

Sales and Leases (LAW 637)
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William S. Boyd School of Law
University of Nevada Las Vegas
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Syllabus

[T]he Code is more what you'd call "guidelines" than actual rules.¹

Navigating a Sea of Change

Most law changes constantly, though most of the change comes (with apologies to Neil Armstrong) in small steps, rather than giant leaps. In the field of commercial law – where lawyers, judges, legislators, and the like constantly strive to keep pace with ever-evolving technology, new forms of financial transactions and devices, and an increasingly global marketplace – we sometimes resort to giant leaps, and attempts to provide a legal framework that facilitates, channels, and organizes change fail almost as often as they succeed.

In the realm of transactions we will explore in this course, the 1999 Uniform Electronic Transactions Act (UETA), which is now law in 47 states – including Nevada – and the District of Columbia,² and the 2001 revision of Uniform Commercial Code (UCC) Article 1, which 40 states – including Nevada – have enacted,³ are notable successes. By contrast, only Oklahoma has enacted any of the 2003 amendments to UCC Articles 2 and 2A before one of its co-sponsors, the American Law Institute (ALI), withdrew its support, and only Maryland and Virginia enacted the 1999 Uniform Computer Information Transactions Act (UCITA) before its sponsor, the National Conference of Commissioners on Uniform State Laws (NCCUSL), ceased its efforts to encourage additional adoptions.⁴

Somewhere between UETA's terrific success and the stark failure of the UCC Article 2 and 2A amendments lay the U.N. Convention on Contracts for the International Sale of Goods (CISG) and the U.N. Convention on the Use of Electronic Communications in International Contracts (CUECIC). Promulgated in 1980, the CISG first took effect in the U.S. and ten other countries on January 1, 1988. On August 1, 2011, Turkey became the 76th country in which the

¹ PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Disney 2003).

² As of August 15, 2011, UETA is law in every state except Illinois, New York, and Washington. Illinois and New York have roughly comparable statutes; Washington does not.

³ As of August 15, 2011, Revised Article 1 is law in every state except Georgia, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, South Carolina, Washington, and Wyoming, as well as D.C.

⁴ UCITA not only failed to garner widespread support, it inspired prophylactic legislation. Four states – Iowa, North Carolina, West Virginia, and Vermont – enacted so-called "UCITA shield" or "bomb shelter" statutes designed to ensure that those states' residents would not be subjected to UCITA without their express consent.

CISG is in effect.⁵ Promulgated in November 2005, the CUECIC is not yet in effect anywhere: although 18 countries – not including the United States – have signed the CUECIC, only two of the requisite three have ratified it.⁶

Not all efforts at making or influencing the law governing transactions in goods take the form of statutes or treaties, as four quick examples illustrate. At its May 2009 annual meeting, the American Law Institute (ALI) approved the Principles of the Law of Software Contracts, which aspire to weave the currently divergent threads of law governing software contracts into a coherent whole that will guide parties in drafting, performing, and enforcing software contracts, assist courts and other arbiters in resolving disputes involving software contracts, and, perhaps, inform future legislation addressing software contracts. Whether the Principles' carrot will succeed where UCITA's stick failed remains to be seen.⁷

Parties to international sales transactions frequently expressly incorporate the International Chamber of Commerce's Incoterms into their contracts to allocate the costs and risks associated with transporting goods. (Indeed, parties to wholly domestic sales contracts often incorporate one or more Incoterm(s), rather than rely on UCC Article 2's default rules.) Even when parties fail to expressly incorporate the Incoterms, courts and other arbiters may imply them when the parties were or should have been aware that their contract employed a transportation term that the Incoterms define.

The International Institute for the Unification of Private Law (UNIDROIT) has published its Principles of International Commercial Contracts in 1994, 2004, and 2010. These UNIDROIT Principles serve a dual function with respect to international sales transactions. Because the CISG lacks official comments like those that accompany the UCC, courts and other arbiters may look to the UNIDROIT Principles for guidance in understanding and applying the CISG. More generally, the UNIDROIT Principles are a rough counterpart to the *Restatement (Second) of the Law of Contracts* (yet another ALI project), providing a framework against which parties may plan and conduct, and courts and other arbiters may enforce, international sales transactions – including sales transactions that fall outside the CISG's scope.

Finally, as Lisa Bernstein and others have described in painstaking detail,⁸ parties in particular industries or trades often develop their own rules, standards, and practices that are as

⁵ See http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. Benin acceded to the CISG on July 29, 2011; but its accession will not take effect until August 1, 2012. See *id.*

⁶ See http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html.

