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Mixed Transactions for Goods and Services: The Need for Consistency in Choosing the Governing Law

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MIXED TRANSACTIONS FOR GOODS AND SERVICES: THE NEED FOR CONSISTENCY IN CHOOSING THE GOVERNING LAW

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INTRODUCTION

Imagine you are about to lose your home insurance after your provider contacted you stating that all homes with a pool are required to have a fence around the property.[1] You quickly find a company that sells and installs fences and enter into a contract with them.[2] You pay a fortune for the fence, but your insurance is saved.[3] Shortly thereafter, the fence proves to be faulty, and the company refuses to fix the problem.[4] Now, you sue under certain warranties that are provided by the Uniform Commercial Code ("U.C.C."), but the court finds that the U.C.C. does not apply to your dispute and that the warranty you wish to sue under is not available under common law.[5] Although you argued that the U.C.C. applies to your case based on prior cases providing that the sale and installation of a fence falls under the U.C.C. as a sale of goods, the court disagrees and finds that the contract seems to be mainly for services, falling under common law.[6] Should there be a better standard for the court to apply in sale of goods and services transactions or is it fair that you are barred from recovery when

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1. *See generally* Frandsen v. City of N. Oaks, No. A12-1468, 2013 WL 599465, at *1 (Minn. Ct. App. Feb. 19, 2013) (discussing a city ordinance requiring all swimming pools to be completely enclosed by safety fences of a certain height).

2. *See infra* Part IV (showing that parties often enter into contracts without knowing what law governs their transaction).

3. *See generally infra* Part IV.

4. *See infra* pp. 9–10 (discussing a case where a seller refused to remedy defects arising out of goods supplied to a buyer).

5. *See* U.C.C. §§ 2-312–18 (2013) (providing various warranties under the U.C.C.).

6. *See infra* note 56 and accompanying text (providing an example of a case dealing with the same issue, but involving the installation of interior shutters on a home).

others in your situation have been able to recover based on similar facts?[7]

This comment begins by discussing the background of the U.C.C. and the predominant purpose doctrine in Part II.[8] Part III of this comment examines the various tests courts have used to determine the governing law of a transaction.[9] Further, Part III.a considers the method of separating the transaction.[10] Part III.b details the application of the U.C.C. to any mixed contract.[11] Part III.c provides a discussion of the gravamen standard, which some courts use as their method of choice.[12] Lastly, Part IV discusses the need for a uniform standard in these situations, provides a view of a recent case where the court developed an efficient set of factors to be applied, and argues how to make those factors even more effective in order to promote widespread adherence to one standard, which will create consistent and just outcomes in cases of tricky mixed transactions.[13]

I. BACKGROUND OF ARTICLE 2 AND THE PREDOMINANT PURPOSE TEST

The National Conference of Commissioners on Uniform State Laws, now known as the Uniform Law Commission ("ULC"), works to create uniform state laws for areas of the law where consistency is needed.[14] The ULC is nonprofit and has existed for more than a century, as it was established in 1892 and is now the oldest state government association.[15]

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7. *See infra* Part IV.
8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part III.a.
11. *See infra* Part III.b.
12. *See infra* Part III.c.
13. *See infra* Part IV; *see also* Audio Visual Artistry v. Tanzer, 403 S.W.3d 789, 799–804 (Tenn. Ct. App. 2012) (applying the four factors in a case involving the sale of home stereo components and installation of the systems).
14. *See About the ULC*, THE NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS, http://uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC (last visited Nov. 21, 2014); *Frequently Asked Questions*, THE NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS, http://uniformlawcommission.com/Narrative.aspx?title=Frequently%20Asked%20Questions (last visited Nov. 21, 2014); LEGAL INFO. INST., CORNELL UNIV. LAW SCH., NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS (NCCUSL), http://www.law.cornell.edu/wex/national_conference_of_commissioners_on_uniform_state_laws_nccusl (last visited Nov. 21, 2014); UNIF. LAW COMM'N, GUIDE TO UNIFORM AND MODEL ACTS (2013–2014), *available at* www.uniformlaws.org/Shared/Publications/GUMA_2013web.pdf (stating in the preface that the ULC's purpose is to promote uniformity in areas of the law where "uniformity is desirable and practicable");
15. *About the ULC, supra* note 14; *Frequently Asked Questions, supra* note 14.

The commission has always worked closely with the American Bar Association and consists of state commissioners from each state in the United States.[16] These commissioners are lawyers, law professors, judges, and legislators, who have passed their state bar exam and have been selected by state governments.[17] When there are various laws governing an area of law, the ULC drafts a set of laws to be used as a replacement, which will achieve consistency and uniformity in the law to be applied throughout the various jurisdictions that choose to adopt the ULC's laws.[18]

One of the reasons for creating this consistency is the fact that people are frequently moving and traveling to other states, which have different laws for every day occurrences such as sale transactions.[19] This difference in law can deter traveling persons from entering into agreements and, in doing so, disturb economic development and the flow of commerce in society, which may lead to the federal government's involvement with state activity.[20] To avoid this, "[t]he ULC improves the law by providing states with non-partisan, carefully-considered, and well-drafted legislation that brings clarity and stability to critical areas of the law."[21]

The process of drafting an act consists of several steps.[22] First, the drafted act must be approved at no less than two annual meetings with state commissioners.[23] A vote is taken, and if the majority of the states approve the act (there are certain requirements as to how many states must be present),[24] it is then approved and each state's legislature can review the act

16. Mary Whisner, *There Oughta Be a Law—A Model Law*, 106 LAW LIBR. J. 125, 127 (2014); *Frequently Asked Questions*, *supra* note 14. In addition to every state, the ULC also includes state commissioners from the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. *Frequently Asked Questions, supra* note 14.

17. UNIF. LAW COMM'N, *supra* note 14; Whisner, *supra* note 16 ; *About the ULC*, *supra* note 15.

18. *Frequently Asked Questions*, *supra* note 14.

19. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 122ND YEAR 400 (William S. Hein & Co., Inc. 2013) [hereinafter THE HANDBOOK].

20. *Id.*

21. UNIF. LAW COMM'N, *supra* note 14; *see also* James J. Brudney, *The Uniform State Law Process: Will the UMA and RUAA be Adopted by the States?* 8 DISP. RESOL. MAG. 3–4 (Summer 2002) (providing that multiple public goals and interests are furthered by the ULC, including the enhancement of "commercial and business development in what has become an interstate or national economic system"); *Frequently Asked Questions*, *supra* note 14 (adding that the ULC makes it easier to facilitate business transactions by the creation of consistent laws across the states). The ULC promotes efficient deals between separate states and the creation of standards that can be incorporated in state laws throughout the country. *See* Brudney, *supra.*

22. *Frequently Asked Questions*, *supra* note 14.

23. *Id*; THE HANDBOOK, *supra* note 19, at 401.

