Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model

Robert A. Hillman
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I. INTRODUCTION

The wheels have been set in motion for the revision of Article 2 of the Uniform Commercial Code.¹ Technological and other changes in the nature and performance of sales transactions substantiate the need to revise Article 2.² The Article 2 project could not be in better hands,³ and the revisers, facing the somewhat staggering task of sifting through the vast numbers of issues presented, have made a laudable start.⁴

The Study Group was appointed in part to determine whether Article 2 needs a complete overhaul.⁵ Although the Preliminary Report does not meet this issue directly, its proposals are comprehensive. The early drafts also are very ambitious.

Obviously, the benefits of revising a section of Article 2 may not always exceed the costs, which may be considerable. Potential costs of a revision include drafting miscalculations and infe-

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¹ A Study Group, appointed by the Permanent Editorial Board for the U.C.C., has issued a preliminary report. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT (1990) [hereinafter PRELIMINARY REPORT]. A Drafting Committee, appointed by the National Conference of Commissioners on Uniform State Laws, has begun circulating preliminary drafts. See, e.g., U.C.C. art. 2 (Discussion Draft Dec. 21, 1993).


³ Professor Richard Speidel of Northwestern Law School, a prolific and influential scholar of contracts and commercial law, and a respected leader in legal education, is the Reporter of the Drafting Committee, which is comprised of many other luminaries in the field.

⁴ For example, the Preliminary Report contains promising work on many of Article 2's trouble spots, such as §§ 2-207 and 2-610.

⁵ The Study Group was asked to “identify ‘major problems of practical importance’ in the interpretation and application of Article 2.” PRELIMINARY REPORT, supra note 1, at 6.
rior compromises that may diminish the effectiveness of a section and conflict with the article’s overall vision, the expense of enacting the revision in fifty states and reeducating the legal and business communities, and the cost of litigation to clarify the meaning of an inartfully drafted revision. To help ensure that redrafting a section results in a net gain, the revisers should identify and follow a set of principles for determining when a section should be revised.

Although such principles are elusive when the subject of revision is as complicated as our sales law, the Preliminary Report and early drafts effectively begin to identify them. Nevertheless, more work needs to be done. In fact, the Preliminary Report invites the Drafting Committee (and, perhaps by implication, others) to “articulate... policies and to improve their implementation.”

In Part II of this Essay, after identifying a few qualms about the current strategy of revision, I will address the Preliminary Report’s challenge to help develop the content of what I will call “principles of revision.” I then illustrate these principles by focusing on a particular Article 2 problem in Part III, namely Article 2’s treatment of “no oral modification” or “NOM” clauses.

II. PRINCIPLES OF REVISION

A. The Study Group Preliminary Report

The Preliminary Report discusses several policies underlying Article 2 as it now stands, and “endorses the drafting style” and the retention of these policies. For example, the Report recog-
nizes the difficulty of drafting law to accommodate the variety of contexts in which business people carry out sales transactions. It therefore endorses Article 2's use of flexible standards, such as good faith and commercial reasonableness. The Report also invokes the overarching themes of the Code, set forth in section 1-102, such as "the continued expansion of commercial practices through custom, usage and agreement of the parties'" and adherence to the "'bargain in fact.'" In addition, the Report recommends continuing Article 2's scheme of supplying a set of commercially reasonable gap-filling terms. Finally, the Report recommends restraint in the area of consumer protection, deferring to other forums.

Sometimes, however, the Preliminary Report fails to clarify the principle supporting a suggested revision. For example, the Report first states that there are "no major problems" with section 2-202's treatment of the parol evidence rule, then justifies assorted possible revisions on the basis of a "number of concerns." In addition, the Report's only explanation for suggesting that section 2-612(2)'s "substantial impairment" test for determining when a buyer can reject an installment be changed to require perfect tender by the seller is that "[t]here is no

12. See id. at 7-8 ("In these overlapping contexts, actual business practices are difficult to identify and quantify, much less to evaluate.").
13. Id. at 7-9, 16-17.
14. Section 1-102(2) provides:
Underlying purposes and policies of this Act are
(a) to simplify, clarify and modernize the law governing commercial transactions;
(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
(c) to make uniform the law among the various jurisdictions.
15. PRELIMINARY REPORT, supra note 1, at 10 (citing U.C.C. § 1-102(2)(b) (1990)).
16. Id. at 11.
17. Id. at 11-13.
18. See id. at 20 ("The responsibility for enacting comprehensive consumer protection legislation should be located outside the scope of general commercial litigation.").
19. Id. at 59 (Rec. A2.2(3)).
20. Section 2-612(2) provides in part: "The buyer may reject any installment . . . if the non-conformity substantially impairs the value of that installment and cannot
persuasive reason why a substantial impairment test should be invoked for rejection of a single installment.\(^2\)

When the *Report* or a subsequent draft applies general principles, it occasionally does so erratically or curiously. For example, the *Report* mentions the lack of certainty and predictability of section 2-609\(^2\) and recognizes disagreements over the section’s interpretation, but then concludes that “there is no evidence” that the section “has failed its intended objectives.”\(^2\) Furthermore, despite opting for open-ended standards, the *Report* suggests extensive explanation of unconscionability in the comments\(^2\) and later drafts have done just that.\(^2\) A recent draft also includes a new consumer protection provision in section 2-302,\(^2\) despite the *Report’s* hesitation in the area of consumer protection.

