The Empty Space in the Teaching of Commercial Law—An Argument for Including Article 7 of the UCC in the Commercial Law Curriculum

Glenys Spence, Barry University School of Law

PROFESSOR SPENCE: Hello! My name is Glenys Spence, and I’m a law professor at the Barry University School of Law in Orlando, Florida. Currently, I teach in the area of commercial law contracts, some upper-level international law electives, and administrative law. Today, my presentation is about infusing or introducing Article 7 of the Uniform Commercial Code (“UCC”) to law students in the United States. The reason for this proposal is that I believe that U.S. law students need to be prepared to compete on the international stage. A well-rounded legal education will combine black letter law with practical law to prepare students for practice by familiarizing students with these documents and the terminology that is used both in domestic and international shipping. I believe the key to a well-rounded education is to help prepare students to compete in the global economy.

UCC Articles 2 and 9 are required courses in U.S. law schools. However, to be honest, in my experience, students have no clue as to what documents of title are. Even if you tried with the little time we have to explain the concepts, it’s not enough for most of the students to reach them. To give students some better familiarity with these concepts, I think it’s incumbent upon those of us who teach in the area of commercial law to take some time, and to at least introduce students to the UCC Article 7. Although the federal laws also govern documents of title, there’s some international treaties as well that will govern in this area. But at the least we should be pointing students towards Article 7, as it is possible they will come across a contract that deals with document of title.

All of these are terms that students may have some discomfort with, and those are the reasons for my proposal to infuse the teachings of Article 7 into either the contracts or commercial classes. Law schools should be thinking about this in terms of a transactional seminar, transactional clinics, or other types of instruction to help students understand these concepts. Interestingly, the ABA, of course, has come out with new rules regarding bar prep. If we look at the NextGen Bar, those of us who are teaching in the
commercial area are troubled by the fact that it appears that the importance of the UCC has been diminished somewhat. The NextGen Bar proposes to keep Article 2 as part of the study of contracts, but to do away with Article 9. At Barry, we have not yet made a determination about how we will approach this.

However, this change is troubling to me as we are trying to push companies and the legal profession to be more inclusive, in terms of hiring students of color and students from other underrepresented groups. To me part of that diversity and inclusion is related to how prepared these students from these different groups are to enter into the corporate realm of practice. When it comes to international trade, international commerce, domestic commerce, and anything that has to do with the shipping, the sales and purchase of goods which include shipping, students who are going to be in working in the business field as lawyers need to become familiar with a lot of these concepts. Do they need to become full-fledged maritime lawyers who are dealing with maritime contracts and maritime insurance day in and day out? No. But we should at least give them some background familiarity with the types of documents that are involved in a given transaction of goods or commodities. I think it is important for us to focus on. Even though the bar exam is sort of moving away from those complex types of topics, it doesn’t mean that our students should not know about these topics. Again, if we’re talking about more diversity and inclusion in the annals of business law and so forth, then more commercial law, not less, is needed.

As I said before, Articles 2 and 9 are required courses in U.S. law schools. This is where students are introduced to the concept of documents of title. They come across a term in a contract, let’s say where the parties agree that payments will be required when documents are presented. I know in my classes that a few cases that talk about payment against documents. And of course, I’ll have to pause and explain that term to students. In Article 9, where documents of title are used as collateral, that’s also an area where some explanation is needed to make to make students comfortable with the concepts. Of course, in Article 2, when we get to the topic on risk of loss and shipping terms, again Article 7 has a meaningful relationship with Article 2. These are all the reasons for my love of commercial law, because of how
these different Articles intersect with each other. And if you want to be involved in that area of practice, you need to have a sort of deep understanding, not to the extent of expertise, but at least some understanding, of these intersections. They constitute the general language of commercial transactions, and I think not introducing students to these concepts will be doing them a disservice. They also need to know the relationship between the federal scheme that governs documents of title and the UCC rules of Article 7. Again, the two sort of complement each other. But, of course, under the preemption doctrine, if there’s a conflict, then the federal rules will always control. Bailment of goods is another concept that students are familiar with, but they do not understand the process of the bailment or its relationships. That’s also another area in which we can do a little bit of instruction.