⁷ The early returns are not promising: As of August 15, 2011, only one American court had invoked, and none had applied, the Principles in a published opinion.

⁸ See, e.g., Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711 (2009); Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 313 (2006); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001). See generally GHALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010).

binding on them in their daily business as any more formal body of commercial law and that courts and other arbiters will (or at least should) look to explain and supplement the parties' agreements and behavior, and sometimes to supplant more formal law.

Course Coverage and Approach

With such a rich reservoir of “hard” and “soft” law to tap, I have to make decisions about what to emphasize. As is typical in courses like this taught elsewhere, we will devote most of our attention to (unamended) UCC Article 2. We will also spend meaningful time discussing the CISG (with some help from the UNIDROIT Principles) and (unamended) UCC Article 2A, as well as the impact of UCC Article 1, UETA, and the Electronic Signatures in Global and National Commerce Act (E-SIGN) on sales and leases of goods. Time permitting, we will also take quick looks at other federal and state statutes and regulations that can come into play in sale and lease transactions, including the Magnusson-Moss Warranty Act, Federal Trade Commission consumer protection rules, and may discuss Incoterms and how pre-revised UCC Article 1 (still the law in ten states and DC) applies to non-goods personal property transactions and steps some states that have enacted Revised UCC Article 1 have taken to salvage elements of pre-revised Article 1.

I will teach this course using both cases and problems – with emphasis on the latter – designed to explore, illustrate, expand upon, and occasionally confound the text, purpose, or both, of Article 9 and other relevant statutes and regulations. We will also, from time to time, turn to secondary sources to better inform our statutory and case law analysis, to fill in gaps where statutory and case law is lacking or is or should be changing, and to aid problem solving.

Goals and Objectives

I aspire, at a minimum, to:

- ◆ expose you to the various bodies of law governing domestic and international sales of goods and domestic leases of goods;
- ◆ explore with you the fundamentals of the law of domestic and international sales and domestic leases of goods, as well as some of the economics, politics, and legal theory underlying that law and shaping its continuing development;
- ◆ enhance your abilities to (a) determine which body of substantive law applies to a particular situation, (b) carefully and thoughtfully read the relevant authorities, (c) formulate a defensible position regarding, if not a resolution of, the situation, and (d) communicate your position or resolution and the rationale underlying it;
- ◆ challenge you to critically evaluate the applicable law, relevant authorities, and the conclusions you draw from reading and thinking about them; and
- ◆ afford you some opportunities to exercise the counseling, negotiating, drafting, and advocacy skills that are essential tools for any lawyer.

Class Meetings

We will meet in **Room 110** every **Monday** and **Wednesday** from **7:50 to 9:15 p.m.** beginning August 22nd and ending November 21st – except for Monday, September 5th (Labor Day) and Wednesday, September 7th, when I will be speaking at the annual meeting of the Society of Legal Scholars in Cambridge, England. We will make-up the September 7th class (most likely at our regular time on Thursday, November 17th – but I’ll confirm that date later). If I miss any other scheduled class meeting, I reserve the right to schedule a make-up class.

Office Hours and Availability

My office is **RAJ 428**. I find, when teaching evening classes, that the most convenient time for many students to meet with me is immediately after class. I will make every effort to be available in Room 110 **Mondays** (and Wednesdays except for nights on which SELA bowling is scheduled) from **9:15 to 10:00 p.m.** I will also hold office hours **Mondays** from **5:15 to 6:00 p.m.** and **Wednesdays** from **4:45 to 6:00 p.m.** (If I am not yet in my office by 5:15 p.m. on Mondays or 4:45 p.m. on Wednesdays, it will almost certainly be because I am or have been answering my Secured Transactions students’ questions in Room 110.)

I am in my office (except for occasional forays to the library, committee meetings, faculty meetings, or to hear guest speakers) most afternoons (and some mornings, too). Feel free to drop in. I will either see you then or arrange a time to meet with you. I will make every effort to accommodate you if you want to schedule an appointment during or outside of my posted office hours. I am also available by e-mail at keith.rowley@unlv.edu, usually beginning around 9:00 a.m. and often as late as 1:00 a.m., whether I am in town or not. I will respond to your e-mails as promptly as I can, and will generally “cc” the whole class if doing so is appropriate.

Required Materials

Our principal text will be **Linda J. Rusch & Stephen L. Sepinuck, *Sales and Leases: A Problem-Solving Approach* (2009)**. You will also need UCC Articles 1, 2 & 2A (text and comments), the CISG, UETA, E-SIGN, and other federal and non-UCC state law. **Ronald J. Mann, Elizabeth Warren & Jay L. Westbrook, *Comprehensive Commercial Law: 2010 Statutory Supplement***⁹ reproduces most of the relevant statutes, treaties, and regulations. Both titles are or will be available at the UNLV Bookstore, from their publishers (West and Aspen, respectively), and from various online booksellers. I will also assign readings that are not included in either of the required texts. I will make these materials available as far as practicable in advance of the date we discuss them in class.