24. *Frequently Asked Questions*, *supra* note 14. A majority of the states present at an annual

to decide whether it wishes to enact it as state law.[25] The ULC has created more than 300 acts in various areas, including commercial law, estates, family law, and alternate dispute resolution, but one of the most broadly adopted acts is the U.C.C.[26]

The U.C.C. was a joint effort between the ULC and the American Law Institute ("ALI").[27] Somewhat similar to the ULC, the ALI's main purpose is to make the law more current and to explain it.[28] The ALI is a nonprofit organization consisting of judges, attorneys, and law professors, and is well known for creating the Restatements of the Law, model codes, and statutes, among other works.[29] The ALI formed because the law in the United States is often uncertain and complex.[30] "[P]art of the law's uncertainty stemmed from the lack of agreement on fundamental principles of the common law, while the law's complexity was attributed to the numerous variations within different jurisdictions of the United States."[31] Similar to the ULC, once the ALI chooses an area of law as a project it wishes to undertake, the institute must go through several required steps, including having its work reviewed by multiple experts, practitioners, law professors, and judges, before the work can be prepared for publication.[32]

ULC meeting, but no less than twenty states, must approve the act before it is considered officially approved. *Id.*

25. THE HANDBOOK, *supra* note 19; Whisner, *supra* note 16, at 126; *Frequently Asked Questions*, *supra* note 14.

26. *Frequently Asked Questions*, *supra* note 14. *But see* Brudney, *supra* note 21, at 3 (stating that although the U.C.C. has been adopted in all jurisdictions, the majority of the ULC's uniform and model laws have not had similar success); *cf.* UNIF. LAW COMM'N, *supra* note 14 (showing that, as of 2013, many of the ULC's acts have been adopted in a majority of the jurisdictions).

27. Roy Ryden Anderson et al., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 986 (1991).

28. *About ALI Overview*, THE AM. LAW INST., http://ali.org/index.cfm?fuseaction=about.overview (last visited Nov. 21, 2014). *But see* Whisner, *supra* note 16, at 129 (noting that the ALI's approach to uniformity of laws is "cautious and measured," avoiding the creation of legislation that would be deemed novel and controversial).

29. Whisner, *supra* note 16, at 128; *About ALI Overview*, *supra* note 28.

30. *About ALI, Creation*, THE AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=about.creation (last visited Nov. 21, 2014).

31. *Id.*

32. *About ALI, How ALI Works*, THE AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=about.instituteworks (last visited Nov. 21, 2014). The reporter, who is usually a legal scholar, prepares an initial draft of the project, which is submitted for revisions to a small group of knowledgeable judges, lawyers, and professors. *Id.* The revised draft is next submitted for consideration to the Council, and if approved, it is presented as a tentative draft to an annual meeting of the entire membership for discussion. *Id.* Once a tentative draft appears complete, a proposed final draft is submitted to the Council and membership and after approval by both, it is prepared for publication. *Id.*

For over fifty years, the ULC and ALI have worked together to create and update the U.C.C.[33] Both organizations have recommended to state legislators that they enact the U.C.C. as state law, and the legislators who chose to do so have either enacted it in full or in part with modifications to fit the needs of the specific state.[34] After adoption, it is codified into that state's statutes, and the U.C.C. becomes the law.[35]

In 1930, the Committee on Compacts and Agreements Between States produced a report regarding whether "world commercial law" was desired.[36] After the committee discussed the matter, it decided that it was not something desirable at that time and did not pursue the matter further.[37] It was not until the 1950s that the decision was made to actively look into creating a uniform commercial code.[38] When the U.C.C. was finally created, it was intended to fix common flaws that the judiciary often faced and to update a wide area of law.[39]

The U.C.C. is a code addressing various areas of law separated into "articles," including sales, leases, negotiable instruments, bank deposits, funds transfers, letters of credit, bulk sales, documents of title, investment securities, and secured transactions.[40] In other words, the U.C.C. is an all-

33. *Projects Overview*, THE AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=about.instituteprojects (last visited Nov. 21, 2014) [hereinafter *ALI Projects Overview*].

34. THE U.S. SMALL BUS. ADMIN., UNIFORM COMMERCIAL CODE, http://sba.gov/category/navigation-structure/starting-managing-business/starting-business/understand-business-law-7 (last visited Nov. 21, 2014).

35. *Id.*; J. MICHAEL GOODSON LAW LIBRARY, DUKE UNIV. SCHOOL OF LAW RESEARCH GUIDES: UNIFORM COMMERCIAL CODE (UCC) (rev. Jul. 2015), *available at* https://law.duke.edu/sites/default/files/lib/ucc.pdf [hereinafter RESEARCH GUIDES: UNIFORM COMMERCIAL CODE (UCC)]

36. Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 U. PA. J. INT'L BUS. L. 227, 252 (1992).

37. *Id.* at 253.

38. *Id.* at 255. *But see* Frederick K. Beutel, *The Proposed Uniform Commercial Code Should Not Be Adopted*, 61 YALE L. J. 334, 335 (1952); Carl W. Funk, *Problems of Classification Under Article 9 of the Uniform Commercial Code*, 102 U. PA. L. REV. 703 (1954); Harold W. Holt, *Some Conflict of Laws Problems under the Uniform Commercial Code*, 1962 U. ILL. L.F. 390 (1962). Many were not happy with the decision to create a uniform commercial code. Beutel, *supra*; Funk, *supra*; Holt, *supra*.

39. Karl Llewellyn, *Why a Commercial Code*, 22 TENN. L. REV. 779, 781 (1951); Student Symposium, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana*, 16 LA. L. REV. 89, 98 (1955). The National Conference of Commissioners on Uniform State Laws and ALI officially adopted the U.C.C. in 1952. *See* Student Symposium, *supra* at 89. The wide area of law that the U.C.C. updated and sought to bring uniformity to was a variety of sub-areas in commercial law. *Id.* at 90.

40. *Publications: Uniform Commercial Code*, THE AM. LAW INST., http://ali.org/index.cfm?fuseaction=publications.ppage&node_id=86 (last visited Nov. 21, 2014);

inclusive code attending to most areas of commercial law, focusing on transactions, and has been regarded as one of the most significant improvements in American law based on its wide-range enactment.[41] All states, as well as Puerto Rico, the District of Columbia, and the Virgin Islands, have adopted the U.C.C. or some version of it.[42] Thus, when conducting business transactions, such as leases, sales of goods, loans, and contracts in general, an individual will need to abide by the U.C.C.[43]

Article 2 of the U.C.C., applicable to transactions in goods, is significant because it has been adopted in whole by forty-nine states and the surrounding territories, not including Louisiana.[44] When transactions involving a mixture of goods and services arise, courts often look to the predominant purpose test.[45] The predominant purpose test provides that the court should apply Article 2 if the contract is predominantly for the sale of goods.[46] If the contract is not primarily for the sale of goods, common law will apply.[47] Article 2 defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action."[48]

One of the earliest cases using the predominant purpose test is *Bonebrake v. Cox*.[49] *Bonebrake* is a 1974 case, which involved the sale and installation of bowling alley-related equipment.[50] When the seller failed to complete the installation, full payment had not yet been made; therefore,

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Uniform Commercial Code, CORNELL UNIV. LAW SCH. LEGAL INFO. INST., http://law.cornell.edu/ucc (last visited Nov. 21, 2014).

