) [hereinafter *FUNDAMENTALS*].

9. J. DOLAN, *UNIFORM COMMERCIAL CODE: TERMS AND TRANSACTIONS IN COMMERCIAL LAW* xxi (1991) [hereinafter *TERMS AND TRANSACTIONS*].

10. J. DOLAN, *THE LAW OF LETTERS OF CREDIT: COMMERCIAL AND STANDBY CREDITS* (2d ed. 1991); S. NICKLES, J. MATHESON, & J. DOLAN, *MATERIALS FOR UNDERSTANDING CREDIT AND PAYMENT SYSTEMS* (1987). Articles include Dolan, *The Merchant Class of Article 2: Farmers, Doctors, & Others*, 1977 WASH. U.L.Q. 1.

works.¹¹ I will refer to both works collectively as the "book."

The book encompasses commercial context for a multitude of transactions to which the U.C.C. may have no, some, or much relevance. For example, in addition to its extensive coverage of important transactions firmly within the scope of the U.C.C., such as sales of goods or personal property secured transactions,¹² the book also contains material about franchising, licensing, and construction contracts, to which the Code is much less relevant.¹³ Thus, the book is useful for attorneys in many types of practices and for those teaching commercial context in many parts of the law school curriculum, including courses in contracts, commercial law, consumer credit, construction law, international business transactions, and so forth. In law school, the book might also provide useful commercial background in "preventative law" courses designed to train students in the planning, counseling, drafting and negotiating functions of attorneys.¹⁴

The book contains four parts: Sales, secured lending, payment systems, and transport and storage. Within each part are multiple chapters discussing particular commercial patterns and practices.¹⁵ For example, the secured financing part includes chapters on the

11. Some differences between the two works include the following. *FUNDAMENTALS* is longer and costs more than *TERMS AND TRANSACTIONS*. The former comes in hard cover with provision for a pocket part while the latter is soft cover. As the difference in length suggests, the two works differ in their respective coverage. For example, *FUNDAMENTALS'* textual discussion of sales by commercial letter of credit is more comprehensive than the discussion of the same topic in *TERMS AND TRANSACTIONS*. Another substantive difference is in the specimen documents. For example, the former work contains a trademark license, a trade secret agreement, and a nondisclosure agreement not contained in the latter.

12. See U.C.C. §§ 2-102, 9-102 (1989).

13. *But see, e.g., id.* § 9-313(1)(c) & (6).

14. See generally L. BROWN & E. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* (1977).

15. *Part I* on sales covers consumer sales, open account sales, sales by documentary draft, sales by commercial letter of credit, consignments and the like, distribution agreements, bulk sales, leasing, and construction contracts. *Part II* on secured lending covers the basic loan agreement and the working capital concept, the financing seller, pledges, financing accounts, inventory lending, chattel paper financing, equipment financing, financing imports and exports, banker's acceptances, and financing the farmer. *Part III* on payment systems covers check and draft collections, wholesale electronic funds transfer, retail electronic funds transfer, collection of international payments, giro accounts, and credit cards. *Part IV* on transport and storage covers documents of title, use of the warehouse receipt and the delivery order, domestic transport, and international shipping.

financing seller, pledges, inventory financing, and so forth.¹⁶ Initially, the chapters provide the reader with a textual and diagrammed "macro" view of a particular commercial pattern. This general discussion describes the actors, the risks, or other motivating factors that shape the transaction, and the purpose of the various documents employed in formalizing their relationships.

This "macro" view is followed by specimen legal documents that provide a "micro" view of the same type of commercial transaction. For example, the initial chapters on secured lending describe the psychology and sociology of loan officers,¹⁷ the functions of collateral,¹⁸ the need for policing the collateral,¹⁹ and the concept of working capital loans.²⁰ These chapters also describe the roles of loan agreements,²¹ promissory notes,²² security agreements and financing statements,²³ and include examples of each of these documents.²⁴

Professor Dolan's approach is highly effective and well executed. The text is clear and concise, and the diagrams enhance understanding. The book is well organized, with careful cross-referencing clearly guiding the reader from one chapter of the book to related material in another. The specimen documents are good examples of typical transaction documentation. They include a vastly more diverse and extensive array of commercial documentation than is provided by any set of contracts or commercial law teaching materials of which I am aware. For example, one can find a contract for the sale of grain and beans,²⁵ an inspection certificate employed in a documentary draft transaction,²⁶ a certificate of insurance employed in a sale by commercial letter of

16. *See supra* note 15.

