The Extension of Article 2 of the Uniform Commercial Code to Leases of Goods

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THE EXTENSION OF ARTICLE 2 OF THE
UNIFORM COMMERCIAL CODE TO
LEASES OF GOODS

In the present economic system, leases are an increasingly prevalent form of acquiring the use and possession of personal property. As such, leases have become a popular alternative to sales as a means of structuring commercial transactions. Items that may be leased range from such mundane things as folding chairs and baby diapers to highly sophisticated computer systems. Equally diverse are the classes of persons who participate in lease transactions; they include both businessmen and consumers.

Reasons for the rapid increase in the use of leases are as varied as the parties and subjects of the transactions. For the more sophisticated businessman, leasing provides an attractive alternative to an outright purchase because the timing of taxes can be controlled. The flexibility available in lease transactions also permits tailoring risk and benefit allocations to different financing arrangements. Further, the use of a lease as opposed to an installment sale, or secured financing agreement, allows a lessee's credit to remain open for other uses. Similarly, leasing may provide the only means that an individual with poor credit can utilize to secure possession of a particular item. Financial considerations, however, are not the only reason for choosing the alternative of leasing; frequently the decisive factor is simply the temporary need for a durable item.

1. References made in this comment to leases or lease transactions include only those whose subject matter fulfills the Uniform Commercial Code's definition of "goods", U.C.C. § 2-105(1) (1972). [Hereinafter all references are to the 1972 version of the Code.]
3. Amounts paid by the lessee are deductible to the extent they are an ordinary and necessary business expense. I.R.C. § 162(a)(3). If these payments produce an equity interest for the lessee, no business expense deduction will be allowed, although a depreciation deduction may be available. Landis, Tax Aspects of Leasing, 79 Com. L.J. 8 (1974).

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Since many purposes are served by leases, the specific terms of individual lease agreements may vary greatly. The rights transferred to the lessee can range from bare possession for a limited period of time to complete ownership subject to a disguised security interest.\(^6\) Other rights and duties that may be allocated by a lease include options to purchase, renewals and such incidents of ownership as personal property tax liability and the duty to maintain and preserve the leased goods.

As with any contract, the allocation of rights and duties created by a lease arrangement is determined by the language of the agreement.\(^7\) Even so, no contract can exist in isolation; its language must be supplemented by rules which supply matters omitted in a particular contract, determine contract formation and construction, and specify the consequences of breach. Because of the similarity of sales and leases, however, it is not always clear which transactions ought to be governed by the law of sales and which by the law of leases. Obviously, the choice of law depends on the characterization given a particular transaction. Unless the distinction is made on the basis of form rather than substance, the line separating leases from sales must frequently be vague and elusive.

Traditionally, sales and leases have been distinguished by the presence of one of two mutually exclusive factors: the obligation to return the thing possessed, indicating a lease, or the eventual passage of title, indicating a sale.\(^8\) When the occurrence of either factor is conditional, the distinction becomes arbitrary and difficult to make. For example, an obligation to return the thing delivered becomes less meaningful when the transaction includes an option to purchase. If the option can be exercised for nominal consideration, the obligation is insignificant.\(^9\) Likewise, attention to the passage of title can also be

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\(^6\) All aspects of transactions relating to security interests in goods are governed by Article 9 of the Uniform Commercial Code, regardless of any disguise. U.C.C. § 9-102. However, a determination that Article 9 applies does not necessarily imply that Article 2 is also applicable. Leasco Data Processing Equip. Corp. v. Starline Overseas Corp., 346 N.Y.S.2d 288 (Sup. Ct. 1973).


\(^8\) Stum v. Baker, 150 U.S. 312 (1893); West v. Backus, 97 Or. 116, 189 P. 645 (1920); see also Annot. 17 A.L.R. 1421 (1922).

misleading. For example, retention of a security interest in a sale can result in title passing to the secured party on default of the debtor,\textsuperscript{10} a result identical to that of a lease.

Apart from these two factors, the line between leases and sales still can become blurred. For example, when the term of possession in a lease equals the useful life of the leased item, the location of title is irrelevant to the economic positions of the parties.\textsuperscript{11}

Of course, in the majority of cases the distinction between a sale and lease is not difficult to make and, arguably, justifies leaving well enough alone. Based on the premise that leases and sales are merely separate points on the same continuum, however, this article advocates the extension of Article 2 to leases. Such an extension will benefit both the practicing attorney and the logical symmetry of the law. The extent to which Article 2 should apply to leases and the method utilized to accomplish the extension will also be considered.