The *Report* occasionally suggests enhancing freedom of contract, such as by granting parties greater freedom to agree to liquidated damages or specific performance.\(^2\) If the revisers take up these suggestions, they should provide a scheme for determining which rules should be immutable and which should be subject to the parties’ agreement.

The revisers also should take a more consistent stand on the effect of frequent litigation of a section. For example, the *Preliminary Report* mentions that “[l]itigation under [section] 2-206 [on offer and acceptance] is sparse” and that the Study Group “is tempted to leave well enough alone.”\(^2\) The *Report* nonetheless makes several suggestions about possible revisions of the section.\(^2\) On the other hand, in reviewing the “basic assumption”

\(^1\) U.C.C. § 2-612(2) (1990).
\(^2\) See *Preliminary Report*, supra note 1, at 177 (Rec. A2.6(8)).
\(^21\) See *Preliminary Report*, supra note 1, at 172.
\(^23\) *Preliminary Report*, supra note 1, at 172.
\(^24\) Id. at 79-81 (Rec. A2.3(1)).
\(^25\) E.g., U.C.C. § 2-302 (Discussion Draft Feb. 17, 1993).
\(^26\) Id. § 2-302(d). The draft of December 21, 1993 deletes the consumer protection provision. See U.C.C. § 2-302 (Discussion Draft Dec. 21, 1993).
\(^27\) See *Preliminary Report*, supra note 1, at 232 (Rec. A2.7(14)(A)) (specific performance); id. at 234 (Rec. A2.7(15)) (liquidation of damages).
\(^28\) Id. at 64.
\(^29\) Id. at 64-66 (including a new comment defining offer and acceptance).
test of section 2-615(a), the report urges "leav[ing] well enough alone" despite considerable litigation under the section.\textsuperscript{30}

The revisers also should clarify when a suggested revision should be placed in the text of a section or in a comment. Sometimes the \textit{Report} introduces comments that would explain the text,\textsuperscript{31} but occasionally it suggests possible comments that would supplement or restrict a section\textsuperscript{32} or would even create a new rule.\textsuperscript{33} Sometimes the \textit{Report} fails to take any position on whether a change should be in the text or a comment,\textsuperscript{34} or assigns part of a revision to the text and part to a comment without explanation.\textsuperscript{35}

\section*{B. The Content of the Principles of Revision}

It is far easier to criticize the \textit{Preliminary Report} for occasional misfirings than to propose concrete standards for revision. Undaunted, I introduce the following principles to begin the discussion. The Drafting Committee should consider redrafting a Code section in any of the following situations.

\begin{itemize}
\item \textsuperscript{30} \textit{See id.} at 187 (Rec. A2.6(10)(C)). Section 2-615(a) provides in part: Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . . . U.C.C. § 2-615(a) (1990). See also the \textit{Preliminary Report's} treatment of § 2-401 and § 2-706. \textit{Preliminary Report, supra} note 1, at 125-26, 205-08 (proposing no revisions despite plenty of litigation).
\item \textsuperscript{31} \textit{See, e.g., Preliminary Report, supra} note 1, at 86-88 (Rec. A2.3(3)) (§ 2-306); \textit{id.} at 131-32 (Rec. A2.5(1)) (§ 2-501).
\item \textsuperscript{32} \textit{See, e.g., id.} at 79-81 (Rec. A2.3(1)) (unconscionability).
\item \textsuperscript{33} \textit{Id.} at 176 (Rec. A2.6(7)(D)) (proposing a comment that would set forth when conduct "inconsistent with a repudiation" would constitute a waiver); \textit{see also id.} at 105 (Rec. A2.3(12)) (proposing a comment that would require proof that the buyer expressly assented to a merger clause).
\item \textsuperscript{34} \textit{See, e.g., id.} at 178 (Rec. A2.6(8)(A)) (stating that revisions to § 2-612(2) should be placed in the text "or" the comments).
\item \textsuperscript{35} \textit{See id.} at 195 (Rec. A2.7(1)(B)) (stating that the text should assign to the defendant the burden of establishing that the plaintiff failed to minimize damages, while the comment should assign to the plaintiff the burden of proving damages with reasonable certainty).
\end{itemize}
1. The Provision Has Been the Subject of Frequent Litigation That Reveals Inconsistent, Vague, or Ambiguous Language

The idea of revision when a section’s language is contradictory or unclear should not be too controversial. An unclear or contradictory section cannot help simplify and clarify the law of sales, a stated goal of the Code. The revisers should proceed cautiously, however, unless frequent litigation substantiates and clarifies the nature of a problem. When that occurs, the revisers may only need to devise a rule that codifies the courts’ majority approach, much like a restatement of the law. But the revisers also should exercise their collective normative judgment and sometimes suggest codifying a minority approach or even some hybrid or new solution.