17. *FUNDAMENTALS* at 265-66.

18. *Id.* at 266-67.

19. *Id.* at 277-78.

20. *Id.* at 274-75.

21. *Id.* at 272-74.

22. *Id.* at 272-73.

23. *Id.* at 275-77.

24. Professor Dolan takes pains to point out that neither *FUNDAMENTALS* nor *TERMS AND TRANSACTION* are form books. *FUNDAMENTALS* at xxxiii; *TERMS AND TRANSACTIONS* at xxii. This is true in the sense that neither book attempts to provide a set of forms such as multiple variations of the sales agreement with an accompanying checklist. Nonetheless, Professor Dolan's specimens may provide a good starting point for some draftspersons.

25. *FUNDAMENTALS* at 31.

26. *Id.* at 51.

credit,²⁷ a stock power,²⁸ a Commodity Credit Corporation commodity certificate,²⁹ an automated teller machine agreement,³⁰ and a bank GIRO push order.³¹ The roles of all these documents are explained in the book's text.

The text, diagrams, and specimen documents are woven together in such a way that the reader can readily understand the commercial or banking dimensions of the underlying transaction and move from this understanding to an appreciation of the relevant contract or commercial law. The only fault in Professor Dolan's approach is that some of the specimens are difficult to read, a result of reproducing actual documents in reduced size. This may be troublesome to some practitioners who would like to use the specimens as forms.³² From a teaching standpoint, however, this inconvenience is offset by the verisimilitude gained by showing real documents used in the commercial world.

Further reality for law students comes from Professor Dolan's recognition that even carefully planned commercial transactions do not always go according to legal Hoyle (e.g., when a seller ships goods before seeing the letter of credit serving the transaction), and that the contents of carefully-drafted formal documents may be unimportant to the parties until one of them wants to escape from the deal.³³ The book offers important realism in other regards. For example, it describes the importance of the loan agreement as an independent document separate from the security agreement, financing statement, and promissory note on which students ordinarily focus in courses concerning U.C.C. Article Nine.³⁴

The book does not contain a great deal of legal explication in the manner of a treatise and only sometimes tips the reader off to the law relevant to the commercial or banking transaction under discussion. For example, the discussion of consumer sales³⁵ mentions state retail installment sales acts,³⁶ and the related specimen

27. *Id.* at 88.

28. *Id.* at 316.

29. *Id.* at 548.

30. *Id.* at 567.

31. *Id.* at 597.

32. *See supra* note 24.

33. FUNDAMENTALS at 26, 62.

34. *Id.* at 272.

35. *Id.* at 7.

36. State retail installment sales acts typically apply to contracts between credit sellers of goods and consumer buyers. *See generally* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 91 (1965).

documents³⁷ include places for the required truth in lending disclosures.³⁸ Thus, the reader becomes aware of these enactments. The legal references given, however, are generally brief and are not comprehensive. The chapter on financing farmers points out that there is federal law relevant to the protection of buyers of farm products in the ordinary course,³⁹ but does not cite or mention the federal law by name.⁴⁰

Users of the book need to be aware that its legal references do not purport to be comprehensive.⁴¹ More extensive legal referencing would certainly not have hurt the book, but the referencing provided is sufficient to meet its stated purpose of introducing commercial activity.⁴² There are plenty of good sources dealing with the law of contracts, the U.C.C., and so forth. Law students can learn of them, and practitioners should know of them, or at least know how to find out about them.

