

Memorandum To: Drafting Committee, UCC and Emerging Technologies
From: Charles W. Mooney, Jr., Reporter
Date: January 24, 2022

Revised versions of draft §§ 2-102 and 2A-102, along with updated comments and notes, are set forth below with track changes from the January 17, 2022 UCC Draft. (A version of this Memo showing the revised sections, comments, and notes in “clean” format without track changes is also distributed with this version.) We will discuss these versions instead of those in the UCC Draft during our upcoming meeting. *We will take up these sections at approximately 4:30 pm on Friday, January 28.*

ARTICLE 2

SALES

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Section 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

(1) Unless the context otherwise requires and except as provided in subsection[s (3) and (4), this Article applies to transactions in goods;.

(2) If the predominant purpose of a transaction is a sale,^[1] this Article applies to the transaction.

(3) If a transaction includes a sale but the predominant purpose of the transaction is not a sale, the provisions of this Article which relate primarily to the goods aspects of the transaction and not to the transaction as a whole apply.

(4) This Article ~~it~~ does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction

[¹ Note that “sale” is defined in Section 2-106 as “the passing of title from the seller to the buyer for a price.” Although the definition (oddly) does not mention “goods,” that apparent lacuna is filled by the definitions in Section 2-103(1) of “buyer” and “seller,” which refer, respectively, to contracts to buy or sell “goods.” Such technical precision notwithstanding, perhaps amending the definition of “sale” to refer to “passing of title *to goods*” would promote clarity.]

nor does this Article impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers.

Official Comment

Prior Uniform Statutory Provision: Section 75, Uniform Sales Act.

Changes: Section 75 has been rephrased.

Purposes of Changes and New Matter:

1. ~~To make~~ This section makes it clear that: ~~The~~ the Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions. “Security transaction” is used in the same sense as in the Article on Secured Transactions (Article 9).

2. In some transactions, the passing of title to goods from the seller to the buyer in return for a price, i.e., a sale, is part of a larger transaction. The other aspects of the transaction might involve the seller providing services to the buyer or the seller transferring to the buyer rights to property other than goods. When the predominant purpose of a transaction is a sale of goods, this Article applies to the transaction.

If a transaction includes a sale of goods but the non-goods aspect of the transaction predominates, under subsection (3) the provisions of this Article relating primarily to the goods aspects of the transaction, and not to the transaction as a whole, apply. Whether a provision applies to the goods aspects of the transaction may depend not only on the provision itself but also on the issue that is implicated. The following examples explain the application of subsection (3).

Example 1. Owner hires Contractor to replace the roof on a structure. As part of the transaction, Contractor promises to remove the existing shingles and install new shingles, which Contractor is providing. The transaction is in part a sale of goods because it involves the passing of title to the new shingles, even though the transaction also involves extensive services. If the goods aspect of the transaction predominates, the provisions of this Article apply to the transaction as a whole. If the services aspect of the transaction predominates and an issue arises about whether the parties reached an agreement, the provisions of this Article dealing with contract formation do not apply. However, this Article’s provisions relating primarily to the goods aspects, such as those on warranties, do apply.

Reasoning: When the services aspect predominates the issue of formation of the contract would affect the entire transaction. Application of the Article 2 provisions to the formation issue would be inappropriate in that circumstance.

Example 2. Under the facts of Example 1, assume that the services aspect predominates.

The transaction was negotiated by means of a purchase order and offer by Owner to which Contractor responded with a confirmation and invoice containing both additional and different terms. If a dispute arises as to whether a contract was formed and, if so, what are its terms, general contract law, rather than this Article, applies to that determination.

Reasoning: As explained in Example 1, application of the Article 2 special rules on the “battle of the forms” (Section 2-207) to the contract covering the entire transaction would not be appropriate when the services aspect predominates.

Example 3. Under the facts of Example 1, assume that the services aspect predominates. The agreement provides that the job will be completed by December 31. Because of COVID-related issues that result in a shortage of both employees and roofing supplies, the job is not completed by the deadline. Whether Contractor’s failure to perform by the agreed-upon date is excused because it resulted from the unanticipated COVID-related issues is determined by general contract law, rather than by this Article.

Reasoning: This result adopts the same reasoning applied in Examples 1 and 2. Application of the Article 2 rules on performance becoming impracticable (Section 2-615) to the contract covering the entire transaction would not be appropriate when the services aspect predominates.

Example 4. Owner hires Contractor to remodel Owner’s kitchen and the services aspect predominates. Part of the transaction, however, involves Contractor supplying new appliances that are the subject of detailed specifications. The dishwasher supplied does not meet a minor aspect of those specifications (but does substantially satisfy the specifications as a whole). Whether Owner may reject the dishwasher (or must retain it, subject to price adjustment for any diminution of value) is determined by this Article.

Reasoning: Although the services aspect predominates, because the issue relates only to the goods aspect of the transaction, the relevant provisions of this article apply. As to whether goods are conforming, see Section 2-106(2) on “conforming” performance. As to the buyer’s rights when goods do not conform to the contract, see Section 2-601, which provides the so-called “perfect tender” rule.