Section 2-207, which deals with the “battle of the forms,” comes to mind as a likely candidate for revision based on the proposed approach. The section contains famously unclear language and has produced mountains of litigation which, unfortunately, has not led to a breakthrough in analysis. This is not surprising. The original drafters took on a colossal challenge when they sought to supply the terms of a contract for parties whose inconsistent forms cross in the mail.

Although litigation is an important indicator that revision may be needed, it should not be sufficient by itself. For example, section 2-302’s unconscionability doctrine has engendered plenty of litigation, but it probably should not be revised. The draft-

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37. U.C.C. § 1-102 (1990); see also supra note 14 and accompanying text.

38. Some analysts suggest that frequent litigation alone should justify a revision. See Fairfax Leary, Jr. & David Frisch, Is Revision Due for Article 2?, 31 VILL. L. REV. 399, 405 (1986). But see infra notes 42-48 and accompanying text.

39. See 1 N.Y. COMM’N REPORT, supra note 36, at 28-29 (arguing that a rule should reflect present case law and reject unwise variations).

40. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3 (3d ed. 1988) (collecting cases).

41. For further discussion, see Leary & Frisch, supra note 38, at 422-36.

42. See WHITE & SUMMERS, supra note 40, § 4-3, at 184-86 nn.1-5 & nn.7-8 (collecting cases).
ers intentionally left unconscionability open-ended, inviting parties to litigate and courts to engage in case-by-case contextual analysis of whether a contract or term should be struck down on fairness grounds. Litigation, therefore, does not signal a problem of clarity or consistency. Instead, it demonstrates a choice made by the drafters in favor of a standard over a rule.

Moreover, the drafters' choice appears to have been correct. Through the use of standards such as commercial reasonableness, unconscionability, and good faith, Article 2 in large measure appears to have accomplished Karl Llewellyn's goal of drafting sales law that reflects societal customs and traditions and adjusts to evolving commercial practices, but still provides a framework of rules to govern commercial relationships. The revisers should have the burden of demonstrating that defining standards more specifically would not upset Article 2's delicate balance of rules and standards. In this light, unconscionability should remain a legal safety valve, ensuring fairness within particular contexts and adapting to new ones.

In addition, to rebut the criticism that standards are too open-ended, theorists have argued that over time courts would generate criteria in particular contexts to fill in their meaning. Courts appear to be doing just that. There may be little rea-

44. The Preliminary Report appears to be in accord. PRELIMINARY REPORT, supra note 1, at 9, 79 (discussing the use of "flexible standards" throughout Article 2).
45. Leary & Frisch, supra note 38, at 466-67 (discussing how commercial law seeks to reconcile individual rights and economic cooperation); Sean M. Hannaway, Note, The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code, 75 CORNELL L. REV. 962, 964-65 (1990) (arguing that the U.C.C. is "semi-permanent").
48. Id. at 811 (noting judicial efforts to "conceptualize" good faith).
son therefore to saddle Article 2 standards with static definitions now.

2. A Major, Relatively Complete, Change in Technology Renders a Section Obsolete

A section may be too tied to the past. For example, it may limit the decisionmaker to a set of preestablished elements that fail to accommodate technological or other advances, or it may contain outdated terminology. Consider general statute of frauds provisions in the new age of electronic communication.\footnote{49} Today, parties may conduct their transactions from beginning to end via computers, without generating any paper.\footnote{50} This can produce substantial savings in time, processing, and storage.\footnote{51} Code provisions requiring signed writings obviously do not accommodate such transactions and therefore impede the modernization of the law.\footnote{52} One simple solution, of course, may be to define a writing to include the \textit{ability} to reduce an agreement to tangible form.\footnote{53}

Changes in technology, unforeseen by the original drafters, therefore can signal the need for revision. Still, the revisers must remain cautious. Revising a section to accommodate new technology may be premature if the technology is still developing or industry has not yet adopted it. The experience of the drafters of Article 4 illustrates this point. They wisely elected not to draft rules to govern the electronic presentment of checks, an obvious wave of the future, because banks had not yet adopted the technology and the drafters could not foretell precisely how the sys-
Moreover, as with any general industry practice, the revisers should be certain that the new technology produces a welcome change. Perhaps in a paperless world, parties would enter sales transactions recklessly and prematurely. The revisers therefore need to consider whether they should jump on the bandwagon of even well-developed modern technology.