In terms of these documents of title, let’s start with the day in the life of a morning coffee. Everybody can relate to that. We all take it for granted. We go to the store and we buy a bag of coffee, or we go to the Starbucks or the gas station and get our morning joe without even thinking about the journey of this bean. It begins this journey from farm to warehouse because it has to be planted by the farmers. Of course, when it’s time for harvest, they then have to get the thing to the warehouse and then into the market to go to your favorite supermarket or barista. To make this journey, the beans are loaded onto vessels, which entails a lot of different people—exporters who work in that particular supply train and the crew of the particular vessel that is going to carry the beans to market. Once the vessel arrives and the coffee passes through customs, then you have your logistics, companies or warehouse folks, who will then collect the container of coffee beans and deliver them to several different warehouses located near a port. This is where a document of title called the bill of lading takes center stage. Who would now that something called a bill of lading is important to us getting our morning coffee?

An original bill of lading is always needed before anyone can move the coffee from that port. Once the vessel comes into port, coffee roasters and coffee importers need to be able to show their bill of lading to claim that coffee. Because, again, this is the document which contains important
information, such as the location of the warehouse, the roasting companies, the shipping weight, the shipping line, the international coffee organization number, the country code, where the coffee originates from, parcel numbers, the code for the exporters or brewers, the name of the person who’s importing the coffee or the roaster. Whoever owns the coffee must carefully check this document to make sure the information is correct, because, again, misstatements on a bill of lading could prevent you from retrieving your coffee. Also, people can be liable criminally and civilly for any incorrect description of other false information on the bill of lading. That’s how important just one document of title is to our regular morning consumption of coffee. And aren’t we happy that there’s such a thing as a bill of lading? Otherwise, we won’t get our coffee, or we may have to resort to growing it ourselves, which be a disaster for some I know. For me it would be.

The UCC defines documents of title as a record, which encompasses the electronic world that we’re now living in where a lot of these are now moving online into some sort of digital repository or are generated digitally in a series of blockchain. Again, keep in mind that the federal scheme also has similar definitions as the UCC. It’s a record, as defined under the UCC, that is used in the regular course of business or financing that evidences that the person in possession of control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers. There you see the importance of a document of title. It sort of contains the respective rights and obligations of the parties to the goods. Again, it represents title to goods.

The two primary types of documents of title that we are going to talk about are bill of lading and warehouse receipts. These are the two that tend to come up the most, either in a case in contracts or more broadly in commercial law. Now, these documents are creations of the ancient world. Some of us argue they have been around since the garden of Eden. Maybe there was an apple that changed ownership from a certain unknown creature to people on the ground who then share the apple. Joking aside, these documents have been around for a while. Merchants were applying them in their trade across the medieval world. They’ve been around awhile. And now, in the moder age, we have a push to make them electronic, although not
everyone is at that point yet. In fact, the United Kingdom recently promulgated a sort of statute to govern electronic documents of title. In the U.S. we've been doing that for a while. The United Nations also has a push to help developing countries also move into a more electronic space when it comes to documents of title.

Importantly, documents of title serve as collateral for loans. My students in particular encounter this concept in a deep way during our study of Article 9 secured transactions because these documents of title are used as collateral. So we have to learn what they are. That's when I get into Article 7 more deeply with my students, is when I’m teaching Article 9 documents of title as collateral. Of course, we have to learn how, once a bank or another party business entity takes on any document of title to serve as collateral, how they then go about protecting their rights in that document. A bit of Article 7 is being taught at this juncture under Article 9. The documents of title serve as collateral for loans while the goods are in the physical possession of a carrier. During transit, a seller is able to pass possession and property in the goods to a subsequent buyer, bypassing a negotiable document of title. We will talk about negotiability in a little bit. The document can also be pledged to a bank and may be used as security to raise finance. For example, if a merchant owns goods stored in a warehouse, the goods can be used as collateral. However, it will not be practical for a bank to take the goods. Number one, they may be perishable. Also, the bank likely doesn’t have any use for them. And also, if you think of this in a practical way, why take away the thing that you want the debtor, the merchant, to sell in order to pay the loan back. Therefore, the bank will not be taking the goods themselves. The goods will be stored with a bailee and a warehouse. The bailee will then issue a paper or a receipt to the lender, in this case to the bank, who we then call the holder of this particular document of title.