\textbf{THE UNIFORM COMMERCIAL CODE AND ARTICLE 2}

In 1942, the American Law Institute and the National Conference of Commissioners on Uniform State Laws undertook the joint preparation of a uniform act to cover the general area of commercial law.\textsuperscript{12} This action was taken for a variety of reasons. While a number of uniform acts were in existence,\textsuperscript{13} their adoption had been piecemeal.\textsuperscript{14} Moreover, commercial practices had undergone rapid development since these acts were drafted.\textsuperscript{15} Finally, local amendment and divergent construction of the acts had defeated actual uniformity.\textsuperscript{16}

To prevent the piecemeal passage of related uniform acts, the Code was designed as a unit, integrating all the different facets of a commercial transaction. This design was predicated upon the belief that all aspects of a commercial transaction were but a single subject

\begin{itemize}
  \item \textsuperscript{10} U.C.C. § 9-505(2) authorizes the secured party to retain the collateral in satisfaction of the debtor's obligation upon written notice of such proposal.
  \item \textsuperscript{11} In re Lakeshore Transit-Kenosha, Inc., 7 U.C.C. Rep. Serv. 607 (E.D. Wis. 1969).
  \item \textsuperscript{12} National Conference of Commissioners on Uniform State Laws & American Law Institute, \textit{General Comment}, in 1 \textit{Uniform Laws Annotated XVII} (1976) [hereinafter cited as \textit{General Comment}].
  \item \textsuperscript{13} \textit{Id.} at XVI.
  \item \textsuperscript{14} Beers, \textit{The New Commercial Code}, 2 \textit{Bus. Law.} 14 (1947) [hereinafter cited as Beers].
  \item \textsuperscript{15} Bunn, \textit{The Uniform Commercial Code—Some General Observations}, 1952 \textit{Wis. L. Rev.} 197 [hereinafter cited as \textit{General Observations}].
  \item \textsuperscript{16} Beers, \textit{supra} note 14, at 14, 15.
\end{itemize}
of law.\textsuperscript{17} To keep in step with developing business practices, the views of industry and business were solicited to draft a pragmatic, workable act. Indeed, for some, certainty and clarity were higher goals than theoretical perfection.\textsuperscript{18} Above all, passage and uniformity in all American jurisdictions were considered fundamental objectives.\textsuperscript{19}

Article 2 is the specific area of the Code dealing with the transfer of ownership in goods. As such, it was designed largely to supplant the Uniform Sales Act,\textsuperscript{20} although significant changes were made. Primarily, these changes were in keeping with the increased emphasis upon functionalism. Although often producing results similar to those reached under the Sales Act, the Code rules were designed to be more workable.\textsuperscript{21}

One of the most fundamental changes brought about by Article 2 was a decreased reliance on the concept of title.\textsuperscript{22} Pre-Code law relied on the title theory,\textsuperscript{23} whereby the location of title determined the rights and duties of the parties. Article 2 sought to avoid the practical problems inherent in the title theory by assigning contractual rights and duties without relying on the location of title in the transaction.\textsuperscript{24} Despite the de-emphasis of the title concept, it appears to remain an indispensable aspect of the sales article,\textsuperscript{25} since Article 2 remains primarily restricted to transactions in which title to goods is transferred.

The scope of Article 2 begins expansively: “Unless the context otherwise requires, this article applies to transactions in goods . . .”\textsuperscript{26} The two key components of this provision are the terms “transactions” and “goods”. The Code definition of “goods”\textsuperscript{27} follows the common


\textsuperscript{18} Beers, supra note 14, at 14.

\textsuperscript{19} General Comment, supra note 12, at xv.

\textsuperscript{20} Corbin, The Uniform Commercial Code—Sales; Should It Be Enacted?, 59 Yale L.J. 821, 834 (1950).

\textsuperscript{21} Braucher, McCurdy, Sutherland & Kaplan, Report on Article 2—Sales by Certain Members of Faculty of Harvard Law School, 6 Bus. Law. 151 (1951).


\textsuperscript{23} Hall, Article 2—Sales—“From Status to Contract”?, 1952 Wis. L. Rev. 209.

\textsuperscript{24} U.C.C. § 2-101, comment states: “The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor.”