The Drafting Committee rarely should revise a section simply because of its own perception that the section obstructs commerce. The revisers should insist on substantial empirical evidence of a problem. Empirical studies can be time consuming, expensive, and unreliable, of course. Moreover, such studies are particularly problematic with respect to Article 2 because of the variety of contexts and transactions it governs. Still, hard evidence is superior to mere surmise. Some empirical proof, even if not scientific or statistical, such as testimony, observation of practices, or reports, would be better than nothing. Such objective evidence could be particularly helpful in preventing interest groups from gaining control of a revision project, such as the banking interests' purported domination of the revision dealing with stop payment orders in Article 4.

54. See Warren, supra note 6, at 818.
55. See Fry, supra note 49, at 615-16 (arguing that writing requirements serve a number of important functions that would be absent in paperless transactions).
57. PRELIMINARY REPORT, supra note 1, at 7. The revisers are currently considering “a hub and spoke framework” for Article 2 to deal with this problem. The “hub” would consist of general provisions and the “spokes” would apply to particular types of transactions.
58. For a similar argument pertaining to the revision of Articles 3 and 4, see Edward L. Rubin, Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4, 26 LOY. L.A. L. REV. 743, 770-71 (1993). See also Russell J. Weintraub, A Survey of Contract Practice and Policy, 1992 WIS. L. REV. 1, 2 (arguing that rules should reflect the community’s needs).
59. Rubin, supra note 58, at 752.
As with technological changes, the revisers also should consider whether Article 2 should encourage a given commercial practice, once found. The revisers should not necessarily accept all that occurs in the commercial world.\(^{60}\) Empirical evidence can help the revisers police the “morals of the marketplace.”\(^{61}\)

4. A Section Is Inconsistent with Other Law, Such as Federal Statutes or International Conventions

Just as the revisers of Article 4 had to adjust to federal legislation preempting a substantial portion of their work on check collection,\(^ {62}\) the Article 2 revisers should consider the effect of other law on Article 2. For example, they should consider how to minimize the conflict between Magnuson-Moss federal warranty protection\(^ {63}\) and the Article 2 treatment of warranties.\(^ {64}\)

The drafters also should consider how other law has dealt with analogous sales problems.\(^ {65}\) For example, portions of the Convention on the International Sales of Goods (CISG)\(^ {66}\) can serve as a model for prospective revision of Article 2, which itself inspired the Convention's drafters. We shall see that the CISG's approach to some problems may be superior to Article 2's and therefore an effective model for reform.\(^ {67}\)

5. A Section Has Been the Subject of Several Non-Uniform State Amendments

Presumably noncontroversial, substantial non-uniform state amendments of a section should signal the need to devise new

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\(^ {62}\) Rubin, *supra* note 58, at 773.


\(^ {64}\) For a discussion of the inconsistencies, see Leary & Frisch, *supra* note 38, at 410-22.

\(^ {65}\) Id. at 405.


\(^ {67}\) See *infra* notes 130-31 and accompanying text.
approaches to bring the various states back into line. After all, one of the Uniform Commercial Code's primary purposes is "to make uniform the law among the various jurisdictions."


Although the Code comments constitute an important part of the Code framework, the states have not adopted them as law. The rules and standards of Article 2 intended to govern sales transactions therefore should appear in the text of its sections. As aids to interpretation of Article 2, the comments should explain a section's meaning and purposes and provide plentiful examples and background.

C. The Problem with Normative Criteria Such as Freedom, Fairness, Efficiency, and Cooperation

Norms such as freedom of contract, fairness, efficiency, and cooperation find no place in the above list of criteria for revising a section of the Code. In a nutshell, such principles are generally too elastic to guide a revision and, if utilized, are too likely to cause major disruptions in commercial practice. Without dramatic evidence of a problem pertaining to any of these criteria, the revisers therefore should be content with the status quo ante.

Consider, for example, whether the revisers should increase the parties' freedom to bargain around Article 2 rules, such as