One of the book's most interesting aspects is the glossary contained at the end of each of its four parts. The glossaries are not limited to terms used in the book's text such as "consumer," "contract," or "collateral." They reach far and wide to define terms that may not be carefully defined when employed in legal texts, law school classes, or teaching materials.⁴³ Some of the terms are important in the economic analysis of law: "Opportunity cost," "moral hazard," and "elasticity" are examples. Others, such as "nemo dat rule," "death of contract," and "market overt" have historical or contemporary significance to more traditional legal reasoning. The glossaries also include terms with specialized commercial meanings, such as "disponent owner," "FPA," and "nostro account." These glossaries, written in essay form, are valuable enough in their own right to be published separately under the title "A Guide to Terms and Expressions Law Professors Use But Seldom Fully Explain."

37. FUNDAMENTALS at 14.

38. See Consumer Credit Protection Act, 15 U.S.C. §§ 1631-1632 (1988).

39. FUNDAMENTALS at 428.

40. It is the Food Security Act. See Food Security Act of 1985 § 1324, 7 U.S.C. § 1631 (1988). The relevant Code provision, U.C.C. § 9-307(1) (1989), is also not cited.

41. Professor Dolan points this out in FUNDAMENTALS at xxxiv. Both FUNDAMENTALS and TERMS AND TRANSACTIONS contain limited bibliographic references to legal treatises or other legal sources.

42. See *supra* notes 8-9 and accompanying text.

43. If you are not familiar with the following examples, you need a copy of TERMS AND TRANSACTIONS OR FUNDAMENTALS.

Each part of the book also includes a bibliography that contains legal sources⁴⁴ as well as books on a range of other topics, such as commercial practices and institutions, law and economics, and legal history. This diversity is a function of the far-ranging nature of the book and its glossaries. The book ends with an extensive index that was helpful when I tried a few "test cases."

The book's wide scope is the most probable explanation for one shortcoming. To meet its stated goals, the book had to cover many forms of commercial activity, and the transactions discussed are governed by many areas of substantive law. There is sometimes an uncertain feel to the book's discussion of that law that can bear significantly on the activity, but which is "noncommercial" in the sense that, traditionally, it is not taught in contracts or commercial law courses.

One of the book's references to antitrust law may serve as an example. The book states that "[s]ince licenses are, by their nature, anticompetitive, they sometimes run afoul of antitrust laws or other regulatory laws or rules."⁴⁵ In fact, licenses are not inherently anticompetitive in any meaningful legal sense. Many offer benefits to both the licensor and the licensee as well as to society in general.⁴⁶ The problem may lie in the book's use of a brief statement to describe what is actually a complex issue. It might be better to merely alert the reader to the existence of the non-commercial law, or to say nothing about it at all.

Professor Dolan's book is an important achievement that fills what has been a significant void in the literature relevant to contract and commercial law. I can easily imagine a perplexed new associate (Kenny Lee Puckett, *cum J.D.*?) consulting this book the first time a partner or client mentions, say, "forfeiting" or a "nostro account." I know the book will also be beneficial to law

44. See *supra* note 41 and accompanying text.

45. FUNDAMENTALS at 112-13.

46. Licenses may restrain trade like any other form of agreement because they place limits on the freedom of the parties. For example, a licensor under an exclusive license is legally constrained from licensing the identical subject matter a second time. Obviously, this general form of restraint without more is insufficient to establish a violation of the antitrust laws. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 165 (1977). Restrictive terms in licenses of intellectual property, such as trade secrets or patents, may be reasonable under the antitrust laws. See *Charles R. Christianson & Int'l Trade Serv. v. Colt Indus. Operating Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,414 (C.D. Ill. 1991); P. AREEDA & L. KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES ¶ 282 (4th ed. 1988).

students in contracts, commercial law and other courses.⁴⁷ I plan to begin assigning it when I next teach our Basic Uniform Commercial Code or Payment Systems courses.

In these courses, it will provide commercial context for many forms of secured financing, business, and banking practices involving documents of title, letters of credit, check collections or electronic funds transfers, and more. Its portrait of commercial activity is far richer and comprehensive than that available in any other published teaching materials I might employ or any other source that practically can be made available to law students. The book gives a business person's or banker's understanding of the underlying transactions studied in the courses, and a point of reference from which to evaluate the sufficiency of the relevant legal rules.

47. See *supra* text accompanying notes 13-15.