\textsuperscript{25} 1 A. Soullante & J. Fonseca, Willston on Sales § 5-7 (4th ed. 1973).

\textsuperscript{26} U.C.C. § 2-102.

\textsuperscript{27} U.C.C. § 2-105(1).
law definition of personal property and excludes money, investment securities and choses in action. If only the term “transactions” is considered, the scope of Article 2 would seem to include leases of personal property. However, this apparently extensive coverage is restricted by the definitions given other basic terms used throughout the Code. As defined, these terms clearly eliminate nonsales transactions from the scope of Article 2, since the term “sale” incorporates the requirement of transfer of title into its definition. As a result of the use of the definition of “sale” in defining other terms and in the substantive provisions of the Code, the requirement of transfer of title seeps into every corner of the Code.

Treatment of the concept of title in Article 2 therefore appears basically inconsistent. On the one hand, the sales provisions are to be applied “irrespective of title” while, on the other, the very application of the sales article is dependent on the passage of title. The only logical conclusion seems to be that while the application of Article 2 does not depend on the actual time at which title passes, the passage of title at some point nonetheless remains an absolute requirement.

The requirement of passage of title in Article 2 does not mean that its drafters considered and rejected the Article’s application to all nonsales transactions. On the contrary, the applicability of Article 2 to leases does not appear to have been considered. At the time the

28. Personal property traditionally has been defined as that which is movable. R. Brown, The Law of Personal Property § 7 (2d ed. 1955).
29. This term is not defined in the Code, but see Webster’s New International Dictionary 2688 (2nd ed. 1950) (transact: “To carry on business; to have dealings...”).
32. The requirement of the transfer of title is explicit in the definition of “sale”; “A ‘sale’ consists in the passing of title from the seller to the buyer for a price...” U.C.C. § 2-106(1). The same requirement is then incorporated into the terms of “contract” and “agreement”, which terms are “limited to those relating to the present or future sale of goods,” Id. The definitions of “buyer” and “seller” are then based upon the existence of a sale or contract to sell, U.C.C. § 2-103(1). Even the definition of “goods” incorporates the idea of passage of title; the term is defined as “all things... which are movable at the time of identification to the contract for sale...” U.C.C. § 2-105(1).
34. U.C.C. § 2-401.
35. This is because the requirement of passage of title is incorporated so extensively throughout Article 2. R. Nordstrom, Law of Sales § 21 (1970).
Article was being drafted, leases of personal property occurred less frequently than today. Problems arising from the requirement of the passage of title were unapparent at the time and the natural tendency of the drafters was to speak in terms of sales. Problems arose only in connection with the precise moment of passage and Article 2 rejected the title concept only insofar as necessary to solve these problems.

Today, however, the intentions of the parties, even as to the eventual passage of title, are much more likely to be unclear. Amid the possible combinations of options to purchase, renewals of the lease term and open-ended leases, the characterization of the intended transaction concerning goods is not only difficult, but subject to change during the evolution of the transaction. Whether the applicable law should be subject to change at any given moment because of the present appearance of the transaction is questionable. In fact, the very difficulty of distinguishing sales and leases suggests that the application of different sets of rules is unjustified. Even when no question exists as to the proper characterization of the transaction, if the economic incidents are the same as those of a sale, the law should not distinguish between the two.

**APPLICATION BY THE COURTS**

The extension of the scope of Article 2 to include leases has been considered increasingly by the courts. However, because the question has arisen in a judicial context, extension has only been considered in regard to a particular section or sections. The purpose of the following discussion is to present those Article 2 provisions which already have been applied to leases. Some general observations will be made concerning the relevance of specific Code sections to leases and the order of discussion will roughly correspond to the frequency with which extension has been considered.

Code sections most frequently applied to lease transactions are those concerning warranties. Not surprisingly, this area is also one

36. See I. MARIASH, TREATISE ON THE LAW OF SALES § 189 (1930) ("A rare and unusual type of transaction is the lease of personal property, a form of agreement used largely in the shoe machinery industry.").