68. Leary & Frisch, supra note 38, at 404.
70. Hannaway, supra note 45, at 967.
71. Id. at 985.
72. See generally Robert H. Skilton, Some Comments on the Comments to the Uniform Commercial Code, 1966 WIS. L. REV. 597 (analyzing selected comments' strengths and weaknesses); Hannaway, supra note 45, at 974 (noting the inconsistency in comments' form and substance).
73. Rubin, supra note 6, at 631-32 ("Any effort to achieve . . . social equity or economic efficiency[ will create too great a risk of disruption . . . ."). The stated policies of § 1-102 also may provide little guidance. See In re Moore, 7 U.C.C. Rep. Serv. (Callaghan) 578, 593-97 (Bankr. D. Me. 1969) (stating that "the underlying purposes and policies of the Code . . . are of an essentially neutral nature").
by permitting them to increase the availability of specific performance\(^7\) or to disclaim a duty of reasonableness.\(^7\) As to the former, academic writing is hardly consistent on whether increasing the right to specific performance would be an improvement on efficiency or other grounds.\(^7\) In fact, as a general matter, efficiency may be a poor tool to guide a revision because of the many assumptions, hidden or otherwise, necessary to sustain an efficiency argument. As to the latter, by allowing commercial parties to personalize, but not expunge, general standards such as good faith, diligence, and reasonableness,\(^7\) the Code already seems to have struck the appropriate balance in its approach to intervention in parties' agreements. The Code employs this approach not because parties always understand the terms of their agreements or because the market always adequately deters merchants from overstepping their bounds, but because the strategy probably constitutes the most reasonable compromise between proponents of freedom of contract and advocates of intervention. The methodology minimizes the amount of outside interference in a contract, but it also protects the parties by requiring minimum standards of behavior.\(^7\)

Notwithstanding Article 2's general approach to fairness issues, should the revisers attempt to increase the amount of consumer protection? Although the present Article 2 is hardly consumer oriented,\(^7\) arguably federal legislation already has taken

\(^{74}\) See U.C.C. § 2-716 (1990) (outlining a buyer's right to specific performance, which is available only "where the goods are unique or in other proper circumstances").

\(^{75}\) See id. § 1-102(3) (stating that "obligations of . . . reasonableness . . . may not be disclaimed").


\(^{77}\) Section 1-102(3) provides in part: "[O]bligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable." U.C.C. § 1-102(3) (1990).

\(^{78}\) "The existence of some mandatory rules may lead to better contracts. In other words, the mixed system of optional and mandatory legal rules . . . may be best even from an essentially contractarian perspective." Jeffrey N. Gordon, The Mandatory Structure of Corporate Law, 89 COLUM. L. REV. 1549, 1554 (1989).

\(^{79}\) See generally McDonnell, supra note 7, at 688 (stating that the U.C.C. gen-
up the slack and is a better forum for dealing with additional issues. The uniform law process itself appears to impede progress on consumer protection issues. Drafting committees dealing with other Code articles have decided not to increase consumer protection because of failures to reach a consensus on the direction reform should take.80 In addition, disparate interest group activity makes a consensus on consumer issues difficult to reach.81 All of this casts a shadow over whether the drafters could succeed in changing Article 2's tilt on consumer issues.82

Consider another "big picture" issue: Should the drafters require greater cooperation between parties, at least in long-term contract settings, in order to reflect our increasingly "relational" world?83 In a relational contract, the parties do not provide for all contingencies at the time of contracting because their agreement extends over time and is therefore subject to unanticipated circumstances. Instead, internal norms such as cooperation and sharing govern their relation.84 Suppose, however, that a party refuses to cooperate when things go awry. I have argued elsewhere that the parties' norm of cooperation may become an enforceable contract term under the broad definition of agreement in section 1-201(3).85 Should the revisers go further? Should they fashion a rule expressly requiring cooperation? Such an approach would raise several issues. Should the rule be immutable? If the parties can override it, is it an appropriate "default" rule? This depends on whether the parties would have agreed to a duty of cooperation if they had faced the issue at the time of contracting and on whether this is the appropriate test for gap-

80. Warren, supra note 6, at 821 ("[I]t is my view that the NCCUSL-ALI consensual approach to uniform state laws does not function well in dealing with controversial consumer issues; consumers probably must look to Congress and non-Code state laws for validation of their claims for greater protection . . . .").
81. Rubin, supra note 58, at 746-47; Warren, supra note 6, at 820-21.
82. See PRELIMINARY REPORT, supra note 1, at 17-20 (discussing the limited scope of Article 2 with regard to consumer protection issues).
83. See generally Speidel, supra note 2 (discussing whether Article 2 should be revised to comport with relational contract theory, which emphasizes deterring opportunistic behavior).
84. Id. at 793.
filling rules. These are heady questions, fun to debate on a theoretical level. But without the benefit of persuasive empirical evidence disclosing a problem with the way Article 2 governs relations or a hard signal from the courts that a default norm requiring cooperation would improve sales law, the revisers should probably, in their own words from another context, "leave well enough alone."

III. SHOULD ARTICLE 2'S APPROACH TO NOM CLAUSES BE REVISED?

Now we shall look at Article 2's treatment of "no oral modification," or "NOM" clauses, to illustrate in more detail many of the ideas and concerns raised in Part II. Arguably the current approach to NOM clauses should be revised because the governing Article 2 provisions are ambiguous and confusing and have been the subject of frequent and perplexing litigation. Moreover, the current treatment of NOM clauses does not take into account new technology and probably does not reflect current practices. In addition, the treatment of NOM clauses in international sales law is arguably superior. On the other hand, principles such as freedom of contract and fairness do not help us find our way out of the forest of NOM clauses.

