4-1-1993

Services Contracts: The Forgotten Sector of Commercial Law

Raymond T. Nimmer

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"Have we left anything out?" asked the blind man. "No, that's the wrong question," said the young person in the dark cloak. "The question is not if you have left anything out, but why? Where are services agreements, technology licenses, intellectual property contracts?"

I. INTRODUCTION

The Uniform Commercial Code is obsolete in its coverage in Article 2 and in its cousin, Article 2A.[1] These articles constitute the *basic* contract law of the Code. They deal with important issues, but fail to address topics that are more significant. Their scope reflects a goods bias. That bias has shaped basic contract law since before the 1950s. But as years progress, the basic contract law provisions become increasingly mismatched to the modern economy. The emphasis on goods reflects an industrial economy that is in fact being supplanted by an information and services based, global economic system. Today, the UCC shows the indelible traces of a world view perpetuated past its time and receding from center stage as the economy shifts.

A Code that deals with *some* major areas of contract law cannot be entirely obsolete. But by failing to cover active, relevant fields of commerce that already outstrip goods in economic importance, Article 2 becomes marginal in its relevance and almost quaint in its world view. What it does, it does well, but it leaves out so much that it is woefully incomplete. In this latter sense, the UCC suffers from a subject-matter obsolescence which, if not a terminal illness, describes an acute failure of the heart and soul of the codification movement.

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1. There are many ways to document the failure to deal with modern themes. The UCC largely excludes consumer law and real estate transactions. These areas of law contain important issues that, with few exceptions, fall outside the UCC. There are reasons that may justify exclusion of real estate transactions and consumer law, including their historic tendency to involve parties with local rather than national affiliations. This "historic tendency" may no longer define actual practice, but I leave that issue for another day.

This Essay focuses on services contracts and the basic contract law of the UCC. The services industry constitutes the single largest sector of commerce in the United States today. Services already exceed goods in economic importance and continue to grow at a far more rapid pace. Many services contracts involve the production or transfer of intangibles such as data, technology and intellectual property. These represent major factors in the modern "information age." But contracts for services are covered in the UCC in only a marginal, limited and indirect manner. Article 2 excludes services contracts unless the sale of "goods" predominates in a transaction. Contracts that transfer intangibles are currently not dealt with at all.

Why? The only answers lie in historical oddities and scope decisions made in far different economic times. The current scope of Article 2 stems from decisions in the 1950s joined to a modern unwillingness to revisit those decisions in light of modern practice and economic systems. Article 2A is a recent exception to this unwillingness driven, one supposes, by a particular industry and a compact group of controversial issues.

We need to reassess not whether specific contracts are within the UCC as currently drafted, but whether redrafting Article 2 without dealing with these fields of commercial contracting makes any sense. A UCC that deals only with sales and leases of *goods* dwells on the the commerce of yesterday, ignores the *reality* of today, and fails to respond to the *inevitable* challenges of the future. Should our priorities continue to be bound by a focus on goods? More fundamentally, can the UCC be treated as a modern *commercial* code when it excludes significant areas and thereby ignores or mischaracterizes what is today's definition of commercial practice?

I argue that it cannot. What we need, instead, is both a revised structure and a revised scope for basic contract law in the UCC. Ultimately, the scope of contract law under the Code should cover not only sales of goods and leasing, but also licensing of intangibles and contracting for services. The scope should, in essence, expand to cover areas of commerce that are relevant in light of today's and tomorrow's commercial practices. We also need a revised structure that permits the growth and expansion of the UCC as the economy transforms in the face of modern technology and commercial practice.

A hub-and-spoke approach to the design of basic contract law principles is appropriate. The hub consists of general principles applicable to all forms of commercial contracting. The spokes are subparts or related articles that concentrate on issues specifically relevant to selected and

important transactions, tailoring standards and default rules to fit and foster commercial practice. The first step in this direction came in adding leases to the UCC. Another, more significant step involves adding commercial services contracts.

II. OBSOLESCENCE AND PRIORITY

The current scope of the UCC reflects choices of policy priority, not historic or theoretical purity. While Llewellyn, Gilmore and their colleagues made choices in the 1950s about what should be included in the UCC, they merely adopted priorities that were reasonable to them at that time.[2] Their choices do not state fundamental truths. But the practical and political scope choices they made are no longer appropriate. Excluded contracts are more significant today than the topics included in the UCC. The excluded contracts present more demanding policy choices and issues of doctrine, as well as more vibrant and growing economic contexts.