⁹ If you already own the 2009 edition of *Comprehensive Commercial Law*, a recent edition of West’s *Selected Commercial Statutes* (Chomsky et al. eds.) or *Commercial and Debtor-Creditor Law: Selected Statutes* (Baird, Eisenberg & Jackson eds.), or if you have ordered the 2011 edition of *Comprehensive Commercial Law*, you’re fine for this course – provided that your book contains the official text of and comments to Revised UCC Article 1 (2001) and unamended UCC Articles 2 and 2A. The Library has the 2010 edition and will have the 2011 edition as soon as it is available; if you’re using an older or different book, you may have to find certain assigned materials on your own.

Optional Materials

For students looking for additional discussion of topics we will cover this semester, I highly recommend **Clayton P. Gillette & Steven D. Walt, *Sales Law: Domestic and International* (2d ed. 2008)**, as a supplement to Rusch & Sepinuck. (Gillette & Walt devote a bit too much attention to UCITA and none to fixtures; but all-in-all, it's a good supplement.) You may also want to look at the leading hornbook, James J. White & Robert S. Summers, *Uniform Commercial Code* (6th ed. 2010), its more concise offspring, James J. White & Robert S. Summers, *Principles of Sales Law* (2009), or Brian D. Hull, *Inside Sales and Leases: What Matters and Why* (2008). Copies of all four titles should be available in the library reserve room and at the UNLV Bookstore. The law library also has several useful ABA publications available: Fred H. Miller, *The ABC's of the UCC – (Revised) Article 1: General Provisions* (2002), Henry D. Gabriel & Linda J. Rusch, *The ABC's of the UCC – Article 2: Sales* (1997), and Amelia H. Boss & Stephen T. Whelan, *The ABC's of the UCC – Article 2A: Leases* (1997).

Students looking to test their ability to apply the legal concepts about which we will read and discuss in class, the law library and UNLV Bookstore have copies of James Brook, *Sales and Leases: Examples & Explanations* (5th ed. 2009), and Scott J. Burnham, *The Glannon Guide to Sales: Learning Sales Through Multiple Choice Questions and Analysis* (2007), and I am in the process of writing *Questions & Answers: Sales, Leases, and Electronic Contracts* (LexisNexis forthcoming 2012), draft portions of which I will distribute to you as the semester progresses. There are also some good Article 2 tutorials available on-line from <http://www.cali.org>.

For the truly ambitious or genuinely interested, the law library has copies of a number of useful references, including: James J. White & Robert S. Summers's four-volume treatise: *Uniform Commercial Code (Practitioners Series)*; William H. Henning & George I. Wallach, *The Law of Sales Under the Uniform Commercial Code*; William H. Lawrence & John H. Minan, *The Law of Personal Property Leasing*; Barkley Clark & Christopher Smith, *The Law of Product Warranties*; and William D. Hawkland et al., *Uniform Commercial Code Series*, and Ronald A. Anderson & Lary Lawrence, *Anderson on the Uniform Commercial Code*, both multi-volume treatises, substantial portions of which are devoted to Articles 2 and 2A.

Obviously, I do not expect any of you to read all of the foregoing this semester, this year, or even this lifetime. My aim is to offer you access to as much helpful information as you desire. I have my own copies of most of the above, as well as some other useful titles. If you find yourself pressed and unable to locate a resource that you want to review, come by my office. If I am in, and if the book you want is available, I will allow you to look at it in my office.

LexisNexis Web Course/Web Content

I will create a restricted-access LexisNexis Web Course, to which I will post electronic copies of all class announcements, reading assignments, assigned readings not appearing in either the Rusch & Sepinuck text or the Mann, Warren & Westbrook statutory supplement, optional written assignments, topical outlines, PowerPoint slides, sample questions and answers, and useful links, and will include an interactive discussion board and an e-mail list.

You must be registered for Sales & Leases and must have a LexisNexis Custom ID or password to access the Web Course. **If you do not have a LexisNexis Custom ID or a Lexis password, please get one as soon as possible. If you are registered for Sales & Leases and cannot access the Web Course, despite having a valid LexisNexis Custom ID or a Lexis password, please e-mail me and I will give you access to the Web Course. If the e-mail address associated with your current LexisNexis Custom ID or a Lexis password is not the e-mail address you normally use, please update your e-mail address.** You should regularly check the e-mail address associated with your LexisNexis Custom ID and the Web Course for important announcements and content.