A. The Current U.C.C. Approach

By inserting a NOM clause in a sales contract, such as "all modifications of this contract must be in writing," the parties intend at the time of contracting to preclude one of them from later asserting an oral modification of a contract term. The parties may fear inadvertent or unwise oral changes in their agree-

86. For example, the rules instead could be designed to motivate particular conduct, such as disclosing information. See Speidel, supra note 2, at 806 & n.64.
87. PRELIMINARY REPORT, supra note 1, at 64; see also James Gordley, European Codes and American Restatements: Some Difficulties, 81 COLUM. L. REV. 140, 145 (1981) (discussing how philosophical approaches to law can become dated).
89. One commentator asserts that "the drafting is perhaps the worst in Article 2." Douglas K. Newell, Cleaning up U.C.C. Section 2-209, 27 IDAHO L. REV. 487, 487 (1990-91).
90. See infra notes 102-05 and accompanying text.
They may believe that the process of reducing their modification to writing will caution them about the consequences. The parties also may believe that a writing will provide evidence to help them repel mistaken or fraudulent attacks on their written agreement.91

To facilitate the parties' efforts, section 2-209(2) reversed the common law and specifically made NOM clauses enforceable.92 In pertinent part, the section provides: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . . ."93 The drafters may have been especially interested in the cautionary and evidentiary contributions of NOM clauses in light of their decision to abolish the requirement of consideration to support a modification. The consideration requirement, at least in theory, helped to accomplish those cautionary and evidentiary tasks.94

Suppose, however, that after contracting, the parties become comfortable with the idea of informal adjustment and begin to enter and perform oral modifications even though their contract contains a NOM clause? Moved by this possibility, the drafters included section 2-209(4). Under the subsection, the parties' "attempt" to alter their agreement orally in conflict with their NOM clause, "can operate as a waiver."95 A party can retract the waiver of "an executory portion of the contract," according to section 2-209(5), "unless the retraction would be unjust" because of material reliance on the waiver.96

92. See id. at 453. The reasons for the common law approach will soon be apparent. See infra notes 95-96 and accompanying text.
95. U.C.C. § 2-209(4) (1990). The subsection provides: "Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) . . . it can operate as a waiver." Id.
96. Id. § 2-209(5). This section provides:
B. Grounds for Revising

The application of the principles of revision developed in Part II suggests the need for altering Article 2's approach to NOM clauses. Because of the inherent tension between making NOM clauses enforceable on the one hand and subject to waiver on the other, section 2-209 should contain clear language delineating precisely when NOM clauses are unenforceable. Unfortunately, clarity is not a virtue of the current scheme.97

For example, what constitutes an "attempt at modification" and when does one "operate as a waiver?" Apparently not all "attempt[s] at modification" should "operate as a waiver" or else there would be little left of section 2-209(2)'s effort to enforce NOM clauses. Section 2-209(1) refers to "agreement[s]" modifying a contract.98 Presumably, the drafters of subsection (4) intended the phrase "attempt[s] at modification" to include oral agreements to modify. But what then of conduct by only one party that suggests an intentional relinquishment of a contract right?99

Moreover, when does an oral agreement "operate as a waiver?" Unfortunately, waiver has several common law meanings, some requiring reliance or consideration and some not, and section 2-209(4) does not clarify what the drafters intended.100 On the other hand, the waiving party's power to retract a waiver in the absence of reliance under section 2-209(5) decreases the importance of nonreliance waivers.101

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A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Id.

97. For a comprehensive discussion, see Hillman, supra note 93.

98. Section 2-209(1) provides: "An agreement modifying a contract within this Article needs no consideration to be binding." U.C.C. § 2-209(1) (1990).

99. Such conduct might be enforceable as a waiver under § 1-103, which provides that common law and equity "shall supplement" the provisions of the U.C.C. Id. § 1-103; see Hillman, supra note 93, at 366-67.

100. See Hillman, supra note 93, at 364 (noting that waiver can refer to an "intentional relinquishment of a right," or the same with consideration, or the same with reliance).

101. Id. at 365.
Not surprisingly, sections 2-209(2) and 2-209(4) have produced frequent litigation,\textsuperscript{102} enough to confirm the inartfulness of the existing language. Moreover, the decisions are confusing; judges cannot rely on current case law to clarify Article 2's NOM clause strategy. For example, in a leading case, two prominent federal court of appeals judges, both former academics, disagreed over whether reliance was an essential element of a section 2-209(4) waiver.\textsuperscript{103} More recent cases have added to the confusion,\textsuperscript{104} some generously permitting oral alterations and others barring most of them.\textsuperscript{105}

Technological advances also signal the need for a hard look at NOM clauses. If computer generated sales transactions are the wave of the future, NOM clauses may become obsolete. Currently, however, most business people do not utilize the new technology in their exchanges.\textsuperscript{106} The time may not yet be ripe for abolishing NOM clauses on this ground.