41. RESEARCH GUIDES: UNIFORM COMMERCIAL CODE (UCC), *supra* note 35; *ALI Projects Overview*, *supra* note 33.

42. RESEARCH GUIDES: UNIFORM COMMERCIAL CODE (UCC), *supra* note 35; THE U.S. SMALL BUS. ADMIN., *supra* note 34.

43. THE U.S. SMALL BUS. ADMIN., *supra* note 34.

44. Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1097 (2002). Louisiana kept the Louisiana Civil Code, which governs sales, but has revised it to resemble Article 2. *Id.*

45. Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974); Jesse M. Brush, Student Scholarship Paper, *Mixed Contracts and the U.C.C.: A Proposal for a Uniform Penalty Default to Protect Consumers*, YALE LAW SCH. LEGAL SCHOLARSHIP REPOSITORY, Paper 47, 11 (2007), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1047&context=student_papers.

46. Brush, *supra* note 45,

47. HENRY D. GABRIEL & LINDA J. RUSCH, THE ABCS OF THE UCC (REVISED) ARTICLE 2: SALES 5–6 (Amelia H. Boss 2004).

48. U.C.C. § 2-105(1) (2011).

49. *Bonebrake*, 499 F.2d at 960.

50. *Id.* at 952.

the buyer proceeded to use another seller to complete the installation.[51] The seller sued for the remainder of the contract price.[52] The issue of whether the court should apply the U.C.C. to the transaction arose.[53] The court held that, in cases of mixed transactions involving both the sale of goods and services,

> [t]he test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).[54]

Using this test, despite being a mixed transaction, the court found that the contract was predominantly for the bowling equipment and not the installation services.[55] Thus, the U.C.C. applied and governed the transaction.[56]

Since *Bonebrake*, courts consistently continue to have difficulty applying the predominant purpose test in trickier cases.[57] In addition, other

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51. *Id.*

52. *Id.*

53. *Id.* at 957–58.

54. *Id.* at 960; *see also* W. Dermatology Consultants, P.C. v. Vitalworks, Inc., 78 A.3d 167, 176 (Conn. App. Ct. 2013) (quoting Nora Beverages, Inc. v. Perrier Grp. of Am., Inc., 164 F.3d 736, 747 (2d Cir. 1998)) ("To determine whether a contract including both goods and services is governed by the [UCC], the court must determine 'whether the dominant factor or 'essence' of the transaction is the sale of the materials or the services.'").

55. *Bonebrake*, 499 F.2d at 960 (specifying that the replacement of equipment destroyed by a fire is clearly something that would be classified as goods in accordance with the U.C.C.'s definition of goods).

56. *Id.*; *see also* Plantation Shutter Co. v. Ezell, 492 S.E.2d 404, 406 (S.C. Ct. App. 1997) (holding that installation services given in combination with the sale of interior shutters for the buyer's home does not remove the transaction from the U.C.C.'s control because the predominant purpose of the contract is for the sale of goods).

57. *See generally* Cambridge Plating Co. v. NAPCO, Inc., 991 F.2d 21, 24 (1st Cir. 1993) (providing generally that in cases where there is a mixed transaction for sales and services, the U.C.C. governs); DeFilippo v. Ford Motor Co., 516 F.2d 1313, 1323 (3d Cir. 1975) (applying a totality of the circumstances standard to decide the governing law of a mixed transaction); Foster v. Colo. Radio Corp., 381 F.2d 222, 226–27 (10th Cir. 1967) (applying the U.C.C. to the sale of goods element of a mixed transaction for goods and services); Meeker v. Hamilton Grain Elevator Co., 442 N.E.2d 921, 922–23 (Ill. App. Ct. 1982) (stating that the governing law of a transaction is the U.C.C. if the contract refers to the parties as seller and purchaser because that indicates a transaction for goods); Erin Printing and Promotional Mktg., Inc. v. Convum, LLC., No. M2003-01449-COA-R3-CV, 2005 WL 366895, at *3 (Tenn. Ct. App. Feb. 15, 2005) (holding that just because a contract is labor-intensive does not mean the contract is one for services and not governed by the U.C.C.); Brush, *supra* note 46, at 11–12 (providing examples of courts reaching differing outcomes as to whether contracts are primarily for goods or services when the factual scenarios are similar); Jennifer S. Martin, *The Uniform Commercial Code Survey: Sales*, 68 BUS.

courts have used entirely different tests.[58] One test is referred to as the gravamen test, which examines whether the dispute between the parties arose based on the goods or services component of the transaction.[59] Another way courts have solved the mixed transaction problem is by separately applying the U.C.C. to the goods portion of the contract and applying common law to the services portion of the contract.[60] In doing so, it no longer matters what the primary purpose of the contract is; the court can apply the U.C.C. to a dispute even marginally involving the sale of goods.[61] The problem is that courts, lacking guidance in this area and having the opportunity to choose which of the various tests they wish to use, often reach inconsistent outcomes in cases that are very similar.[62]

II. OTHER COURT CLASSIFICATIONS

A. SEPARATING THE TRANSACTION

One way in which courts have dealt with the issue of what law applies in a mixed goods and services transaction is by examining each transaction

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LAW. 1173, 1173–75 (2013) (contrasting sales cases where courts applied different methods to evaluate mixed sales and services transactions); D.A. Jeremy Telman, *Teaching Sales, Issue 1: Mixed Contracts Under the UCC*, CONTRACTSPROFBLOG (Jan. 15, 2013), http://lawprofessors.typepad.com/contractsprof_blog/2013/01/mixed-contracts-under-the-ucc.html (stating that the predominant purpose standard is "vague and hard to apply").

58. Brush, *supra* note 45, at 9; Martin, *supra* note 57, at 1173–75; *see also* W. Lake Superior Sanitary Dist. v. Orfei & Sons, Inc., 463 N.W.2d 781, 787 (Minn. Ct. App. 1990) (finding that whether a contract is characterized as a transaction for goods or services is a question of law). *But see* United States v. Twin Falls, 806 F.2d 862, 870 (9th Cir. 1986) (providing that the issue regarding contract type typically may be a question for the jury).

59. Telman, *supra* note 57; *see* Miles Lab., Inc., Cutter Lab. Div. v. Doe, 556 A.2d 1107, 1115 (Md. 1989) (applying the gravamen test to determine the gravamen of the dispute stemming from blood product suppliers); Anthony Pools v. Sheehan, 455 A.2d 434, 441 (Md. 1983) (using the gravamen standard to choose governing law in a dispute where a buyer was injured after falling off a diving board attached to a swimming pool).

60. *E.g.*, Whitecap Inv. Corp. v. Putnam Lumber & Exp. Co., No. 2010-139, 2013 WL 2365406, at *2, *4 (D.V.I. May 30, 2013) (denying a motion for summary judgment because each transaction had to be evaluated separately to decide whether it was predominantly for goods or services). *See also* Brush, *supra* note 45, at 14.