Example 5. As in Example 4, Owner hires Contractor to remodel Owner’s kitchen, the services aspect predominates, and part of the transaction involves Contractor supplying new appliances that are the subject of detailed specifications. In an action brought by Owner alleging a breach of warranty, Owner offers testimony that at the time the contract was signed Contractor orally assured Owner that the dishwasher would operate at a temperature of up to 180 degrees even though the contract specified operation at up to 160 degrees. Because the issue involves a variation of the contract’s specifications as to the goods, the parol evidence rule of this Article (Section 2-202) determines whether Owner’s testimony may be allowed.

Reasoning: Because the particular application of the parol evidence rule in issue relates

only to the goods aspect of the transaction, the relevant provisions of this article apply.

Example 6. As in Example 4, Owner hires Contractor to remodel Owner’s kitchen and the services aspect predominates. In an action brought by Contractor for Owner’s failure to pay according to the contract, Owner defends based on the allegation that Contractor failed to perform its obligations with respect to both the services and goods aspects of the contract. Contractor offers testimony that at the time the contract was signed Owner orally agreed with Contractor that any disputes relating to the contract would be settled by arbitration. Because the issue involves a variation of the contract that affects the resolution of disputes in connection with the entire transaction, the parol evidence rule, if any, applicable under general contract law and not under this Article determines whether Owner’s testimony may be allowed.

Reasoning: Because the particular application of the parol evidence rule in issue relates to the transaction as a whole and not only to the goods aspect of the transaction, general contract law applies.

Reporter’s Note

1. *“Bundled” transactions.* Article 2 currently does not specifically address the application of the Article to transactions that cover both goods and non-goods, such as transactions that involve the sale of goods and either the provision of services or the transfer of property other than goods. (These transactions are often referred to as “hybrid,” “mixed,” or “bundled” transactions.) This has provided courts some flexibility in deciding whether, and to what extent, this Article should be applied to such transactions.

2. *“Predominant purpose” and “gravamen” approaches.* As a general matter, courts have applied this Article to such transactions when the goods aspect of the transaction predominates and have declined to apply this Article when the non-goods aspect predominates. Subsection (2) of the revised section adopts this “predominant purpose” approach. (This approach also is proposed in the definition of “chattel paper” in draft § 9-102(a)(11)(B).) When, however, an issue that relates to the goods aspect of the transaction arises, such as whether the characteristics of the goods conform to the contract, application of the provisions of this Article which relate primarily to that issue is appropriate even if the goods aspect of the transaction does not predominate. This approach, sometimes referred to as the “gravamen” approach, has expressly been applied by some courts and has implicitly been adopted by others. Subsection (3) of the revised section adopts the gravamen approach.

3. The difficulty of capturing the appropriate application of these approaches to bundled transactions in the statutory text should not be underestimated. This application is especially challenging in the context of determining which provisions of the article should be applied to which issues when the non-goods aspects of a transaction predominate. Although the Examples provided in the draft revisions to the Official Comment serve to illustrate the application of subsection (3), it will be important to include additional examples in the comment.

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ARTICLE 2A

LEASES

Section 2A-102. Scope.

(1) [This] [Except as provided in subsection (3), this] Article applies to any transaction, regardless of form, that creates a lease.

(2) If the predominant purpose of a transaction is to create a lease, this Article applies to the transaction.

(3) If a transaction includes a lease but the predominant purpose of the transaction is not to create a lease:

(A) the provisions of this Article which relate primarily to the goods aspects of the transaction and not to the transaction as a whole apply; and

(B) Section 2A-407 applies to the promises of a person that is the lessee in a finance lease to the extent the promises are consideration for the right to possession and use of the [leased] goods.

Official Comment

1. This Article applies to any transaction, regardless of form, that creates a lease.

2. In some transactions, the transfer of the right to possession and use of goods for a term in return for consideration, i.e., a lease, is part of a larger transaction. The other aspects of the transaction might involve the provision of services or a transfer of rights to property other than goods. In such a situation, because the transaction includes a lease, subsection (3)(A) applies and the provisions of this Article which relate primarily to the goods aspects of the transaction and not to the transaction as a whole apply. [The Comment also should include appropriate examples of the application of subsection (3)(A) in the context of leasing transactions.]

3. A finance lease, defined in Section 2A-103(1)(g), may be included in a transaction in which the lease of goods is not the predominant purpose. The provisions of this Article dealing with finance leases, primarily Sections 2A-209 and 2A-407, apply to an included finance lease

because they relate primarily to the goods aspect of the transaction. Subsection (3)(B) addresses the application of Section 2A-407 to promises made by the lessee under a finance lease in this situation. That section applies to those promises that are consideration for the lessee's right to possession and use of the leased goods. Whether a promise of a lessee so qualifies is a question of fact.

Example. Supplier and User enter into a contract that provides for the supplier to (i) lease equipment to User and (ii) provide to User a variety of maintenance and consulting services. The services aspect of the transaction predominates. As consideration for Supplier's obligations under the contract, User promises to pay a monthly "service and use" fee of a specified amount. The contract makes no provision for allocating the portion of the monthly fee that is consideration for the services or for the possession and use of the equipment. Section 2A-407 applies to the lessee's promises that are consideration for the lessee's right to use and possession of the equipment (and, in particular, the promise to pay that portion of the monthly fee that is consideration for that right). In an action involving the application of Section 2A-407, the determination of those promises that are consideration for the right to use and possession of the equipment is a question of fact.

Reporter's Note

"Bundled" transactions; "predominant purpose" and "gravamen" approaches. The discussion and analysis in the draft Official Comment and the Reporter's Note to draft § 2-102 generally apply to this section.