Of course, with being the holder of a document of title comes many rights and obligations. The holder of the paper can then negotiate this paper, meaning, transfer it to other holders in exchange for loans or transactions they want to do with the other entities. You can see in this way, negotiable documents of title are important to our economy and the global economy. All in all, they keep the waves of commerce turning. That’s how important
they are. Now, these documents of title can be either negotiable or nonnegotiable. What’s the negotiable document of title? A negotiable document of title represents ownership of the goods, whereas a nonnegotiable document of title is only evidence of the contract between a bailer and a bailee. A nonnegotiable document states the name of the person to whom the goods will be delivered, and the conditions for delivery. Lenders will only provide loans, however, for negotiable documents, because again, it’s safer than a nonnegotiable document. A lender would not have the opportunity to know whether the goods are still in a warehouse, or have they been collected by somebody else. There you can understand why the preference is to only provide loans against negotiable documents of title. Again, because of the risk involved with the nonnegotiable documents of title. Now, you’ll see them for what they are, because if a document of title is negotiable, it would say that across the front, in bold letters, and the same goes for nonnegotiable. There’s no sort of mystery in knowing which is which.

Let’s talk about warehouse receipts. Warehouse receipts will be governed by the UCC Article 7. They’ll be governed under federal law. Warehouse receipts serve as a receipt for the goods, a contract for the storage between the bailer and bailee at the warehouse, and if they’re negotiable, they also serve as title to the goods. This means that whoever is holding a negotiable warehouse receipt has title to the goods. A warehouse receipt need not be in any particular form in the U.S., but there’s certain information that has to be on a warehouse receipt by law. The required information includes: the location of the warehouse facility where the goods are stored; the date of use of the receipt; the unique identification code of the receipt; a statement saying whether the goods received will be delivered to the bearer or to a named person. This document will also contain the magic words that tell us whether the document is negotiable. You also need to see either order or bearer a language in order to determine whether or not you’re holding a negotiable document of title.

Next, we go on to the bill of lading, which is the other document of title that we encounter in U.S. law schools in the commercial law course. As I said before, Article 7 of the UCC governs bills of lading in interstate
commerce. Let’s say you are shipping goods from Florida to New York. Article 7 would govern that particular bill of lading. To the extent that the federal scheme comes into play, the federal scheme and Article 7 are consistent with one another, but if they weren’t the federal scheme would preempt. There are also other international statutes that we use here in the United States, when the good are crossing oceans. Students first tend to encounter a bill of lading when we cover the case involving the ships called *Peerless*. This allows us to get a bit of information about maritime rules and bills of lading in students’ minds early on in contracts. You can explain to them that the term lading comes from the process of loading cargo onto a ship or vessel. That’s sort of the ancient terminology. You can explain that the document allows for the process of loading, hence the term bill of lading. You can explain that it’s a legal document issued by a carrier to a shipper that details the type, quantity, and destination of the goods being carried. A bill of lading is the basic transportation contract between the shipper, who is also called a consignor, and the carrier, meaning the vessel. Its terms and conditions would bind the shipper and all contracting carriers. You can explain all of this early on.

A bill of lading has three basic functions. It’s a document of title. It’s also a receipt for the shipped goods. It’s also a contract between a carrier and a shipper. Again, as I said with the coffee analogy, the bill of lading must accompany the goods that are shipped, and it must be signed by an authorized representative from the carrier, shipper, and receiver. If managed and reviewed properly, a bill of laden can help to prevent asset theft. These documents do more than cover the goods. They are also of utmost importance to preserving and saving these assets. In the world of shipping and trade, a bill of lading is one of three official documents used to guarantee proper accounting of shipments by all parties. They’re used both internationally and domestically. They’re important to the parties because they allocate liability for casualty to the goods. They also help to ensure that importers receive and pay for the goods and that exporters receive proper payment. It’s a critical part of the shipping process. It’s proof that the carrier promised to carry the goods. It’s a receipt that the merchandise that is listed on the bill of lading was received by the carrier and was received in good order. Third, it is evidence of the ownership of the goods. Whoever holds
the bill of lading has current ownership of those goods. In that vein it has a sort of evidentiary purpose.

It can be evidence of the relevant terms of the contract with the carrier where the goods are lost for damage in transit or short delivered. These terms are the basis on which cargo interests may be able to pursue a claim against the carrier. A bill of lading can also indicate the condition of the merchandise at the time of receipt. We refer to these as either a clean bill of lading or foul bill of lading. A clean bill of lading lets people know that the merchandise was in good condition when was received. A foul bill of lading denotes some or all of the merchandise was damaged upon receipt. In my classes, this is where I tend to get more into the weeds with bills of lading because, in commercial law, the book that I use is has a several chapters on risk of loss and the different shipping terms under the UCC. Keep in mind that, like the warehouse receipt, they can either be negotiable or nonnegotiable. The negotiable bill of lading is one kind of bill of lading distinguished by the fact that it is a contract of carriage that can be transferred. It is negotiable. As I noted before, a negotiable document sort of represents money in the hands of its holders. It represents currency because the person who holds that negotiable document of title can then use that to procure loans for themselves, use as collateral, and so forth. The life of a negotiable document is a busy one because of their importance, as I said before, to commerce both domestically and globally.