61. Brush, *supra* note 45, at 14–15.

62. *Id.* at 5–7. *Compare* Snyder v. Herbert Greenbaum & Assocs., Inc., 380 A.2d 618, 621 (Md. App. 1977) (holding that a carpeting installation agreement for an apartment complex was considered a contract for sale of goods and fell under the U.C.C.), *with* Freeman v. Shannon Const., Inc., 560 S.W.2d 732, 737 (Tex. App. 1977) (finding that an agreement for a subcontractor to provide cement work on an apartment project for a general contractor was considered a service contract and common law applied, even though the transaction included the sale of goods as well).

separately.[63] In *Whitecap Investment Corporation v. Putnam Lumber & Export Company*,[64] the two parties entered into an agreement for lumber treatment services, and on a reoccurring basis, the buyer would bring lumber to the treatment company for this purpose.[65] The majority of the transactions between the parties were of this nature, and the buyer would then go on to resell the lumber for a profit to customers such as Whitecap.[66] However, on certain occasions, the buyer would not bring the lumber and would instead purchase some of the treatment company's wood to fulfill its order.[67]

An issue arose when some of the treated wood provided by the company decayed prematurely, causing damage to the buildings that the wood had been used to build.[68] After the treatment company moved for summary judgment regarding all breach of warranty claims made under the U.C.C., the court denied the motion and held that there was not enough evidence to show whether the defective lumber was from a purchase of lumber from the company or from lumber that the buyer brought to the company for the treatment services.[69] The court provided that it would apply the U.C.C. separately to the lumber that the buyer bought from the company and would apply common law to the lumber that was only treated by the company.[70]

The problem that arises with this method is that, while attempting to appropriately deal with these difficult transactions, the courts actually make the dispute's resolution even more complicated.[71] Because of the added

63. *See* Foster v. Colo. Radio Corp., 381 F.2d 222, 226–27 (10th Cir. 1967) (holding that where the dispute is over furnishings and equipment, which were part of the sale of a radio station, the U.C.C. still applies because the furnishings and equipment are classified as goods); *Whitecap Inv. Corp.*, 2013 WL 2365406, at *4.

64. *Whitecap Inv. Corp.*, 2013 WL 2365406.

65. *See id.* at *3 (stating that the seller argued that their sole involvement with the buyer was for the treatment services and that they are not a merchant or seller of goods).

66. *Id.* at *1.

67. *Id.* at *3.

68. *Id.* at *1.

69. *Id.* at *2, *4 (providing that the court's decision to deny the motion was based on the treatment company's failure to meet the summary judgment standard). The court stated that the summary judgment standard required the movant to prove that there is no genuine issue of material fact, when here there was evidence showing that the defective wood could have come from one of the sales of lumber that the treatment company made to the buyer. *Id.*.

70. *Whitecap Inv. Corp.*, 2013 WL 2365406, at *4 (holding that the court must examine each transaction between the parties separately to determine what law is applicable).

71. *See* Hudson v. Town and Country True Value Hardware, Inc., 666 S.W. 2d 51, 54 (Tenn. 1984) (recognizing that applying multiple sets of laws to mixed transactions can create serious problems for the court). The court stated that these problems involved having to divide the

complication, this approach has been rejected in the past.[72] Splitting the transactions apart requires the court to apply different substantive and procedural laws, including the statute of limitations, the parole evidence rule, and the ability to bring an action based on certain warranties, to various parts of the same transaction.[73] Because of the extra work it creates for courts, examining each individual transaction or component of a contract separately and applying different laws to each depending on whether it mainly involves goods or services is complex, problematic, and a poor approach for choosing applicable law.[74]

B. APPLYING THE U.C.C. TO MIXED TRANSACTIONS

Another way that courts have dealt with the tricky transaction issue is by finding that if the transaction involves the sale of goods, it is governed by the U.C.C., regardless of whether it also involves the sale of services.[75] For example, in *Cambridge Plating Company v. NAPCO, Incorporated*,[76]

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contract into separate components and determine each component's value individually for the purpose of calculating damages. *Id.*

72. *E.g.*, Preston v. Thompson, 280 S.E.2d 780, 784–85 (N.C. Ct. App. 1981) (holding that the U.C.C. did not apply to a portion of a transaction in a case where one party alleged that the transfer of an oral contraceptive, such as dentures, constituted a sale of goods under the U.C.C. because it was purchased by the patient). *But see* Garcia v. Edgewater Hosp., 613 N.E.2d 1243, 1247–48 (Ill. App. Ct. 1993) (ruling that the components of a contract could be separated, and U.C.C. claims regarding the replacement of a diseased heart valve that was found to be defective were valid against a hospital).

73. Brush, *supra* note 45, at 15 (discussing the effect this method has on applying the statute of limitations to a case and providing a case example to show how this can differ outcomes and complicate the court's determination); *see also* Plantation Shutter Co. v. Ezell, 492 S.E.2d 404, 406–07 (S.C. Ct. App. 1997) (providing an example of a case where the court's application of the U.C.C. for the purchase and installation of interior shutters for the buyer's home altered the outcome because of the U.C.C.'s strict requirements for effectively rejecting goods supplied by a seller).

74. *See* Brush, *supra* note 45, at 14–16 (suggesting that this should not be used as the exclusive approach to mixed agreements).

75. *See* Cambridge Plating Co. v. NAPCO, Inc., 991 F.2d 21, 24 (1st Cir. 1993) (providing that in cases where there is a mixed transaction for sales and services, the U.C.C. is applicable); Bailey v. Montgomery Ward & Co., 690 P.2d 1280, 1282 (Colo. App. 1984) (finding that if the transaction is identified as a purchase in the contract and a party is referred to as the customer, that is enough to indicate that the contract is one for the sale of goods under the U.C.C.); USM Corp. v. Arthur D. Little Sys., Inc., 546 N.E.2d 888, 894 (Mass. App. Ct. 1989) (holding that the parties correctly assumed that the contract, which provided for both the sale of goods and the delivery of services, is subject to the provisions of Article 2 of the U.C.C.); Finnin v. Associated Materials, Inc., No. 953454H, 1998 WL 1184125, at *2 (Mass. Super. Ct. Sept. 1, 1998) (ruling that an agreement for window installation was a mixed contract of goods and services, and the U.C.C. applied).

76. *NAPCO*, 991 F.2d 21.

the buyer of a wastewater treatment system brought a claim for breach of contract, among others, against the seller after the system was found to be defective.[77] The district court granted the seller's motion for summary judgment, finding that the applicable statutes of limitation barred all of the seller's claims.[78] The court found that the purchase of the wastewater treatment system was a sale of goods, which would fall under the U.C.C. and be barred by the four-year limitations period.[79] On appeal, the buyer argued that the equipment purchased did not fall into the category of goods, as defined in the code.[80] The court disagreed, finding that the lower court correctly applied Article 2 of the U.C.C. to the dispute and stating, "[t]hat the contract involved the purchase of engineering and installation services, in addition to a sale of goods, is of no consequence."[81]

The issue that this method presents is that sometimes a transaction may be primarily for services, but there is still a small portion of the transaction related to the sale of goods, which is merely incidental to the contract.[82] Following this method, the U.C.C. would govern over the entire transaction, and thus, the applicable laws that normally attach to a contract for the sale of services would not be applied to the transaction, which

77. *Id.* at 22–23 (stating that, in addition to the breach of contract claim, the buyer also brought claims of negligence, fraud, negligent misrepresentation, and violation of a Massachusetts unfair business practice act).

78. *Id.* at 23.

