B. SCOPE OF ARTICLE 2

Article 2 is entitled “Sales.” § 2-101. The Official Comment to § 2-101 states, “the arrangement of the present Article is in terms of contract for sale and the various steps of its performance.” The scope provision, § 2-102, however, is arguably broader, providing that Article 2 applies to “transactions in goods.” Right at the start, then, is a conflict between the idea of a “contract for sale of goods” and “transactions in goods.” “Transaction” is not defined in the Code; whereas, a “sale” is defined as “the passing of title from the seller to the buyer for a price.” § 2-106(1). A transaction in goods could be construed to encompass more than just a sale of goods. Until Article 2A was promulgated, for example, a lease of goods could have been a transaction in goods covered under Article 2 even though the transaction was not a sale of goods. Courts relied upon the expansive wording of § 2-102 to justify applying Article 2 to lease transactions. On the other hand, some courts refused to apply Article 2 to a lease transaction because many of the specific substantive provisions of Article 2 are phrased in terms of a “seller” and a “buyer” and are drafted with the paradigm of a sale of goods in mind. Other courts applied selected Article 2 provisions to a lease on a case-by-case basis, relying upon Official Comment 1 to former § 2-105 that invited courts to apply Article 2 by analogy in appropriate cases. This nonuniform approach to leasing existed until Article 2A was promulgated in 1987, thereby making Article 2 inapplicable to a lease transaction. See § 2A-102.

This ambiguity concerning the meaning of “transactions in goods” leads to a problem under current law in another respect: whether Article 2 should be applied in a so-called “mixed” transaction. Contracts often involve both the sale of goods and the service or installation of the goods sold. When the transaction is mixed, the courts apply one of two tests: the predominate purpose test (majority view) or the gravamen test (minority view).

Under the predominate purpose test, the court determines whether the predominate purpose of the transaction is to sell the goods or to provide the service. If the predominate purpose is to sell the goods, Article 2 applies. If the predominate purpose is to provide the service, Article 2 does not apply. To determine whether the predominate purpose is to provide the goods or the service, courts generally look at the predominate component in the transaction. To determine what is the predominate component, courts examine many factors including the terminology of the contract, the objective of the parties in entering the contract, the ratio of the price of the goods to the whole price of the contract, the nature of the business of the supplier, and the intrinsic value of the goods without the service.

In contrast, under the gravamen test, the court looks at the basis of the complaint rather than the overall nature of the transaction. If the plaintiff is complaining about the goods component, Article 2 applies. If the plaintiff is complaining about the service component, Article 2 is inapplicable.
EXAMPLE 1: The seller agreed, under a “Material & Equipment” contract with the buyer, to assemble, construct, and install replacement bowling lanes for the buyer’s bowling alley and to provide lane-cleaning equipment. Under the contract terms, the buyer ordered and the seller shipped and installed the lanes and equipment. The price included sales tax (which did not apply to services), and the contract warranty extended to the lanes and equipment but not to the installation services. Under the predominate purpose test, the court would look to see whether the primary purpose of this contract was to provide the goods; if so, Article 2 would apply. If the predominate purpose was to supply a service, non–Article 2 contract law would apply. The dominant aspect of this contract appears to be provision of the goods with the installation being incidental because of the terminology used in the contract, the parties’ objectives in entering the contract, and the nature of the supplier’s services. Under the gravamen test, the court would look at whether the complaint was with the goods or with the installation service. If the problem was with the parts of the lane or the pinsetting equipment, Article 2 would apply. If the problem was with how the lanes or equipment were installed, then Article 2 would not apply.

Article 2 only applies to transactions involving goods. The definition of the term “goods” prior to the 2003 amendments was “all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).” Former § 2-105(1). This language raised the question of what it meant to have a “movable thing,” the linchpin of the definition of “good.” An example is the courts’ struggle over whether sale of electricity is a sale of a “good.” The court cases on this issue are mixed. Labor, services, and investment securities (such as bonds and stocks) are not considered “goods.” A cause of action is not a “good.”