Generally, the revisers need more facts about the uses and abuses of NOM clauses in practice before they determine how to revise sections 2-209(2) and 2-209(4). The NOM clause problem challenges lawmakers in part because they lack information regarding whether business would be better or worse off if oral modifications were enforced notwithstanding the presence of a NOM clause. To answer this question, lawmakers must compare


\textsuperscript{103} Wisconsin Knife Works, 781 F.2d 1280. The judges were Richard A. Posner and Frank H. Easterbrook.

\textsuperscript{104} Courts have had special trouble sifting through ambiguous evidence of the parties' conduct to determine whether one of them has waived a NOM clause. See, e.g., Clyde Iron, 979 F.2d 1068; Green Constr., 735 F. Supp. 1254. The results can be surprising. See, e.g., Martinsville Nylon Employees Council Corp. v. NLRB, 969 F.2d 1263 (D.C. Cir. 1992) (enforcing a NOM clause in a collective bargaining agreement despite evidence that one of the parties had waived the clause through conduct lasting for a year).

\textsuperscript{105} See Newell, supra note 89, at 493 & nn.25-26.

\textsuperscript{106} See Fry, supra note 49, at 607-08 (posing that few "paperless" transactions are taking place).
the frequency and costs of parties wrongly believing a NOM clause benefits them with the frequency and advantages of parties correctly embracing a NOM clause.\textsuperscript{107} Unfortunately, it is unlikely that practices and attitudes concerning NOM clauses will be consistent among the scores of trade cultures governed by Article 2.

Despite their shortcomings, sections 2-209(2) and 2-209(4) have not been the subject of nonuniform amendments. Nevertheless, lawmakers in another important forum have taken a different approach to NOM clauses.\textsuperscript{108} Article 29(2) of the CISG states:

\begin{quote}
A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.\textsuperscript{109}
\end{quote}

Article 29(2) is no doubt in part a reaction to sections 2-209(2) and 2-209(4). As with section 2-209, Article 29(2) first recognizes NOM clauses and then carves out a major exception. Still, Article 29(2) improves the treatment of NOM clauses by eliminating the ambiguous references to "attempt[s] at modification" that "operate as . . . waiver[s]." Instead, more directly, reliance on a party's "conduct" may preclude the party from asserting a NOM clause. Article 29(2) does leave open the type of "conduct" and "reliance" that can bar the assertion of a NOM clause.\textsuperscript{110}

While the above discussion suggests that sections 2-209(2) and 2-209(4) are likely candidates for revision, broad normative principles provide little assistance in determining whether and how to revise the sections.\textsuperscript{111} On one hand, the principle of freedom of contract appears to support the enforcement of NOM clauses—parties should be free to bind themselves to an agreed man-

\begin{footnotes}
\footnote{107. See Hillman, supra note 91, at 452.}
\footnote{108. See supra text accompanying notes 65-67.}
\footnote{109. CISG, supra note 66, art. 29(2).}
\footnote{110. For a more complete discussion, see Hillman, supra note 91.}
\footnote{111. See generally id. at 452 ("Arguments appealing to freedom and fairness are inherently controversial.").}
\end{footnotes}
ner of adjustment. Moreover, enforcement appears to be efficient if the parties, in theory the best judges of their needs and interests, believed at the time of contracting that the gains in certainty and stability of including a NOM clause would outweigh the costs of greater formality. Denying enforcement of NOM clauses would be based on the paternalistic assumption that the revisers' judgment of the value of NOM clauses is better than the parties'. In addition, enforcement of NOM clauses seems to be fair because any reliance on an oral modification in the face of a NOM clause arguably is unreasonable. Finally, enforcement appears to preclude fraud because it prevents parties from asserting nonexistent oral modifications.