79. *Id.* If the court had found that the sale of the treatment system was not considered goods, the applicable statute of limitations period would have been six years and the buyer's claim would not have been barred. *Id.*

80. *Id.* at 24 (stating that the buyer's argument that the U.C.C. should not apply was based on the premise that the equipment purchased was not a movable good because of the massive size of the wastewater treatment system and the installation efforts required); *see* U.C.C. § 2-105(1) (2011).

81. *Id.*, at 24 (providing that there is a general trend to treat these mixed contracts for goods and services as governed by the U.C.C.); *see also* Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568, 572 n.2 (9th Cir.1978) (providing that since Article 2 of the U.C.C. applies to goods and the contract in the case included both goods and services, the U.C.C. applies); Plantation Shutter Co. v. Ezell, 492 S.E.2d 404, 406 (S.C. Ct. App. 1997) ("In most cases in which the contract calls for a combination of services with the sale of goods, courts have applied the UCC."). "The modern trend is to apply Article 2 to such mixed sales/services contracts." *Haas & Haynie Corp.*, 577 F.2d at 572 n.2 (citing Bonebrake v. Cox, 499 F.2d 951, 958 (8th Cir. 1974)).

82. *See* Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 444–45 (D.S.C. 1977) (providing an example of a sale of goods incidental to a sale of services where parties contracted for construction services, but the servicing company also was buying goods from an independent party for use in the construction project); Computer Servicenters, Inc. v. Beacon Mfg. Co., 328 F. Supp. 653, 655 (D.S.C. 1970) (giving another example of a case where the sale of goods, necessary supplies, was merely incidental to the primary function of the transaction, which was the sale of data processing services).

seems inequitable to those in the service industry.[83] Similar to the method of separating the transaction, holding that a case involving goods automatically falls under Article 2 of the U.C.C., even when the transaction contains services as well, can create an unjust result by applying law that dramatically alters the outcome of the case.[84]

C. THE GRAVAMEN STANDARD

The next test that courts have often used to decipher whether Article 2 of the U.C.C. or common law should be applied to a transaction in dispute is known as the gravamen standard.[85] The gravamen standard requires the court to look at the dispute between the parties, decide whether the gravamen of the dispute involves the goods or services portion of the mixed transaction, and choose the applicable law based on that decision.[86]

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83. *But see, e.g.*, U.C.C. § 2-313 cmt. 2 (2011) (adding that the U.C.C. is not meant to overrule common law notions that have previously been established). This comment provides:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract.

Id.

84. *See NAPCO*, 991 F.2d at 23 (discussing how the court's application of Article 2 of the U.C.C. altered the outcome of the case); Hudson v. Town and Country True Value Hardware, Inc., 666 S.W. 2d 51, 52–54 (Tenn. 1984) (discussing how Article II of the UCC does not apply in a mixed transaction of goods and non-goods although the parties intended one portion of the transaction to be governed by the UCC); *see also supra* Part III.a (discussing how the method of separating the transaction apart into goods and services and applying the applicable law can also have an altering effect on the case). *But see Haas & Haynie Corp.*, 577 F.2d at 570, 572 n.2 (recognizing that whether or not the U.C.C. is applied to the dispute in the case, stemming from a construction project to install carpeting in a courthouse, the court would reach the same result).

85. *See* Miles Lab., Inc., Cutter Lab. Div. v. Doe, 556 A.2d 1107, 1115 (Md. 1989) (using the gravamen test to determine the gravamen of the dispute in a case involving suppliers of blood products); Anthony Pools v. Sheehan, 455 A.2d 434, 440–41 (Md. 1983) (applying the gravamen standard to a dispute where the buyer was injured after falling off the diving board of a swimming pool); Peavey Elecs. Corp. v. Baan U.S.A., Inc., 10 So. 3d 945, 961 (Miss. App. 2009) (analyzing a dispute arising from the sale of software using the gravamen standard); Brush, *supra* note 45, at 16–19 (evaluating the gravamen standard); Telman, *supra* note 57 (discussing the gravamen standard as a law professor's preferred method for applying the correct law to disputes arising out of mixed goods and services transactions).

86. *See Anthony Pools*, 455 A.2d at 440–41 (providing that the court utilized the gravamen test, which requires that goods retain their character after performance is completed, to determine whether the U.C.C. provisions concerning implied warranties apply); Brush, *supra* note 45, at 16 ("The [gravamen] test asks whether the gravamen of the dispute relates to goods or services."); Telman, *supra* note 57 (describing the gravamen standard analysis as focusing not on the whole contract, but only on the issues between the parties and seeing if those issues are related to faulty service or faulty goods).

In *J.O. Hooker & Sons v. Roberts Cabinet Company*, a general contractor entered into an agreement for a public housing project involving the renovation of residences.[87] The project required the hiring of a subcontractor for the removal of fixtures and the installation of new cabinets in the residences.[88] A dispute arose between the parties concerning whether the general contractor or the subcontractor was required to dispose of the old cabinets and fixtures.[89]

When the parties were unable to resolve their dispute, the subcontractor brought suit against the general contractor, asserting breach of contract after performance had already begun.[90] The trial court granted the subcontractor's motion for summary judgment, finding that the general contractor had no reason to terminate the agreement.[91] On appeal, the general contractor argued that the U.C.C. should be applied to the disputed transaction because the purpose of the contract was to sell new cabinets for the renovated homes, but the court disagreed and found that, even though the contract was for the sale of goods, the dispute arose out of the performance of the installation services and the delegation of duties under the agreement.[92]

Case law has frequently been unclear as to whether construction cases fall under Article 2 of the U.C.C. or common law when the dispute involves the sale of goods in addition to construction services, which is why courts have often resulted to using the gravamen standard.[93] One

87. J.O. Hooker & Sons v. Roberts Cabinet Co., 683 So. 2d 396, 398 (Miss. 1996) (clarifying that the general contractor was hired by Bessemer Public Housing Authority in Bessemer, Alabama).

88. *Id.* (specifying the language used in the parties' agreement). "[T]he price includes the cost of tear-out (sic.) old cabinets and installation of new cabinets." *Id.*

89. *Id.* at 398–99 (adding that the general contractor asserted that the "as per specs and plans" language in the parties' subcontract served the purpose of incorporating the general contract into the subcontract, making the subcontractor aware that the disposal of the old fixtures was required as part of its duties).

90. *Id.* at 399 (providing that the general contractor sent a fax to the subcontractor, which stated that he contacted his lawyer and was considering the contract to be null and void).

91. *Id.* (denying the general contractor's motions for new trial or a remittitur of the jury's verdict, which led to the filing of an appeal).

92. *J.O. Hooker & Sons*, 683 So. 2d at 399–400 ("The present case clearly does not concern the cabinets manufactured, but rather the refusal of [the subcontractor] to assume duties which [the general contractor] contractually obligated itself to perform.").