The 2003 amendments to Article 2 revised the definition of “goods” in Rev. § 2-103(1)(k) to exclude “information” and “the subject matter of foreign exchange transactions” in addition to the exclusions from the definition of goods in former § 2-105. Thus, Article 2 does not apply directly to a transaction that consists only of providing information, unconnected to any goods. The term “information” is not defined but is intended to cover at least computer programs. If a transaction involves both information and goods, however, the courts will have to resolve whether to apply Article 2 in whole or in part to the transaction. Whether the courts will use some version of the predominate purpose test or the gravamen test or another standard yet to be created for making that determination remains to be seen. A “foreign exchange transaction” is defined in Rev. § 2-103(1)(i) as an agreement for trading in foreign currencies where the settlement takes place through debiting or crediting account balances. If the settlement takes place through physical delivery of specie or money, however, the transaction is not a foreign exchange transaction and would be covered by Article 2.
Section 2-107 provides that minerals, oil, gas, and buildings to be severed from the realty are goods if the seller severs them. If the buyer is to sever the oil and gas, then the contract for sale would not be governed by Article 2. The possible sources of law for this type of transaction are common law contract rights for services of extraction or perhaps real estate law if the transaction is to transfer property rights. If a contract for sale is made after severance of such items as oil and gas, those items are “goods.” On the other hand, growing crops or timber or other things that can be severed without material harm to the land are goods even before severance without regard to who will sever those items.

The final clause of § 2-102 states that Article 2 does not apply to a transaction that is intended to operate as a security transaction. A security transaction is governed by Article 9. Assume that a buyer wants to purchase goods but the buyer does not want to pay for the goods at sale. The parties agree to a conditional sales contract in which the seller retains title to the goods until full payment of the price. This is both a sale and a secured transaction, and Article 9 would apply. The Official Comment to § 2-102 states that Article 2 governs the sale aspects of the transaction, such as warranty or delivery terms, as between the buyer and seller. Article 9 would govern the security arrangement aspects, such as priority among third parties.

The final clause of § 2-102 states that Article 2 does not repeal or impair statutes enacted for particular classes of buyers, such as consumers or farmers. This clause is included to ensure that state statutes that provide special protections for certain types of people are still in force and effect even after Article 2 is enacted. This is necessary to prevent a statutory interpretation argument that the later-enacted statute overrides the earlier-enacted statute—or the statutory interpretation canon that a more specific statute overrides a more general statute. Examples of state consumer protection statutes include the Uniform Consumer Credit Code, a retail installment sales act, or a “plain English” statute that mandates a certain type of language in consumer contracts.

Amended Article 2 contains a new section, Rev. § 2-108, which makes clear that if a transaction subject to Article 2 also is subject to another type of law specified in this section, in the event of a conflict, the other law controls, with one exception. The other law referred to in this section is of three types: (1) certificate of title laws, (2) consumer law, and (3) statutes dealing with particular types of products or transactions, such as agricultural products, human blood and tissue, consignments of art by artists, distribution or franchise agreements, food and drug misbranding or adulteration, and regulation of product dealers. The one exception to the deference to other law is that the Article 2 rule on enttement stated in Rev. § 2-403(2), protecting a buyer in ordinary course, will prevail over a contrary rule in a certificate of title statute in one situation. If a buyer in ordinary course has rights that arise before a certificate of title is issued in the name of any other buyer, the Article 2 enttement rule will prevail over a contrary rule in a certificate of title law. Rev. § 2-108 also provides that the rules in Article 2 will supercede the provisions of the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”) except for certain types of consumer notices described in 15 U.S.C. § 7001(c) and notices exempted from E-Sign in 15 U.S.C. § 7003(c). Thus, to the extent that Article 2 has rules that support electronic commerce, those rules will take precedence over the rules stated in E-Sign with the noted exceptions.