37. U.C.C. § 2-312 (warranty of title); U.C.C. § 2-313 (express warranties); U.C.C. § 2-314 (implied warranty of merchantability); U.C.C. § 2-315 (implied warranty of fitness for particular purpose); U.C.C. § 2-316 (exclusion or modification of warranties); U.C.C. § 2-317 (cumulation and conflict of warranties); U.C.C. § 2-318 (third party beneficiaries of warranties).
in which the concept of extension has been most intensively scrutinized. This commentary has been overwhelmingly favorable because of the policy interests favoring uniform treatment of transactions in goods. In both a sale and a lease, the buyer/lessee is interested in obtaining the use of certain goods, while the seller/lessor is interested in providing the goods to be used. The particular circumstances in each case, which determine whether the transaction takes the form of a sale of a lease, do not change the reason for implying warranties. The reliance of the user on the quality and safety of the items furnished is as great in a lease as in a sale. As a result, the Code sections on warranties have been applied in a wide variety of contexts.

Part 6 of Article 2 contains provisions governing the acceptance or rejection of goods and each party's duties in either event. These provisions have been found applicable to leases in a number of instances. Sections requiring notification of breach, granting the right to adequate assurance of performance, and defining the doctrine of anticipatory repudiation have all been applied to lease transactions. Courts have noted that the standards of conduct called for by Part 6 are either based on the common law or phrased in terms of reasonableness. Thus, even where the court hesitates to find that the underlying transaction is governed directly by a particular Code provision, it may simply apply the provision as the best available statement of the law.


40. See Annot. 48 A.L.R.3d 668 (1973) for a comprehensive list of examples where the Code sections on warranties have been applied.

41. U.C.C. §§ 2-601 through 2-616.


44. U.C.C. § 2-610, applied in William B. Tanner Co. v. WIOO, Inc., 528 F.2d 262 (3d Cir. 1975).


Part 7 of Article 2 governs the remedies of parties to the sales transaction. As might be expected, the most frequently applied provisions are those dealing with the amount of damages recoverable. Other sections which have been applied are those dealing with cumulative remedies and the statute of limitations.

The Article 2 provision granting courts the power to strike unconscionable clauses and contracts has been held applicable in a number of cases. Extension of this provision has been urged on the ground that it states a general principle of justice which transcends the area of sales. In the absence of such specific statutory authority, courts must resort to various subterfuges to reach just results.

The remaining sections of Article 2 which have been applied to leases are found in Part 2, which contains general rules of contract formation. These provisions have been applied in regard to the statute of frauds and writings in confirmation, the use of parole evidence, and the modification of a contract. These provisions and the others in Part 2 of the Article simply represent updated statements of the general rules of contract law.

48. U.C.C. §§ 2-701 through 2-725.
52. U.C.C. § 2-302.
54. In reference to § 2-302, Professor Corbin notes: Where this section is made applicable to contracts for the sale of goods, no court should fail to make it applicable to all other contracts; for the policy it adopts is applicable to all alike, it puts upon the court the responsibility for determining the degree of unconscionability and the requirement of "justice".
5 A. CORBIN, CONTRACTS § 1164, at 223 (1964).
METHODS OF APPLICATION

There are several rationales under which Article 2 has been extended to apply to leases. Under two of these theories, leases are assumed to be directly within the scope of Article 2; two others extend the scope of Article 2 by analogy. Because each theory is justified by different considerations, each supports the application of the Code to leases in varying degrees.

The first method under which leases are found directly within the scope of Article 2 is employed in situations in which a transaction, though labelled a lease, is in reality a sale. While such a facade is not always easily detectable, the intent of the parties is so clear in some instances that no other characterization of the transaction is possible. An example of a transaction which justifies this treatment is a lease agreement providing that upon expiration of the term of the lease title to the goods automatically passes to the lessee. 0 By providing for automatic passage of title, the purported lease fulfills the Code definition of a “contract for sale,” which includes “a contract to sell goods at a future time.” 61 Once the self-serving label of a lease is disregarded, all Article 2 provisions should be applicable to the transaction.

The second method under which leases have been found directly within the purview of Article 2 focuses on the language of the Article’s scope provision, which restricts the applicability of Article 2 to “transactions in goods.” 62 At least one court has reasoned that this phrasing includes leases of goods, subject to express exclusion from specific provisions. 63 The approach thus emphasizes the breadth of the term “transaction” and relies on the Code’s purpose of de-emphasizing title, requiring extension to be considered on a section by section basis. Under this approach, extension is inappropriate only in regard to a section that expressly incorporates the requirement of a sale. 65

This rationale for extension is unjustified for two reasons. First, this approach assumes that the drafters intended the scope of Article