The modern Code dwells on a narrow segment of commercial practice. If the themes selected in the 1950s still represented either the most important areas of law or those most susceptible to codification, relying on the old decisions would be sensible. But they do not. If the UCC did not exist and you chose from scratch what types of contracts a uniform code should address, would you select *nonconsumer* sales of goods and *personal property* leases as the most important? I think not. But basic contract law in Articles 2 and 2A focuses on these subjects.

Even though commercial services are widely significant, we treat the sale and exchange of *items* as the focus of commerce and commercial contract law.[3] Services contracts are relegated to a secondary position folded into uncodified law and are seldom examined as an independent part of commercial law. Yet, the modern national economy is a services economy existing in an information age.[4] These two descriptions of the U.S. economy share a close nexus and stem from similar events. Information, communications and transportation technology enable the expansion of both the services and information producing sectors of commerce. These technologies have transformed what was once a transitory, nonstorable and nonreusable commercial asset into one that can be

2. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341 (1948).

3. *See* KARL P. SAUVANT, INTERNATIONAL TRANSACTIONS IN SERVICES: THE POLITICS OF TRANSBORDER DATA FLOWS 18-22 (1986).

4. *See, e.g.*, U.S. OFFICE OF TECHNOLOGY ASSESSMENT, INTERNATIONAL COMPETITIVENESS IN SERVICES 22 (1987).

delivered across the country by national providers, and whose outputs are often retained and retrievable at will. At the same time that product manufacturing is being truncated, automated or shifted to offshore locations, the services sector is burgeoning.

Services and the exchange relationships they entail challenge many preconceptions about law, social relationships and traditional categories of legal analysis. We see reactions to these changes in many contexts. Perhaps the most significant for a discussion of the UCC are developments in international trade negotiations. This forum reflects multinational judgments about modern commercial values and the direction in which commerce is evolving. While international trade analyses historically focused entirely on trade in goods, the discussions now include, for the first time, a direct focus on trade in services and intangibles.[5] It may not be necessary that the UCC mirror this change, but the fact that the change occurred indicates that traditional boundaries of commerce and commercial law are being redrawn. The driving force behind this change flows from the services and information sectors.

Commercial contracts between services providers and their clients include various important contractual relationships. These range across subject-matter areas such as design services, transportation, programming, consulting, drilling, security management, commodities trading, maintenance, repair, data processing, opinion surveys, training, advertising, research and development, accounting, entertainment, financial planning, communications, investment management and information services. While the subject-matter diversity appears daunting, the range of contract law issues is no greater than the diversity involved in transactions in goods. The difference between a contract to design an office and a contract to repair an elevator is no greater than the difference between a contract to buy a toaster and a contract to sell liquid helium. And this is just the every-day commercial world.

The law on services *contracts* comes from both common law and scattered statutes. It contains an array of uncertain legal doctrines. In contrast, commercial sales of goods are governed by articulate, codified rules, which receive extensive attention in legal literature and are being

5. *See generally* A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 STAN. J. INT'L L. 57 (1987) (discussing inclusion of new subject matter, including intellectual property rights and trade in services, in Uruguay Round of GATT negotiations); Paul E. Geller, *Can the GATT Incorporate Berne Whole?*, 4 WORLD INTELL. PROP. REP. 193 (1990) (discussing proposals in Uruguay Round regarding trade-related aspects of intellectual property rights); Joel H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747 (1989) (same).

rewritten for a second time in forty years to reflect modern developments. The imbalance could not be more blatant, nor could it be more unfortunate. It is time, actually long past time, to include services contracts in the UCC.

III. THE SCOPE OF NECESSARY CODE CHANGES: ISSUES AND CRITERIA

How does one decide whether to include or exclude an entire area of contract law from codification in the UCC? The criteria are seldom discussed and are surprisingly obscure. Since the initial scope decisions in the 1950s, the question of subject-matter inclusion or exclusion seldom has been revisited. The two exceptions are Articles 2A and 4A, both of which focus on narrow industries or types of transactions. The history of *these* changes, however, suggests several criteria for including a new field of contracting in the UCC.[6] To qualify:

(1) the area should have economic significance (the *volume* principle);
(2) it should be a field that can benefit from codification (the *relevance* principle);
(3) it should be national in practice (the *national* principle);
(4) the area should have subject-matter and policy elements that distinguish it from already codified sectors (the *uniqueness* principle); and
(5) the codification task must be reasonably achievable (the *feasibility* principle).