93. *Id.* at 400 (noting that many states, relying on U.C.C. § 2-102, have concluded that the U.C.C. does not apply to construction contracts); *see* Perlmutter v. Don's Ford, Inc., 409 N.Y.S.2d 628, 630 (1978); Christiansen Bros., Inc. v. State, 586 P.2d 840, 877 (Wash. 1978). *But see* Snyder v. Herbert Greenbaum & Assocs., Inc., 380 A.2d 618, 621 (Md. App. 1977) (holding that a carpeting installation agreement for an apartment complex was considered a contract for sale of goods, carpet, and fell under the U.C.C.); Freeman v. Shannon Const., Inc., 560 S.W.2d

problem that arises with the use of this method is that when parties to a contract are sued, they will be tempted to assert counterclaims relating to the part of the contract that correlates with the governing law that is beneficial to them.[94] Additionally, the main problem with using the gravamen standard is that it prevents parties from knowing what law governs their contract at its inception, which leaves the parties unaware of their rights and obligations under the contract until a dispute arises.[95] Overall, courts should not use the gravamen standard as their method of choosing what law applies to a transaction because it can tax judicial resources and preclude parties from being on notice as to the law that applies to their contract.[96]

III. WIDESPREAD ADOPTION OF THE *TANZER* FACTORS WILL PROMOTE CONSISTENCY AND A CLEAR UNDERSTANDING AMONG COURTS

Several of the courts that have used the majority approach, the predominant purpose doctrine, to select the governing law in a dispute have also added factors to consider.[97] In *Audio Visual Artistry v. Tanzer*,[98] a

732, 737 (Tex. Civ. App. 1977) (finding that an agreement for a subcontractor to provide cement work on an apartment project for a general contractor was considered a service contract and common law applied, even though the transaction included the sale of goods as well). Although construction cases are looked at as service contracts, they often primarily involve a sale of goods, which makes choosing the governing law a difficult decision for courts and often results in inconsistent outcomes. *Snyder*, 380 A.2d 618; *Freeman*, 560 S.W.2d 732.

94. Brush, *supra* note 45, at 18 (providing that a seller who wishes for common law to govern the transaction will assert counterclaims based on service-related issues, hoping that the court will not apply the U.C.C. which contains implied warranties that are usually unavailable under common law). This will create additional work for courts by requiring them to determine what the gravamen of the dispute is and then deal with excess claims or counterclaims brought for the purpose of impacting the court's decision as to the governing law. *Id.* at 18–19.

95. *Id.* at 18 (adding that different gap fillers would apply to the transaction if the governing law was the U.C.C. rather than common law). *But see* Telman, *supra* note 57 (stating that if the gravamen standard is always used, parties will always know Article 2 of the U.C.C. applies to the goods portion of the transaction).

96. *See* Brush, *supra* note 46, at 18. *But see* Telman, *supra* note 57 (asserting that the gravamen standard seems to be the best method for courts to apply and expressing surprise that courts have not utilized it more often).

97. *See* Buddy's Plant Plus Corp. v. CentiMark Corp., No. 10-670, 2013 U.S. Dist. LEXIS 6373, at *21 (W.D. Pa. 2013) (considering the purpose and essence of the contract, which the court said included the relative labor and material costs under the agreement); Action Grp., Inc. v. NanoStatics Corp., No. 13AP-72, 2013 WL 6708395, at *8–9 (Ohio Ct. App. Dec. 17, 2013) (applying the predominant purpose doctrine and adding the consideration of factual issues, including the contract language and extrinsic evidence such as course of performance and other circumstances).

98. Audio Visual Artistry v. Tanzer, 403 S.W.3d 789 (Tenn. Ct. App. 2012).

buyer entered into a contract for the purchase of a smart-home system to be installed in his new house that was under construction at the time.[99] A dispute arose when the system was not installed and debugged within three months, as the buyer had been promised, and the buyer continued to experience these complications with the system at fifteen months.[100] A lawsuit emerged after the buyer fired the seller and disputed the unpaid amount.[101] After the lower court held for the seller, the buyer appealed and alleged that, among other things, the lower court erred in applying the U.C.C. to the transaction.[102]

On appeal, the court stated that four factors must be evaluated when applying the predominant purpose test:

(1) the language of the contract;

(2) the nature of the business of the supplier of goods and services;

(3) the reason the parties entered into the contract, and

(4) the amounts paid for the rendition of the services and goods, respectively.[103]

The court concluded that all four factors were in favor of finding that the lower court did not err and that the predominant purpose of the contract was for the sale of goods, the smart-home system.[104] The court focused first on the language of the contract, which listed the various movable components that were to be sold, and then noted that the fact that the equipment was installed in the buyer's home did not change the characterization of the equipment as movable.[105] Additionally, the seller

99. *Id.* at 792 (stating that the buyer was having a $3.5 million, 15,000 square foot home built and construction had just commenced at the time the parties entered into the agreement).

100. *Id.* at 793 (adding that the buyer alleged in his complaint multiple problems, including that two or three new issues would arise every time the sellers would fix a flaw in the system).

101. *Id.* (providing that the buyer still owed the seller almost $44,000).

102. *Id.* at 795–96 (arguing that the thrust of the agreement was the sale of services and not goods).

103. *Id.* at 799 (citing Pass v. Shelby Aviation Inc., No. W1999-00018-COA-R9-CV, 2000 Tenn. App. LEXIS 247, at *11 (Tenn. Ct. App. Apr. 13, 2000)).

104. *Tanzer*, 403 S.W.3d at 804 (holding that Article 2 of the U.C.C. was correctly applied to the dispute).

105. *Id.* at 799–803 (stating that it is important to look at the terms describing the parties' relationship and the required performances); *see also* Bonebrake v. Cox, 499 F.2d 951, 958 (8th Cir. 1974) (noting that "equipment" is a term of art which is used when discussing the sale of goods). In *Tanzer*, the contract was titled "Systems Sale and Installation Contract," the buyer was noted as "purchaser," and the contract included the terms "goods" and "equipment" many times. *Tanzer*, 403 S.W.3d at 800. The court also noted other cases where the installation of equipment, such as electrical equipment, was found to be the sale of goods. *Id.* at 801 (citing E. C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026, 1030 n.4 (5th Cir. 1977)).

was in the business of selling smart-home components and the installation service provided was merely incidental to the sale.[106] Next, the court found that the reason for contracting was for the sale of the smart-home system, which is a good.[107] Lastly, the amount paid for the components was significantly more than the amount paid for the installation charge.[108]

The method and factors presented by the court in *Tanzer* provide an efficient test for courts to choose the proper law to govern a mixed transaction dispute.[109] As provided in this article, there are a number of ways in which courts have decided what law applies, which create inconsistent outcomes and leave parties without the knowledge of what will apply to their case if a problem develops.[110] In addition to the lack of awareness of a set standard, it creates a lack of clear precedent for courts to follow in future lawsuits.[111] The *Tanzer* factors assist in solving this problem by requiring the court to analyze the transaction more thoroughly using a set standard, which will lead to consistency if courts adopt the approach.[112]

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106. *Tanzer*, 403 S.W.3d at 803.

107. *Id.* at 804 (noting that the buyer admitted that he was contracting for electronic equipment and that the seller ordered all of the equipment for sale from another manufacturer).

108. *Id.* (stating that the equipment constituted nearly eighty-two percent of the price paid by the buyer under the agreement); *see also* BMC Indus. v. Barth Indus., 160 F.3d 1322, 1330 (11th Cir. 1998) ("[Where] the charge for goods exceeds that for services, the contract is more likely to be for goods.").