60. This was the fact situation in Granite Equip. Leasing Corp. v. Everett School, Inc., 9 U.C.C. Rep. Serv. 849 (N.Y. Civ. Ct. 1971).
61. U.C.C. § 2-106(1).
64. 298 N.Y.S.2d at 396.
65. Such incorporation occurs in sections containing words such as “seller,” “buyer,” or “contract.” See note 32 supra.
2 to encompass more than outright sales, as suggested by the use of the term "transaction". The number of provisions incorporating the requirement of a sale belies this assumption and suggest that the use of the term "transaction" was merely the result of inadvertent draftsmanship. Secondly, assuming that the scope provision of Article 2 indeed was intended to be broader than the majority of its provisions, such an approach is of minimal utility. The approach would preclude the extension of most Article 2 provisions to leases, particularly those provisions where extension would be most beneficial.66

Extension by analogy has frequently been used to avoid the problems associated with express inclusion of leases within Article 2. Courts utilizing this method concede that leases do not expressly fall within the scope of Article 2, but they nevertheless apply its provisions by analogy. Unfortunately, courts which have applied Article 2 to leases "by analogy" have usually failed to distinguish between two different methods of analogizing leases to sales.

Under the first method, a court relies on the analogy that exists between the lease in question and the paradigm of a sale; if the two are sufficiently analogous, Article 2 is applied to the lease.67 This method must be distinguished from a similar method, discussed previously, of recognizing a disguised sale. Under the analogy method, the transaction cannot be properly characterized as a sale; its functional resemblance to a sale, however, requires similar treatment. Thus, the crucial question is whether the lease is sufficiently analogous to a sale to warrant the application of similar rules. In making such a determination, a number of factors are considered indicative of the functional nature of transactions in goods. While these factors can be identified, their presence and importance vary from case to case, making it impossible to state any precise formula for predicting how a transaction will be classified.

One of the most important factors considered by the courts under the analogy method is the presence of an option to purchase in a lease.68 An option to purchase creates a potential contract for sale.

66. Note that all three warranty sections, U.C.C. §§ 2-313 through 2-315, contain such terms and are among those most frequently applied. See text accompanying note 37 supra.
As a result, there is uncertainty whether sales law or lease law should be applied to the transaction. If non-Code law is initially applicable to the transaction and Code law is applied after the exercise of the option, the result is the undesirable application of inconsistent rules to different stages of the same transaction. If non-Code law is applied to all stages of the transaction, the intended scope of Article 2 is frustrated. The only solution compatible with both uniformity and the intent of the Code is the application of Article 2 to all stages of a transaction in goods containing an option to purchase.

In evaluating the weight to be given an option to purchase, logic suggests that the lower the cost to the lessee of exercising the option, the higher the probability that Article 2 will be applied to all stages of the transaction. At some point, the cost of exercising the option is so low that a court could find the lease is in fact a sale.

A second important factor focused on by the courts is the length of the lease term relative to the useful life of the item leased. The greater the percentage of an item's useful life which a lessee will possess, the greater the likelihood that Article 2 will be applied. In evaluating this factor, it is important to distinguish leases where there is only a potential for a long or open-ended term from those whose term is expressly defined as a major portion of the item's useful life. In the latter case, the lessee is "locked in"; thus, the analogy of the lease to the sale is clearer and exists at all stages of the lease.

Other factors which have been considered by the courts include identifying the party vested with the usual incidents of ownership, such as the duty to repair and maintain the goods, the risk of loss and the duty to pay personal property taxes. The position of the lessee more closely resembles that of a buyer as he assumes more of these burdens.

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69. E.g., in New York, where the statute of limitations for leases is six years, N.Y. Civ. Prac. Law § 213(2) (1971), would the Code's four-year statute of limitations, U.C.C. § 2-725, bar an action for breach of warranty filed five years after breach if, in the intervening period, an option to purchase had been exercised? Would the result be different if the option had been exercised before the breach?


72. See Redfern Meats, Inc. v. Hertz Corp., 34 Ga. App. 381, 215 S.E.2d 10 (1975) (lessee obligated to either rent the item for its entire useful life or exercise option to purchase).