In a modern world characterized by rapid movement of value, instantaneous communications and state boundaries that have less significance in national trade, codification most often provides an appropriate alternative to patched together common-law developments. If volume, relevance and national scope exist in a given contracting area, as in services, there should be a presumption favoring codification.

A. The Volume Principle

An area of commercial contract law should not be codified unless the topic has sufficient scope to justify the effort and there is some reason to believe that codification will benefit commercial practice.[7] Because

6. *See* Gilmore, *supra* note 2; Raymond T. Nimmer, *Uniform Codification of Commercial Contract Law*, 18 RUTGERS COMPUTER & TECH. L.J. 465, 469-81 (1992).

7. Having stated the obvious, one must recognize that the criteria for inclusion are not always clear. Sales of goods and secured transactions in goods were important commercial topics in the 1950s and 1960s, and remain so today. It is less clear that bulk sales, investment securities and domestic letters of credit were equally important when included in the UCC. While these areas are included, the UCC excludes contracts for commercial services, transac-

codification activities work with limited resources, they must focus on topics that count.

Services contracts count. They dominate the modern economy. Services transactions cover a wide and growing range of business and account for a more substantial portion of the economic system than transactions in goods. They affect all aspects of society, both in this country and internationally.

A useful comparison can be drawn between services contracts and the two topics most recently brought into the Code: personal property leases (Article 2A) and funds transfers (Article 4A). A justification for Article 4A was that funds transfers deal with huge amounts of money and that "[t]here is no comprehensive body of law that defines the rights and obligations that arise from wire transfers."[8] Yet, transactions covered by Article 4A occur in relatively narrow economic and commercial strata. While massive amounts of money are transferred, few litigated disputes arise. The volume and importance criteria here focus solely on the amount of money involved, not the scope of the activity in terms of how many different actors and areas of commerce are affected.

The justification for Article 2A also concentrated on the importance of leasing, yet the value of personal property leases pales in comparison to the dollars involved in commercial services contracting. While litigation regarding commercial leases was common prior to the adoption of Article 2A, most of the litigation largely dealt with tax law and with the intersection between Article 2A and secured financing law. Article 2A properly goes far beyond these issues, dealing broadly with the lease relationship and creating a codified body of law that effectively guides transacting parties through the legal issues.

Funds transfers and leases are important and should be covered by the UCC. Services contracts are even more important and permeate modern commercial practice to a far greater extent. If a case based on importance can be made for either funds transfer or leasing, that case has far greater weight in reference to services contracts.

B. The Relevance Principle

Mere commercial importance does not mandate codification. The *relevance* principle states that before one attempts to codify, there must be a reason to believe that codification will benefit commerce. One meas-

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tions in intangibles (other than security interests) and transactions in real estate. Today, it could hardly be argued that these are less frequent, less economically significant and less commercial in nature than are topics brought under the umbrella of the UCC.

8. U.C.C. § 4A prefatory note (1990).

ures benefit by the extent to which codification promotes commercial development and makes contracting more efficient and effective, while remaining sensitive to competing public policies. One codifies an area of contract law because codification better serves policy and practical needs than a common law governed by judicial rulings coupled with scattered statutes enacted among the fifty states.

It is easy to mischaracterize the potential benefits of codification. In a decision whether or not to *undertake* a codification project, the relevant benefits do not lie solely in resolving current litigation or disputed contract issues. The focus does not center on the courtroom per se, but on negotiation and planning. Will codified rules expedite contracting or, at least, remove potential obstacles? The optimal goal is to facilitate and support the commercial transaction itself, not primarily to establish rules that yield "fair" results in litigation. Herein lies a fundamental point about commercial contract law. Uncertainty about the rule that applies often engenders uncertainty and error in negotiation: This adds costs to commercial transactions. More certain and commercially relevant rules, on the other hand, facilitate contracting.

The benefits of *undertaking* a process of codification do not lie primarily in any particular rule that might eventually be promulgated. For example, one should not begin a project to codify services law because of a desire for a new rule on disclaimers. The initial benefits lie in method and form. The eventual substantive rules depend on consensus and the political context of the statutory enactment that cannot be forecast at the outset.

Codification is a process. It yields a type of product. The content of that product varies with variations in subject matter. Both the process and the general character of the product are significant. Both yield benefits not produced in common law.