109. *Tanzer*, 403 S.W.3d at 799–804 (showing that the court's analysis of the four factors provided a much more in-depth discussion of the issue of what law applies to the transaction, providing for a more reliable result); *cf.* Highland Rim Constructors v. Atl. Software Corp., No. 01-A-01-9104-CV-00147, 1992 Tenn. App. LEXIS 675, at *5–7 (Tenn. Ct. App. Aug. 5, 1992) (discussing the predominant purpose standard very briefly when determining the governing law that applies to the parties' dispute in a contract for the sale of a software program and training services); Camara v. Hill, 596 A.2d 349, 351 (Vt. 1991) (involving the purchase of a computer system and the court applying the predominant purpose test very briefly to come to its conclusion as to what law applies).

110. *See* Brush, *supra* note 45, at 15 (providing that even if all courts do adopt the predominant purpose test, which is the majority approach, there are still a number of different ways courts have applied that standard); *supra* Part III (providing a detailed discussion of the variety of differing tests and standards that courts have used in mixed transaction disputes).

111. *See, e.g.*, Cambridge Plating Co. v. NAPCO, Inc., 991 F.2d 21, 24 (1st Cir. 1993) (applying Article 2 of the U.C.C. to a transaction that contains a sale of goods regardless of whether the transaction also contains the sale of services); J.O. Hooker & Sons v. Roberts Cabinet Co., 683 So. 2d 396, 399–400 (Miss. 1996) (using the gravamen standard to apply the law that correlates to the area of the transaction the problem arose out of); Whitecap Inv. Corp. v. Putnam Lumber & Export Co., No. 2010-139, 2013 WL 2365406, at *4 (D.V.I. May 30, 2013) (compartmentalizing each portion of the transaction when deciding what law to apply).

112. *Tanzer*, 403 S.W.3d at 799 (providing the four factors the court took into consideration when analyzing the transaction); *see also* IBP, Inc. v. HK Sys., No. 8:98CV480, 2000 U.S. Dist. LEXIS 12282, at *5 (D. Neb. Aug. 15, 2000) (analyzing the mixed transaction using a three-

If courts adopt the *Tanzer* approach in a widespread fashion, the tricky transaction situation will no longer create issues for judges, parties to a lawsuit, and persons generally entering into contracts for both sales of goods and services.[113] Extensive adherence to a multi-factor approach will not only provide judges with reliable precedent, but will also assist in making accurate determinations with regard to a transaction's applicable law, furthering the goal of creating predictable outcomes in factually-similar cases.[114] However, even the *Tanzer* approach lacks complete clarity, as can be seen by the in-depth analysis required by the court.[115] Thus, the four-factor analysis can be improved by two modifications, which will create a standard that will be easier to apply and will provide even more effective results as future disputes arise.[116]

Initially, the third factor considered in the *Tanzer* approach, the purpose of the contract, seems vague.[117] Although the court in *Tanzer* interpreted and applied the factor in an effective manner, it required the court to go through a discussion of precedent in order to define the factor's meaning.[118] Instead of requiring courts to discern how to properly interpret

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factor test including the movability of the goods, the price allocation between the goods and services portions of the contract, and the language of the contract); Tilcon N.Y., Inc. v. Morris Cnty. Co-op Pricing Council, No. A-5453-10T3, 2014 WL 839122, at *24 (N.J. Super. Ct. App. Div. Mar. 5, 2014) (stating that the relevant factors in the governing law decision are the language of the contract, the circumstances surrounding the contract, the compensation structure of the transaction, and the intrinsic value of the good in the interrelationship of the goods and services portions of the contract). *See generally supra* note 57 and accompanying text (showing several examples of the inconsistency of tests currently used by courts and the differing results produced). The *Tanzer* court is not the only court to use a multi-factor test when attempting to properly determine the governing law of a dispute. *IBP, Inc.*, 2000 U.S. Dist. LEXIS 12282, at *5; *Tilcon*, 2014 WL 839122, at *24.

113. *Tanzer*, 403 S.W.3d at 799; *see* Brush, *supra* note 45, at 6. Persons entering into contracts do not usually have knowledge of the applicable law of the contract, and thus, are lost as to their rights when disputes arise. *See* Brush, *supra* note 45, at 6 (stating that sellers can often avoid implied warranties because courts may apply common law, which does not provide for the same implied warranties that are available under the U.C.C.).

114. *See supra* note 62 and accompanying text (providing an example of the issue regarding differing determinations as to governing law in factually-similar scenarios).

115. *Tanzer*, 403 S.W.3d at 799 (showing the thorough approach taken by the court when analyzing the transaction); Martin, *supra* note 57, at 1174 (providing a discussion of the *Tanzer* court's analysis involving the predominant purpose standard and its use of factors).

116. *See Tanzer*, 403 S.W.3d at 799 (discussing the four-factor analysis used by the court in order to determine the applicable law to the transaction).

117. *See id.* at 803–04 (analyzing the purpose of the contract in a thorough discussion, which includes using cases to clarify the meaning of this factor in order to appropriately determine what the purpose of the contract is).

118. *Id. But see* Pass v. Shelby Aviation, Inc., No. W1999-00018-COA-R9-CV, 2000 WL 388775, at *5 (Tenn. Ct. App. Apr. 13, 2000) (analyzing the purpose of a contract for annual

the factor, the purpose of the contract factor should be replaced with a new factor, referred to as "the purchaser's ultimate goal."[119] Regardless of whether service is incidentally required, if the purchaser's ultimate goal is to obtain a good, this factor leans in favor of applying the U.C.C. to the dispute.[120] This will help to create consistent outcomes when applying the factors, as it will be easier for judges to interpret and will help future parties to a lawsuit better understand the law in this area.[121]

Secondly, to further the goal of creating effective and consistent future outcomes in factually similar cases, a fifth factor should be added to the predominant purpose analysis.[122] The fifth factor involves a consideration of extrinsic evidence surrounding the parties' transaction.[123] Included in this review of extrinsic evidence would be any course of dealing or course of performance between the parties, which often will

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aircraft inspection services in the same manner as the *Tanzer* court, but doing so much more briefly).

119. *See* Neibarger v. Universal Coops., 486 N.W.2d 612, 622 (Mich. 1992). The court in *Neibarger* stated:

> If the purchaser's ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser's ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service.

Id.

120. *Id.*; *Tanzer*, 403 S.W.3d at 803–04; *accord* Highland Rim Constructors v. Atl. Software Corp., No. 01-A-01-9104CV00147, 1992 WL 184872, at *2–3 (Tenn. Ct. App. Aug. 5, 1992) (finding that even in scenarios where the parties contemplated both labor and services as being integral parts of the contract, courts still often found that Article 2 of the U.C.C. governed the dispute); Martin, *supra* note 57, at 1174 (providing that the purpose of the contract factor applied in *Tanzer* was applied by looking at, *inter alia*, the purchaser's ultimate goal). The buyer in *Tanzer* even described the contract as being a transaction for the sale of equipment. Martin, *supra* note 57, at 1174.

121. *Tanzer*, 403 S.W.3d at 803–04 (showing that the court interpreted the purpose of the contract factor in the same way as this comment asserts the purchaser's ultimate goal factor, which is more clear).