Similarly, a final factor considered in evaluating the particular transaction is the status of the lessor. If he is normally engaged in selling the same item as that leased, or has previously offered to sell an item that was later leased, there is an increased chance that the transaction will be held analogous to a sale.\textsuperscript{74}

The reasoning which underlies the application of Article 2 to analogous lease transactions has been expressed in various ways. Some courts have characterized the method as the recognition of a kind of spillover effect: \textit{"[T]he Uniform Commercial Code Article on Sales is attended by a penumbra or umbrella of influence in areas of contract law not specifically within the literal definition of sales . . . ."}\textsuperscript{75}

When the transaction in question is sufficiently analogous to a sale, it falls within this penumbra of influence and Code law is applied. Implicit in this position is the assumption that the scope of Article 2 is not strictly confined to sales transactions. Rather, its scope extends to the degree necessary to preserve the logical consistency of the law. Other courts have focused on the practical effect of the transaction:

\begin{quote}
In view of the great volume of commercial transactions which are entered into by the device of a lease, rather than a sale, it would be anomalous if this large body of commercial transactions were subject to different rules of law than other commercial transactions which tend to the identical economic result.\textsuperscript{76}
\end{quote}

No matter how the reasoning is expressed, courts which utilize this first method of extension "by analogy" look beyond the legal form of the transaction and examine its commercial substance. Cognizant of the fact that one purpose of the Code is to make commercial law reflect the realities of the market place, these courts appear wary of subordinating commercial practices to legal theory.\textsuperscript{77} However, these courts are still somewhat confused as to which factors are relevant in


\textsuperscript{77} See Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, —, 215 S.E.2d 10, 17 (1975) ("[W]e are attempting to prevent merchants from dodging the requirements of the UCC by selling goods under the guise of a lease . . . ."); United States Leasing Corp. v. Franklin Plaza Apart., Inc., 65 Misc. 2d 1082, —, 319 N.Y.S.2d 531, 535 (Civ. Ct. 1971) ("From the point of view of the user it makes little difference that he is labelled a buyer or a lessee.").
characterizing the commercial reality of a transaction. By utilizing this method of extension, these courts have, in a sense, "leapfrogged" this theoretical lag while attempting to fulfill the purpose of the Code. Principally because of this theoretical lag, the implications of this method of extension are extremely vague. Logically, it appears that a lease which is sufficiently analogous to a sale for the application of one Article 2 provision should be sufficiently analogous to warrant the extension of every other provision. In practice, however, this issue remains far from settled. While some courts have applied a wide variety of provisions to leases that were found to be analogous to a sale, other courts have expressly limited their application to specific provisions.

The second method of extending Article 2 to leases "by analogy" does not depend on the similarity of the particular lease to the paradigm of a sale. Instead, this method is used in cases where the legal principles of Article 2 are felt to be the best expressions of the law which should be applied to leases. The analogy here is between rules drawn from alternative sources of law:

Reasoning by analogy does not require us to apply Article 2 in toto to a lease; rather, we need apply only those provisions which are sufficiently analogous. In order to determine which provisions are applicable we will look to the commercial setting in which the problem arises and contrast the relevant common law with Article 2—we will use Article 2 as "a premise for reasoning only when the case involves the same considerations that gave rise to the Code provisions and an analogy is not rebutted by additional antithetical circumstances."

Under this method many of the provision of Article 2 are viewed simply as expressions of the general law of contracts. So viewed, their relevance transcends the limited area of sales. Thus, even though found in an Article whose scope is limited to sales, certain sections of the Article have been held controlling, for practical reasons, in disputes related to bona fide leases.

83. "The Code, far from rejecting the foundations of prior contract law, in most areas simply distills from the cases the most effective and desirable rules which it then codifies in a clearly defined formulation." Judicial Reasoning, supra note 38, at 886. See, e.g., Glen Dick Equip. Co. v. Bass, 96 Idaho 873, 538 P.2d 1184, 1191 (1975).
ARTICLE 2 AND LEASE TRANSACTIONS

There are two reasons for turning to Code provisions under such circumstances. First of all, non-Code law does not provide clear answers to legal problems concerning leases. Very little statutory law exists in the area of personal property leases and case law governing such leases often is sparse. This state of affairs leaves a dearth of authority on many questions involving leases. When similar questions have been answered by the Code, it is natural for courts to rely on such answers. This tendency is encouraged by the fact that many Code provisions draw a bright line between compliance and non-compliance. Others specifically allocate a right or duty where the law was previously silent. In either case, while the provisions may be arbitrary in an absolute sense, they are essential in providing the necessary certainty for conducting daily business affairs. In the absence of definite rules, different jurisdictions could adopt equally valid, but incompatible, rules. Thus, even where a transaction falls outside the scope of a particular provision, courts, in the interest of certainty, have held code provisions determinative.