The *process* consists of an extensive examination of commercial practice, commercial law and contract policy in an open forum conducted over a period of years during which all interested groups can participate. This process is in stark contrast to common law. In court, litigants debate specific disputed issues. Common law evolves through the accumulated knowledge and shared inferences. Its rules are generated by numerous disputes played out in different courtrooms by different litigants debating similar points. This takes time. It ordinarily leaves significant gaps in reasoning and consistency among the states. Furthermore, in our modern era, common law goes hand in hand with scattered state statutes. Legislatures respond to local conditions and lobbying with statutes that augment or alter the common law. A national codification

project is better suited for the development of coherent, commercially relevant standards for contract law than is the common-law process.

The *product* of codification is a single document stating basic law in relatively explicit terms. This document serves a variety of functions. Developed in a national forum, the codification carries weight that reduces local willingness to adopt a policy directly at odds with national norms. This yields relative consistency. Furthermore, by placing many basic rules in a single document, codification enhances the accessibility of contract law, especially as accessibility is gauged by reference to parties that lack the time, resources or expertise to engage in extended legal research. Both consistency and accessibility reduce the costs and the risks associated with agreements entered into by commercial parties in a national, even global market.

In contrast, common-law decisions and augmenting statutes often yield scattered, incomplete and contradictory rules. These can be discerned and understood by commercial parties only through labored research and analysis or by hiring legal experts. Local variations are the norm, rather than the exception. The codification *product* generally yields a more readily discernable, consistent approach to contract issues than its common-law counterpart.

The relevance principle thus causes one to ask whether an area of contract law would benefit by a process that supplants common law with an open forum for multilateral discussion, and that creates a code containing a central statement of legal principles. Ordinarily, the answer is yes. Contract law benefits from codification unless federal law already establishes stable and discernible rules. Services contract law consists of often obscure common-law principles and state-by-state diversity. The process of examining fundamental commercial principles and, ideally, incorporating them into a coherent statement of law in enforceable form would provide significant advantages.

The codification process also shapes the *content* of the eventual legal rules in a way that encourages and supports commercial practices. Courts exist to resolve specific disputes. In the absence of codified law, judicial rulings often seek standards that enhance *contextual* fairness in individual disputes and that rely on *litigation* to solve problems. Neither approach serves well to protect commercial interests. In contrast, codification deals with broad ideas divorced of specific disputes in a forum in which numerous interests are represented. This more likely yields rules that facilitate commercial contracting and makes commercially appropriate choices about where and to what extent commercial interests should predominate in light of commercial *and* countervailing interests.

A first principle in commercial law is that a norm of contract freedom and flexibility best fosters commerce because it enables the parties to tailor a transaction to their own needs. Is freedom of contract better served by codification, or by common-law and local statute development? The record favors a conclusion that codes best preserve and foster contractual freedom. This principle of contract freedom explicitly permeates the UCC. It is mandated in those rules that establish default principles relating to the relationship between contracting parties.[9] Contract freedom, of course, also characterizes many common-law contract rules. However, while many common-law rules encourage contract freedom, the converse illustrations are too numerous, too recent and too compelling to ignore. Modern courts sharply disagree about the proper scope of contract freedom.[10] A codification in the UCC is more likely to contain explicit safeguards for freedom of contract than a purely common-law development.

The codification process also affects "default" rules in contract law. As a general rule, codification is more likely to yield commerce-facilitating default rules.

Where contract freedom dominates, the parties themselves define the terms of their bargain. Contract law plays an indirect role through "gap-filling" or "default" rules that govern in the absence of contract terms to the contrary.[11] The ideal default rule reflects commercial expec-

9. For a recent illustration, see the official comment to UCC § 2A-101: "This codification was greatly influenced by the fundamental tenet of the common law as it has developed with respect to leases of goods: freedom of the parties to contract . . . subject to certain limitations including those that relate to the obligations of good faith, diligence, reasonableness and care." U.C.C. § 2A-101 cmt. As a matter of UCC jurisprudence, there is a subsidiary premise that, in the absence of express terms on a disputed point, contract law should prefer a judicial resolution guided by general standards of commercial and contextual reasonableness, rather than controlled by an explicit default rule. Some contest this premise, arguing that default rules ought to be discernible and fixed to minimize the need for court action to define the rights of the parties in the absence of an express, contrary agreement.

10. Lender liability litigation is one illustration of conflict. *See* Helen D. Chaitman, *The Ten Commandments for Avoiding Lender Liability*, 22 UCC L.J. 3 (1989); *cf.* Kham & Nate's Shoes No. 2 v. First Bank, 908 F.2d 1351, 1357 (7th Cir. 1990) ("[F]irms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of 'good faith.' "). Another area is in reference to noncompetition clauses. *See, e.g.*, ROGER MILGRIM, TRADE SECRETS 3-67 (1967); RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY ¶ 3.10[3] (2d ed. 1992) (discussing conflict over enforceability of noncompetition clauses).