122. *See id.* at 799 (analyzing the predominant purpose of the transaction using four factors, including the contract language, the nature of the seller's business, the purpose of the contract, and the amount paid for both the goods and the services portions of the contract); Action Grp., Inc. v. NanoStatics Corp., No. 13AP-72, 2013 WL 6708395, at *8 (Ohio Ct. App. Dec. 17, 2013).

123. *See* Cranpark, Inc. v. Rogers Grp., Inc., 498 F. App'x 563, 568 (6th Cir. 2012) (alleging that the determination of whether a contract is primarily for the purchase or sale of services or goods is to be determined by a review of the language in the contract and the surrounding circumstances at the time of contract formation); *NanoStatics*, 2013 WL 6708395, at *8 ("[The predominant purpose] test requires consideration of both the contractual language and extrinsic evidence . . . ."); Renaissance Technologies, Inc. v. Speaker Components, Inc., No. 21183, 2003 WL 118509, at *1 (Ohio Ct. App. Jan. 15, 2003) ("This is a factual question and is to be determined by a review of the contractual language and the circumstances surrounding the contract formation and expected performance.").

indicate whether the U.C.C. should be applied to the contract.[124] Thus, if the contract entered into involves a series of performances over a period of time and a dispute arises during one of those performances, courts should look to the past performances to see if what was provided to the purchaser was primarily goods or services.[125] Similarly, even if past performances between the parties are not part of the same contract, courts should look to the course of dealing between the parties.[126] This factor will solidify the effectiveness of the predominant purpose analysis by providing a more complete inquiry into the critical issue of what the governing law of a disputed transaction should be.[127]

For the new five-factor predominant purpose test to effectively create consistent outcomes in future cases, there must be extensive adherence to the standard.[128] Courts should interpret Section 2-102 of the U.C.C. as meaning that Article 2 applies to transactions for goods as determined by this five-factor test.[129] If the test is applied in a widespread fashion, it will

124. *NanoStatics*, 2013 WL 6708395, at *8 (providing examples of extrinsic evidence for courts to look at when applying the predominant purpose doctrine, including the surrounding circumstances during contract formation and the parties' performance in the transaction); *see also* U.C.C. § 1-303 (2012) (defining course of performance, course of dealing, and usage of trade between transacting parties).

125. *See* U.C.C. § 1-303(a) (2012) (defining course of performance). This section provides:

> (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

Id.

126. *See* U.C.C. § 1-303(b) (2012) (defining course of dealing). This section provides: "(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Id.*

127. *See* Dillard v. City of Greensboro, 946 F. Supp. 946, 955–56 (M.D. Ala. 1996) (stating that 'predominant' is a relative term and whether something is predominant is determined by its greater or superior influence compared to other factors); *see also supra* Part III.a (providing examples of the determinative effect the governing law decision can have on the outcome of a case and showing the importance of applying an adequate test when making that decision). *But see* Telman, *supra* note 57 (arguing that when parties are faced with a multi-factor test, such as the predominant purpose doctrine, they are unable to know in advance whether the law governing their contract is the U.C.C. or common law).

128. *See generally* Brush, *supra* note 45, at 37 (showing the lack of a clear standard for courts to apply to the tricky mixed transaction situation); *supra* Part III (discussing the many different tests that have been applied by different jurisdictions, which provide no precedential value for judges or parties to a transaction).

129. *See generally* U.C.C. § 2-102 (2012) (stating that the U.C.C. applies to goods); David Frisch, *Commercial Law's Complexity*, 18 GEO. MASON L. REV. 245, 247 (2011) (providing an example of a failed revision to the U.C.C.); George E. Maggs, *The Waning Importance of*

provide a clear understanding of tricky, mixed transaction cases and will become the prevalent method of determining the applicable law in a mixed transaction case, which will further the goal of creating accurate, consistent precedent for future courts and parties.[130]

CONCLUSION

When faced with a dispute arising out of a sale of both goods and services, courts inconsistently determine the applicable law.[131] Several tests, including those discussed in this comment, have been applied in attempting to correctly choose whether the U.C.C. or common law governs a transaction.[132] However, the lack of clarity regarding how to make a proper determination, due to both the U.C.C.'s silence on this issue and differing precedent, causes courts to reach entirely different holdings in cases with almost identical facts.[133] This diminishes the precedential value and makes things difficult for both courts and contracting parties.[134]

This problem can be solved by the adoption of a uniform standard used to properly interpret Section 2-102 of the UCC.[135] The *Tanzer* case provides the basis for an efficient predominant purpose test for courts to employ in tricky transactions cases, but it lacks precision as well.[136] Thus, courts should adopt the five-factor test presented by this comment, which is easily applied and will provide consistent and just outcomes.[137] The five-

Revisions to U.C.C. Article 2, 78 NOTRE DAME L. REV. 595, 601–02 (2003); Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009 (2002); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683. This comment is asserting a widespread interpretation of, rather than a revision or addition to, Section 2-102 of the U.C.C. because revisions to the U.C.C. continuously fail, even after scrupulous attempts by scholars. Frisch, *supra*; Maggs, *supra*; Scott, *supra*; Rusch, *supra*.

130. *See* Action Grp., Inc. v. NanoStatics Corp., No. 13AP-72, 2013 WL 6708395, at *8 (Ohio Ct. App. Dec. 17, 2013) (creating the fifth factor in this comment's five-factor analysis for a more clear interpretation and application of the predominant purpose test); Audio Visual Artistry v. Tanzer, 403 S.W.3d 789, 792 (Tenn. Ct. App. 2012) (providing the majority of the other factors for the five-factor predominant purpose analysis asserted in this comment).

131. *See supra* note 57 and accompanying text (showing multiple examples of the in/consistency of the current tests used by courts and the conflicting results these tests produce).

132. *See supra* Part III.

133. *See supra* note 62 and accompanying text (providing an example of conflicting decisions as to the choice of governing law in factually similar scenarios).

134. *See supra* note 62 and accompanying text.

135. *See* U.C.C. § 2-102 (2012). *See generally supra* Part IV (asserting the adoption of a uniform standard to be applied to mixed transactions for goods and services).

136. Audio Visual Artistry v. Tanzer, 403 S.W.3d 7789, 799 (Tenn. Ct. App. 2012) (citing Pass v. Shelby Aviation Inc., No. W1999-00018-COA-R9-CV, 2000 Tenn. App. LEXIS 247 (Tenn. Ct. App. Apr. 13, 2000)).

137. *See supra* Part IV.

factor test for the predominant purpose doctrine consists of analyzing (1) the language of the contract, (2) the nature of the seller's business, (3) the purchaser's ultimate goal, (4) the amounts paid toward the goods and services portions of the contract, and (5) the extrinsic evidence surrounding the parties' transaction.[138] Widespread adherence to this predominant purpose test will assist courts and parties in the future by creating decisions with precedential value and, in turn, eliminating the challenge of determining the governing law of a disputed transaction.[139]

138. *See supra* Part IV (discussing the creation of the new test and the purposes it serves).

139. *See supra* Part IV. If courts adhere to this test in a widespread fashion and the test becomes the majority view, cases in this area will finally serve as valuable precedent for future cases, and future cases may not even require application of the factors, as a previous factually similar case may have already done the work. *See Supra* Part IV.