The second reason for turning to Article 2 provisions in these circumstances is that much relevant non-Code law has become outdated. Here again, the absence of statutory provisions and recent case law is a primary cause of this state of affairs. One of the purposes of the Code was to update the law where business practices had outpaced existing legal principles. The fact that the scope of Article 2 was restricted to sales does not justify the inference that the law for other

84. Usually personal property leases are governed by general statutory contract provisions. See, e.g., N.Y. GEN. OBLIG. LAW ch. 24-A (McKinney 1964). When states do engage in an occasional statutory foray into this area, the results are extremely limited as compared with the Code. See, e.g., CAL. CIV. CODE §§ 1925-1935, 1955-1959 (1954); OKLA. STAT. tit. 15, §§ 531-545 (1972).


86. E.g., an objection to the terms of a writing in confirmation must be given within ten days, U.C.C. § 2-201(2), and, upon request, assurance of due performance must be given within thirty days, U.C.C. § 2-609(4).


88. In William B. Tanner Co. v. WIOO, Inc., 528 F.2d 262 (3d Cir. 1975), the court considered the application of the Code provision on anticipatory repudiation, U.C.C. § 2-610. After first holding that the Code did not govern in the case of a lease, the court followed the dictates of the provision, stating: "We know of no justification or logic for applying a different rule to a contract which is outside the Code. . . . In reaching this conclusion we do no more than recognize a single rule of anticipatory breach governing all contracts, within or without the Uniform Commercial Code." Id. at 271.

89. See General Observations, supra note 15.
transactions was intended to remain static. As a result, courts have found justification in the Code to modernize outdated laws relating to leases technically outside Article 2's scope.90

It is important to keep in mind that the extension of Article 2 to leases has not been universally accepted.91 Courts that have rejected opportunities to extend the Code to lease transactions have anticipated fundamental problems. One concern has been that by extending the scope of Article 2 to leases, the judiciary would invade the legislative function.92 While such concern is understandable, other courts have taken the opposite tact, suggesting that the Code encourages judicial extension.93 The introductory Code provision on rules of construction and purpose seems to support this position and appears to provide an internal growth mechanism.94

A second major objection to the extension of Article 2 provisions to leases is grounded on the fear of uncertainty and unpredictability of results. If the line between a sale and a lease is blurred or abandoned, where should the new line be drawn? Moreover, what assurances are there that the new line will be any clearer than the old one? No definitive test has yet been proposed which yields consistent results in this regard.95 In light of the many factors which must be

90. In Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971), the court considered the effect of an innocuous disclaimer in the lease of a defective golf cart. Under case law directly in point, such a disclaimer would avoid liability. Nevertheless, the court adopted the Code provision nullifying such disclaimers, U.C.C. § 2-316(2), as expressive of public policy and held the disclaimer void.


92. Bona v. Graefe, 264 Md. 69, —, 285 A.2d 607, 609 (1972) ("[I]f the draftsmen had intended the sections [U.C.C. §§ 2-313, 2-315] to apply to leases of goods as well as to sales, they should have said so.") (footnote omitted). See also Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, —, 428 S.W.2d 46, 54 (1968) (Fogleman, J., dissenting).


94. U.C.C. § 1-102, comment 1 begins:

This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.

95. Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, —, 428 S.W.2d 46, 56 (1968) (Fogleman, J., dissenting).
considered, a distinction based on any one factor would be at least as arbitrary as the present distinction based on title. On the other hand, any differentiation made on the basis of all the various factors must be inherently subjective. Even so, while no greater certainty may be possible, the choice of law should be made on the basis of substance rather than form.

In any case, the question of which transactions come within the scope of Article 2 is asked only in regard to specific sections. If the volume of case reports is any indication, some provisions may be extended much more readily than others. The policy behind each provision is the controlling factor. This raises the problem of ascertaining the policy behind each section. As a result, some courts have suggested that piecemeal extension interferes too greatly with the Code's objectives of certainty and predictability:

I am unable to discern how we will be able to decide the application of code provisions to leases on a section by section basis in the absence of clear statutory intent. Nor do I see any guide to the trial bench or bar, much less to the business community, in making these decisions. The purpose of clarifying, stabilizing and making uniform the commercial laws of the various states is thus defeated by creating an atmosphere of confusion about the whole thing.