11. *See, e.g.*, Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985) (suggesting that predictability of explicit default rules may provide incentive to adopt those rules, rather than to create new terminology or relationship for contract).

tations and contains sufficient flexibility to allow for changes in evolving contract practice.[12]

Discernible, commercially sensible rules support commerce in numerous ways. They fill in gaps with appropriate standards and provide a benchmark against which bargains can be drafted without having to negotiate or account for all elements of a relationship in detail. Having access to established principles also reduces the burden or load that a written contract must carry; this facilitates agreement.[13] Also, because many *commercial* contracts involve no bargaining and are not tailored to a particular deal, default rules for such transactions should provide reasonably contoured relationships.

In these respects, codification more reliably yields relevant default terms than does a common-law process of litigation and uncoordinated local statutes. This is true because the process develops default rules through consultation with groups of experts and practitioners. These participants in the "real world" of commerce supply information about ordinary practices and commercial expectations in a setting divorced from a litigation context. This input is vital. In contrast, a court relies on the arguments of litigants, their limited and self-interested perspective and their self-selected, paid experts. While some judges see past the thicket of dispute-centered presentations, others do not. The common-law process is not conducive to the development of commercially relevant rules.

This is especially true for services contracts, in which the match between current law and current practice is unknown and created by happenstance. Current legal principles are embedded in general common-law contract rules that evolved without specific or consistent attention to the commercial services sector.

C. The National Principle

A codification topic should be national in scope. This *national* principle refers to two issues. One is that the contracting field and the issues

12. Gilmore, *supra* note 2.

13. These are not always best served by rules that do no more than provide a legal theory for litigation. The *Restatement (Second) of Contracts* provides that omitted essential terms of a contract should be filled by a court adopting a term "which is reasonable in the circumstances." RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981). *See generally* Richard E. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785 (1982) (discussing use of *Restatement (Second) of Contracts* as guideline in contract formation and interpretation). While a default or gap-filling term earmarked as "reasonable" often provides the only way to deal with an omitted contract term, this language invites rather than forecloses litigation. Such terms may not always be appropriate for *commercial* contract law.

it raises must concern and impact most states and regions of the country. The second is that the area of contracting should be characterized by national, rather than purely local participation.

The national principle thus focuses both on the importance of the subject and on a characteristic of codification that identifies one of its chief benefits: the role of codes in promoting contract practice by creating accessible understandable legal rules against which the contract can be measured.

Consider what default rule governs whether delivery of a slightly damaged product breaches a contract for the sale of a television, and contrast this with the default rule that governs whether a brief delay in completing work breaches a consulting contract. More to the point, how would you—or the contracting parties—discover the appropriate rule in your own state or in another state? For the television, UCC Article 2 provides the reference point, and the general rule will be the same in most states.[14] The answer for the consulting contract lies in common-law rules. One might turn to the *Restatement (Second) of Contracts* for a general principle, but the *Restatement* principles have not been adopted in all states; answers for particular states would depend on relevant case law, particularly the extent of common-law development of the concepts of material breach and substantial performance for services.

Both bodies of law can be discovered and applied, but codified rules are more readily accessible and tend to be more uniform across jurisdictions. Uncodified services contract law does not thus become entirely inaccessible. It is merely difficult to find and apply, especially on a national basis. This imposes avoidable costs on contracting. These costs are especially important in industries in which national practice is significant. Variations in local law hinder national operation. Elimination of these variations represents a potentially significant contribution from uniform, national codification. These more uniform rules level the commercial playing field for both large companies that have the expertise and the resources to undertake a search for applicable law and small firms that cannot afford to do so.

The national principle does not demand that all transactions in an area involve national actors. If that were true, no contract law could

14. U.C.C. § 2-601. The UCC standard specifies that if the goods "fail in any respect to conform to the contract" the buyer may reject the delivery. *Id.* This adopts the "perfect tender" rule, which is eroded by exceptions in the Code and in case law. *See, e.g., id.* § 2-508 (providing seller right to cure); Damashek v. Wang Labs., 540 N.Y.S.2d 429, 432 (App. Div. 1989) (holding that seller of defective computer disk drive must be given reasonable opportunity to cure defect).

pass the test. In all areas covered by Articles 2 and 2A, local transactions among purely local participants predominate. Rather than a universal national practice, it is important that there be a significant national practice in addition to the local practice. This national scope establishes benefits by clarifying (making accessible) and unifying (eliminating conflicts in) local law.