Class Assignments

I will periodically distribute an updated Reading List, the first installment of which is attached. **For the first week of class, please read all of the items in Topics I.A and I.B,** as well as the **Introduction to Sales, Leases & Related Transactions** handout posted to the Web Course. (This is an unusually long reading assignment, but completing it before our first class meeting will both prepare you for the first two classes and enable us to have a more meaningful discussion during our first class meetings.) We should get into Topic I.B.1 before the end of our first class and into (and hopefully through) Topic I.B.4 by the end of our second class. I will make every effort to post all assigned readings not included in the Rusch & Sepinuck text or the Mann, Warren & Westbrook statutory supplement to the LexisNexis Web Course at least one week prior to the class meeting in which we discuss them. I reserve the right to modify assignments as circumstances dictate. I will always try to tell you before the end of a particular day's class what I expect to cover in the next class or two.

Grades

Grades do not reflect your value as a human being and may not reflect your potential as a lawyer. They can be important, everything else being equal, in securing a judicial clerkship or other post-law school employment. Moreover, there is a strong historic correlation between Boyd students' grades and their performance on the Nevada Bar Exam. I will make every effort to fairly evaluate your written and in-class performance and to assign you a course grade that fairly reflects that performance.

Class Attendance and Participation

Teaching you how to "think like a lawyer" about sales, leases, and related transactions works best if you regularly prepare for, attend, and participate in class. **I reserve the right to raise or lower your final grade by up to one-half letter** (*e.g.*, from B to B+ or from B to B-) **based on your class attendance and participation.** Furthermore, ABA Standard 304(e) dictates that "[r]egular and punctual class attendance is *necessary* [for a student] to satisfy residence credit and credit hour requirements." Therefore, **I also reserve the right to drop any student who misses all or most of seven or more class meetings (with or without excuse) or to reduce her course grade by one-half letter grade for each class missed following her sixth absence.**

Written Assignments

I anticipate making periodic written assignments and will factor your performance on those assignments into your course grade, *provided that doing so improves your course grade*. You may choose whether to complete each assignment and submit your work. If you do, your grade on the optional assignment will count toward your course grade – thus reducing the weight of the final exam – unless counting it would lower your course grade; if you do not, it will not count against you, but your final exam grade will weigh more in calculating your course grade.

Periodic Quizzes

I may also offer short quizzes throughout the semester to allow you and me to better assess your grasp of key concepts, some of the nuances surrounding them, and the cumulative nature of the material. We'll discuss in the first week or two of the semester whether I will require these quizzes or make them optional.

Exam

The largest component of your grade will be your performance on the final exam scheduled for **Saturday, December 10th, at 1:00 p.m.** The final exam will include questions designed to test the breadth of your knowledge of the material we will have covered, the depth of your knowledge of particular topics, and your analytical skills. As the semester progresses, I will let you know the precise format of the exam and what materials you may use to assist you in taking it. I will also provide you with sample exam questions and answers from prior semesters.

Calculating Your Course Grade

Current BSL policy permits me (1) to consider work graded nonanonymously and your classroom performance (as discussed above), as well as your performance on the anonymously-graded final exam; and (2) to combine anonymous and nonanonymous grade components after obtaining exam number identities from the registrar, provided that I disclose that fact in writing before the end of the first week of the semester.

I plan to calculate your course grade in the following manner:

Final Exam	75-100%
Written Work	0-25%
Class Participation	-5% to +5%

I hereby disclose to you that, as I have done for the entirety of my legal teaching career, I will grade all optional written assignment(s) nonanonymously, and will calculate final course grades, including class participation and optional written assignment grades, after the registrar reveals whose name goes with each exam I.D. number. Never fear. I take grades too seriously and value my reputation as a fair grader too much to play favorites.

Accommodating Disabilities

UNLV complies with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, offering reasonable accommodations to qualified students with documented disabilities. If you have a documented disability that may require accommodation, you will need to contact the Disability Resource Center (DRC). The DRC coordinates all academic accommodations for students with documented disabilities. The DRC reviews and maintains student disability documentation and provides students with an official Academic Accommodation Plan to present to their professors if the DRC concludes that an accommodation is warranted. UNLV strongly discourages faculty from accommodating students who lack an Academic Accommodation Plan.

The DRC is located in the Student Services Complex (SSC-A), Room 143. Its contact numbers are: Tel: (702) 895-0866; TTY: (702) 895-0652; Fax: (702) 895-0651. For additional information, visit: <http://studentlife.unlv.edu/disability/>.