Proposals

Past extensions of Article 2 to leases have occurred in response to a felt need for change; a need that appears widespread and likely to increase. Substantial questions have been raised, however, concerning the effect of extension and the fear of even greater uncertainty resulting from increased extension of the Code. While no panacea can be offered, two alternative proposals are presented.

The first suggestion is the incorporation of all leases within the scope of Article 2. Such a modification would do away with the sale requirement of the Code, without affecting the limitation of its applicability to "goods". Simplicity and certainty would be the primary

96. See text accompanying notes 68 to 74 supra.
97. See text accompanying notes 84 to 90 supra.
98. See text accompanying note 81 supra.
100. U.C.C. § 2-102 incorporates this dual requirement. See text accompanying notes 26 to 31 supra.
benefits of this change. Distinctions would no longer be necessary anywhere on the sales/lease continuum and all Article 2 provisions would be applicable to leases. The only shortcoming of such a modification is the danger of overextension; review of Article 2 reveals a few provisions which might not be applicable to leases.\textsuperscript{101} Insofar as they are truly inapplicable, little harm should result, however. Likewise, review reveals no provision of Article 2 which, if applied to leases with common sense, would lead to an unjust result.\textsuperscript{102} Nevertheless, not all fact situations can be imagined in advance. The prospect of some peculiar set of circumstances transforming an extended provision into a legal Frankenstein cannot be lightly disregarded.\textsuperscript{103}

Insomuch as the proposal for complete incorporation of leases within the scope of Article 2 admittedly involves a large step, an alternative proposal is presented. This is a two-step process which employs both forms of extension by analogy. To this extent, the proposal utilizes practices which already are in use in varying degrees. However, by applying them in a conscious, formal process, desirable results can be reached that also provide certainty.

The first step would require the identification of all Article 2 provisions which should be applied to all leases. In order to make this determination, the inquiry should be the same as the second method of extension by analogy used by the courts. Thus the Article 2 provisions that should be applied to every lease of personal property should include the vast majority of Article 2 provisions. Identified sections could then be amended to reflect their applicability to leases.\textsuperscript{104} A selection process conducted by the Permanent Editorial Board of the Uniform Commercial Code would enhance the likelihood of consistent amendment. Certainty and predictability would be increased from the present situation; whenever the question of the applicability of Article 2 to a lease arose, some provisions would definitely apply.

The second step would be used only in regard to those provisions not expressly extended to all leases. For these provisions, extension

\textsuperscript{101} E.g., U.C.C. § 2-326 deals with sales on approval and consignments; U.C.C. § 2-509 deals with risk of loss.

\textsuperscript{102} Some Article 2 provisions must be interpreted in a slightly different light. E.g., literal interpretation of the section on the measure of damages for seller's breach, U.C.C. § 2-714(2), might fail to adjust the level of damages to reflect the lessee's limited temporal interest in the goods.

\textsuperscript{103} Consideration by committee, such as the Permanent Editorial Board for the Commercial Code, would do much to lessen this possibility.

\textsuperscript{104} Specific extension would be provided for in a manner similar to that used in U.C.C. § 2-314 to the serving for value of food or drink.
would occur on a case-by-case basis. In considering the application of these provisions to particular leases, courts would analyze the relevant factors of the transaction and consider whether, in light of the provision to be applied, the lease was sufficiently analogous to a sale to justify application. The method used at this step is the same as the first method of extension by analogy.

This method of extension attempts to serve two masters: uniformity and flexibility. Uniformity would be aided by making those provisions of Article 2 most applicable to leases explicitly applicable. Flexibility would be preserved by allowing further extension on a case-by-case basis. The second step involving more difficult questions and more subjective answers can be avoided in most cases. Further, because the process of selection under the first step would be a relatively slow one, the second step would allow courts immediate freedom to extend Article 2 where necessary.

CONCLUSION

Determining the applicable body of law to control questions arising in regard to leases of personal property is a problem encountered with increasing frequency. When these questions arise, there is a natural tendency for those familiar with the Uniform Commercial Code to look to Article 2 for answers. The limited scope of the Article, however, prevents universal reliance on the extension of its provisions to leases.

While many provisions of Article 2 have been extended to leases, extension has been only piecemeal. Inconsistent results and theories have prevented the certainty and uniformity which are essential in commercial law. To realize these objectives, therefore, it is imperative that a clear and comprehensive body of law be developed for leases. In light of the functional similarity between leases and sales, it is inevitable that provisions of Article 2 will play a decisive role in the development of the law governing leases of personal property.

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