It is in respect of this *national* principle that perhaps the greatest sea change has occurred in contracts involving commercial services. Historically, services contracts involved intangible and nonstorable value. If I hire a company to repair my office air conditioning system, the services it provides are rendered on site and cannot be stored for later use. The service provider must be present. In contrast, if I purchase an air conditioner and install it myself, the seller never need visit or even know details about the location at which its product will be used.

Many modern services contracts retain this nonstorable and localized character. But prior to the information, communications and transportation explosions of the past several decades, this was the *only* option for most commercial services. Services were delivered primarily by local or regional participants. Either you brought the service provider to where the value would be received or you brought the items to the service provider. Because of difficulties of transportation, both options tended to advantage local vendors over national enterprises. When original Article 2 was written, most commercial services were provided locally.

The world has changed. While many services are provided on a local basis, vast amounts of commercial services are supplied by national companies or by services vendors brought in from remote locations. The illustrations are numerous. EDS processes data for companies throughout the country. IBM services computers in all fifty states. Browning-Ferris supplies waste management on a national and international basis; H & R Block, tax services; Ernst & Young, accounting; Jones, Day, Reavis & Pogue, lawyering; Gallup Corporation, opinion surveys; Pace Entertainment, rock concerts; Mead Data, Lexis and Nexis electronic database services; Hilton, hotel management. All of these are truly national services providers.

Equally important, through information technology and communications systems, vendors can work from remote locations. If desired, the services output can usually be stored. Restraints in location and storability, like impediments on travel, no longer impede national services networks. A company delivers inventory data processing for a Texas retailer from a computer located in Virginia. A law firm analyzes law in

its Washington office for a client in Detroit. An advertising campaign is designed in New York and delivered in Maine and Indiana for a California company. A computer program is designed and written in California for a company in Florida to be used on a computer in Georgia. Credit data are processed "on-line" by a company in Utah for companies throughout the country.

Services contracts today involve a mix of nationally sourced and local transactions. In this respect, they resemble the mix found in transactions in goods. Yet, the transactions occur in a legal environment characterized by a chaotic blend of common-law decision, local statute and undocumented tradition. The need for codification is apparent.

D. Tailoring Principles

In a country characterized by instantaneous communications and increasingly national commerce, contract-law codification is often appropriate as an alternative to patchwork common-law development of contract law. Services are a national industry. They entail transactions of volume and importance that can benefit from codification. As I indicated before, this combination argues for a presumption that favors creating a codification project.

As a practical matter, however, this presumption could lead to either of two positions. One could argue that we should incorporate the area of services contracts within existing law on contracts for the sale or lease of goods. This approach treats sales law as the dominant form of commercial contract law. It force fits services within that model. The alternative approach would argue for separate codification tailored to services contracts. This treats both goods and services as basic commercial contract-law topics that entail distinct policy and practice issues. In part, the choice between these two options hinges on applying the *uniqueness* principle to services contracts.

1. The uniqueness principle

The *uniqueness* principle states that one should codify contract rules specially tailored to a topic if that topic presents unique questions of law or practice. It is not necessary that the field be entirely unique. That burden could not be met by any area of contract law, including sales and leases, because all areas of contract law ultimately derive from similar principles. The argument is, rather, that separate codification should flow from differences in the type of issues faced and in their commercial solutions such that a *commercial uniqueness* exists relevant to contract form and expectations. One asks whether tailored rules better serve to

bolster commercial contracting than reliance on rules codified for different contexts and different transactions.

A subject matter that contains unique issues in this commercial sense might justify an entirely separate, self-sufficient codification, such as was done for leases. Ultimately, however, separate UCC articles on sales, leases, licensing, services and other contracts would lead to gross overlap and repetition. Indeed, for example, Article 2A on leases restates many of the basic law sections of Article 2.

A "hub-and-spoke" approach is better. This distinguishes between general legal principles that can be applied to sales, leases, licenses and services and, thus incorporated into generally applicable UCC provisions, as contrasted to specially tailored rules applicable to each area. The general rules provide the hub, with spokes branching out from that hub to provide special treatment of substantively unique, important transactions. This drafting style is common in many codes. It blends both growth potential and fundamental stability.