The negotiable bill of lading instructs the carrier to deliver goods to any one person in possession of the original endorsed negotiable bill. Again, you need the holder of the bill of lading to sign it to endorse it because endorsement is also crucial to the concept of negotiability. A nonnegotiable bill of lading again sets out that the goods shall be delivered to a particular person be that a consignee, or receiver, or a buyer to whom the goods must be shipped. The nonnegotiable bills of lading will not serve as collateral for financing. To be negotiable, the document must have words of negotiability. It must be made out to the order of a specific person, or, of course, to the bearer, bearer meaning whoever is in possession of it. The negotiability aspect of these documents kind of sets them apart from other regular, nonnegotiable documents, because, as I said before, they are sort of creatures
of finance. They serve as collateral. They carry a lot of power, even if you do not think a piece of paper can hold power, it does with negotiable documents. Then again, it’s a form of security because the shipper will use the document as security and will then email a copy of it and other shipping documents to a buyer to prove that the goods have been shipped, and to request a balance of payment. The shipper will hold on to the original bill of lading, and therefore retain ownership of the cargo. Sometimes, you find these bills of lading connected to a letter of credit governed by Article 5.

Now, you are probably wondering, “Professor, we don’t have time. It’s hard enough to get through a course on contracts or secured transactions.” My whole purpose here is to show you not to get into the weeds. Rather, we can just provide basic backup knowledge as we come across these terms in other cases. For instance, if you have a student throw up their hand and say, “What’s a document of title? Why do I care?” We need to be able to at least explain that. We can say, “If you would turn me briefly to Article 7 of the UCC and read the definition of it.” We don’t need to spend a lot of time on it, but at least we shouldn’t ignore it. I’ve been a professor teaching this for sixteen years, so I know the time constraints when teaching this. However, a brief introduction to these topics is really important. These are the areas where I briefly wade into Article 7 to provide context to the students.

Students are also going to meet Article 7 when learning about Article 9, which governs secured transactions. That’s where banks or other financial entities are lending people money, and because they are taking on a risk, they need to have some sort of collateral in case the person defaults so that they can go and repossess that collateral and so forth. Documents of title can also serve as collateral, and they do. And again, I get into Article 7 a lot when I’m teaching Article 9, and of course when I teach any sort of electives on international arbitration or international business transactions, but that’s an elective that not many students take unless they are encouraged to do so.

International business transactions is where we can do a lot of influence when it comes to teaching students about the field of commerce in its entirety. Because teaching students Article 2 is not enough for this new
global age that we’re in. Other countries, like China, are making sure they are teaching more. I remember when I was a student in my LLM program at Tulane, I was happy to have many Chinese and African students in my classes, who were able to show me how much importance schools outside of the U.S. put towards commercial law and making sure that their students were studying the law. At least some of them have an understanding of international commercial law. These international classes are where we can, as professors can, do a lot of magic to do some sort of comparative teaching between UCC Article 7 and the different treaties that exist to guide international trade in terms of documents of title. In courses like this, we can sink our teeth into educating our law students to compete in the global world. For instance, the United Kingdom’s scheme has slight differences from U.S. law when it comes to warehouse receipts and so forth. So, you could have your students look at those differences to bring students into the realm of international rules and treaties. Of course, the U.S. has not signed some of these treaties, but they are there. And we never know where students are going to end up, where they may need to speak sensibly about international trade. Some of these students are going to end up in commercial law, doing things like working for a shipping company, and they need to be able to speak sensibly.

So in the primary classes on contracts, we need to at least talk about these things. The same goes during the study of commercial law, where students will encounter the concept of documents of title as used for collateral on Article 9 of the UCC. And of course, with instruction on Article 2, we again come across these documents of title when we are instructing students on the risk of loss for goods and so forth, casualty to goods. I think it’s incumbent on us to at least give them some kind of introduction to Article 7 of the UCC. For those of us who have students who are interested in this field, we should at least provide them with a space for them to learn about this topic and to be able to compete in this global world that is becoming more and more globalized as these students enter the practice. At least students who are armed with these tools can be able to participate in a meaningful way and have a conversation with a prospective employer about their knowledge, however basic it may be in this particular field.
Thank you for listening to my presentation. I hope to continue the conversation with my colleagues. Thanks. Have a good day.