While services contracts are unique from sales of goods, this does not argue that an entirely different contract law need be developed. The unique issues in services contracts argue only that in some important aspects, services contracting should not be handled by rules developed for the sale of a drill press or a television. The context and content are different. The differences in default rules demanded by the variations in transactional expectations can be accommodated while also retaining (actually creating) similarity in rules such as statutes of frauds and limitations, good faith, conscionability and the like under a hub-and-spoke approach to Article 2.

Under either a separate article or a hub-and-spoke approach to drafting, however, services contracts clearly qualify for treatment separate from sales and leases of goods. Indeed, even seriously asking the question of whether sales law adequately accommodates services contracts indicates how dominated our minds are by a "goods bias." The differences between services contracts and goods-related contracts are apparent even from their terminology. We *sell* and *lease* goods, but we *perform* services. An architectural firm *designs* a building. A computer programming company *develops* a custom program. A market survey firm *conducts* a study. A consulting firm *advises* a client. A maintenance company *repairs* an elevator. An entertainer *appears* at a concert. A movie studio *produces* a film. A company *installs* a communications system. A security service *monitors* a warehouse. In a services contract, one party provides effort, time or interpretive skill in return for valuable consideration. The contract emphasizes personal or corporate perform-

ance, rather than any product that the services provider delivers. Indeed, a *pure* services contract delivers no tangible end product except perhaps reports, diagrams or electronic documents. As a result, the identity of the services provider often has greater significance than the final content or timing of the services performed. In this field, one often encounters issues about the transferability of contract obligations, the attention that the services provider gave to the project, and the degree of care or skill anticipated in the agreement. The rules applicable to these issues in sales or leases of goods yield results that should be markedly different than in the services context.[15]

Contracts in which the parties contemplate performance in the form of action, thought or judgment, rather than delivery of a product, entail a host of problems, drafting and legal issues that do not come into play in the sale of *property*. In services contracts, one is interested more in gauging the adequacy of the provider's conduct, the quality of its effort, the extent of the buyer's cooperation, and the proper compensation for partially completed projects, than in determining whether the end product fulfills original expectations.

In a services contract, the provider exchanges intangible value in return for consideration (payment). As a consequence, many rules in law pertaining to contracts for the sale of goods are not applicable to services agreements. These include doctrines associated with "tender of delivery" and "rejection or acceptance." These doctrines presume that delivery of a tangible item defines performance under the agreement. In a services agreement, however, a tangible item may not exist. Performance typically occurs over a period of time rather than in a single "tender of delivery." Once performed, services cannot be rejected or returned in the same way as can a defective television. For services contracts, "rejection" means simply a refusal to pay for completed services and "return" has no relevant meaning at all.

As a consequence, default rules defining the rights and remedies in services contracts must differ from those in sales or leases of goods. The law must balance the fact that the services provider often has relin-

15. Personal services contracts are not assignable unless made so by contract. "The reason is that the personal qualities of the person who is to render the services, such as his ability, skill, taste, integrity, dependability, and the like, are a material factor." Egner v. States Realty Co., 26 N.W.2d 464, 469 (Minn. 1947); *see also In re* Alltech Plastics, 71 B.R. 686 (Bankr. W.D. Tenn. 1987) (holding patent license nonassignable). Of course, not all services agreements carry with them the *personal* performance expectation necessary to create a nonassignable agreement. *See In re* Rooster, 100 B.R. 228 (Bankr. E.D. Pa. 1989) (applying Pennsylvania law); *In re* Sentry Data, 87 B.R. 943 (Bankr. N.D. Ill. 1988) (applying Minnesota law).

quished something that cannot be returned or resold—its time and effort—and that the client may have received some value that it cannot relinquish even if it desires to do so and even if the value received falls short of what it contracted to receive. While in goods contracts, remedies for a vendor's breach often present an all-or-nothing option requiring acceptance or permitting full rejection and nonpayment, services contract remedies must be gauged to achieve proper distribution of value and loss. The cases emphasize a concept of substantial performance and permit complete nonpayment only in the face of a material breach. The receiving party must pay for the value it obtains in the agreement even if that value falls short of the full expectations.

What constitutes a "defect" in performance is gauged differently in services contracts than in sales contracts. The UCC implies a warranty of merchantability, measured by reference to the average quality of similar goods, as a default rule for goods, subject to the right of the parties to disclaim that warranty.

In a contract for services, in gauging the adequacy of performance one might refer to the norms of reasonable performance in the trade or profession, but that reference lacks the clarity of merchantability standards. It must always be prefaced by a limit based on the degree of skill or insight reasonably associated with the services provider. The circumstances lend themselves to a reasonable person approach that closely resembles negligence law standards.

Often, an ambiguity exists in defining the expectations in the agreement. A contract for commercial services might merely demand the effort and skill of the particular service provider (an *efforts* contract), or it might demand a result (a contract for a *result*). Was the services provider expected to provide "correct" advice (*result*) or simply to use its time and judgment (*effort*)?

There are a host of other issues that need not detain us here. The point is simply that the subject matter of a services contract generates concerns and standard expectations different from those in sales of goods. Sales law cannot simply be transported as a whole into the services venue. Separate treatment reflecting commercial contract expectations is called for in this field.

2. The feasibility principle

Don Quixote was content to seek the impossible dream, but in law we should be concerned with the feasibility of the projects we undertake. Any codification must satisfy the *feasibility* principle. The task must be one that can be achieved.

One reaction to the idea of codifying commercial services contract law is that the task is impossible. There is, the argument goes, too much variety and too many commercially distinct issues. There is too much local licensing and too many local regulations. There is, simply put, too much here.

In the space available for this Essay, only two responses can be made to this argument. First, the diversity in services contracts is neither more nor less than the diversity in commercial goods contracts. We have, over the years, learned to submerge the diversity in goods while basking in comfort created by the general principles of Article 2. Thus, we apply Article 2 rules on requirements contracts to transactions involving aircraft engines, coal, oil and gas, motor vehicles and televisions. We similarly apply standard warranty rules to vastly different transactions involving diverse subject matters. We do so on the assumption that, while details and commercial exigencies differ, there are fundamental aspects of the sale relationship that are amenable to rules tailored broadly to the sale of goods. While it is not feasible to develop detailed contract rules applicable to specific practice in all the varieties of services contracts, it is possible to implement a code reflecting basic commercial practices, expectations and principles.

Second, in codifying contract law one need not cover all contract rules applicable to the particular area, but may focus only on basic rules whose codification can aid in the evolution of contract practice. Article 2 does not codify all contract law applicable to sales. It leaves out much, relying on general law to deal with topics in areas where codification was considered unimportant or impossible. Article 2A appears more oriented toward a complete statement of leasing law, but it too leaves out much.

The test for feasiblility is not whether a codification can rewrite all contract law for services. The test is whether codifying some of the law applicable to services contracts can benefit commercial practice by making contract law more practical, contracting more efficient, and commercial transactions more effective in the modern environment. In this regard, there clearly is room for significant codification even if not comprehensive and detailed in scope.

IV. CONCLUSION

For years, the only scope questions in the UCC centered on whether the existing rules could—or should—be extended to areas beyond their original domain in individual contracts that fall on the cusp between Article 2 and common law. Now a more fundamental question has been brought to the fore by modern, comprehensive revision of the UCC in a

series of separate projects to revise individual articles of the Code. Should a redrafted UCC cover new areas even if this requires new articles to the UCC or a new structure for the basic contract law contained in Articles 2 and 2A?

Yes. With thorough revisions pending, what we do today represents the contribution of this generation to uniform and codified contract law. Modern commercial systems challenge basic assumptions in our law.[16] These assumptions were formed in an industrial economy. The economy has evolved in a fundamental shift from tangibles as the sole measure of wealth to services and intangibles as major forces in commerce.[17] Basic precepts of law must be rethought in response to this change.[18]

When we discuss commercial transactions, many of us assume that we are talking about transactions involving goods or real estate. The UCC centers on goods. Yet, in our modern economy, the commercial services sector has already surpassed the goods sector in both the dollars involved and the potential for future economic growth.

This represents fundamental change in how value is created and what conditions encourage and support its transfer. This change must be accompanied by an analysis of how commercial contract principles meet and facilitate this change. The last war in commercial law involved examining and then codifying legal concepts to support trade and finance in goods. The next war centers on commercial services and information products. It is time to undertake the task of bringing this field of commercial contracting into the UCC.

16. As to questions about property law, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992); Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 13 J. LEGAL STUD. 683 (1980); and Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839 (1990).

17. *See* John B. Shoven, *Intellectual Property Rights and Economic Growth*, *in* INTELLECTUAL PROPERTY RIGHTS AND CAPITAL FORMATION IN THE NEXT DECADE 46 (Charles E. Walker & Mark A. Bloomfield eds., 1988); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990).

18. DONALD A. MARCHAND & FOREST W. HORTON, INFOTRENDS: PROFITING FROM YOUR INFORMATION RESOURCES 19 (1986) ("While we have been living with the consequences of the information economy for many years, our understanding of these shifts in human events has lagged behind the reality.").