On the other hand, one can argue that the parties should be free to change their minds about their agreed manner of adjustment, just as they can alter most of the other terms of their agreement.112 According to this argument, enforcement of NOM clauses appears to impede the parties' freedom. For that matter, efficiency arguably commands that the law enforce the latest manifestation of the parties' preferences, here the oral modification. Moreover, fairness may sometimes require enforcing oral modifications because parties often innocently and even reasonably rely on them. Finally, instead of protecting against fraud, a NOM clause may sometimes encourage it, such as when a party contests an oral modification actually made or produces a forged writing.113

The NOM clause debate thus remains unresolved in part because the normative policy arguments are inherently controversial. I have previously suggested the following possible strategy out of this morass: courts could measure and compare the quality of the parties' assent to the NOM clause with the quality of their assent to the subsequent oral agreement.114 For example, consider parties who enjoy an informal relationship, who generally are unconcerned about and rarely read their printed forms, and therefore are unaware of the legal effect of their NOM

112. Id. at 451 & n.17.
113. See id. at 451-52 (arguing that "a writing does not necessarily promote the cautionary and evidentiary functions").
114. Id. at 464-66.
clause. These parties also value flexibility and often adjust their agreements orally, but only after careful contemplation. Because their NOM clause is not a "dickered term" and because these parties frequently adjust orally, freedom of contract counsels in favor of enforcing their modifications. For the same reasons, reliance on an oral modification would be reasonable for such parties despite the boilerplate NOM clause. Moreover, enforcing the NOM clause would be inefficient because the parties were neither aware of the clause at the time of contracting nor did they understand its legal effect. In short, the NOM clause in this example does not express the parties' intentions, it serves no useful purpose, it impinges on the parties' freedom, and it is unfair. The law should bar the enforceability of NOM clauses in such situations.

Now imagine a different pair of contracting parties, who thoughtfully craft their initial agreement to suit their needs, seek to preserve their rights under the agreement, and therefore include a NOM clause. Suppose further that these parties establish no practice of modifying their agreements orally. On one occasion, however, they enter an ill-conceived oral adjustment. The NOM clause should be enforced in such a situation because it serves the parties' purposes, reliance on the precipitous oral alteration might well be unreasonable, and therefore fairness does not require enforcement.

This assent-based test is appealing because it supports the parties' "bargain in fact" and it is contextual. It allows courts to weigh pertinent trade customs and other facts in particular cases, including the effects of technology on the manner of communication between the parties. The problem with this approach is that in most cases the difference between the quality of assent at the initial and modification stages would not be so stark. Courts would have to weigh conflicting evidence concerning the quality of the parties' bargaining, conduct, and intentions at two separate stages of their relationship. The assent test therefore might increase, rather than decrease, the confusion over and the costs of NOM clauses.

C. The PEB Study Group Preliminary Report and Subsequent Drafts

The Preliminary Report recommended preserving section 2-209(2)'s enforcement of NOM clauses because "no major problems have arisen." On the other hand, the Report acknowledged that the lack of a definition of "waiver" in section 2-209(4) "has produced confusion" and "generated some interesting judicial decisions." The Report concluded that "[a] working definition of waiver is clearly required," but hedged on whether the definition should be in the text or comments.

The Report also recommended clarifying the effect of a waiver, once found.

A recent draft offered two alternative treatments of NOM clauses. One approach broke with the Preliminary Report and expunged all reference to NOM clauses. The effect of such a strategy would have been unclear. Would the approach have reinstated the common law restriction against NOM clauses, or would the parties have been free to employ NOM clauses under the Code's general enabling provision?

The draft's other alternative provided:

(b) Except as provided in subsection (c), a signed agreement that excludes modification or rescission except by a signed writing or authenticated symbol may not be otherwise modified or rescinded . . .

(c) A party may not assert a term described in subsection (b) if the party's language or conduct in attempting a modification or rescission, or otherwise, is inconsistent with the term and induces the other party to change its position in good faith.

116. PRELIMINARY REPORT, supra note 1, at 74 (Rec. A2.2(9)(C)).
117. Id. at 75.
118. Id. at 76.
119. Id. at 76 (Rec. A2.2(9)(E)).
120. Id. at 76.
121. U.C.C. art. 2 (Discussion Draft Feb. 17, 1993). At the time of distribution of this draft, the draft of April 2, 1992 contained the latest comments to § 2-209. I shall refer to these comments.
123. See supra notes 92-94 and accompanying text.
Subject to subsection (c), an agreement may be modified or rescinded by waiver. The waiver of an executory portion of the contract may be retracted by reasonable notification received by the other party . . . unless the other party has changed its position in good faith reliance on the waiver.124

One can see that, like the present section 2-209, this alternative recognized NOM clauses and then largely swallowed them up. First, it preserved most of section 2-209(2)'s embrace of NOM clauses in subsection (b), adding only that an "authenticated symbol" could serve as an alternative to a "signed" written modification.125 The comments failed to explain precisely what the drafters had in mind by the new terminology,126 but presumably they sought to ratify new technologies for making contracts.

Subsection (c) of the draft buried NOM clauses. The subsection continued the use of the curious "attempt" at modification language.127 If the parties made such an attempt, one of them could not later assert a NOM clause if her "language or conduct" in the attempt induced a good faith change of position.128 The "attempt" language was not very important, however, because subsection (c) added that a party also could be precluded from asserting a NOM clause if her "language or conduct . . . otherwise" (apparently short of an "attempt" at modification) induced a good faith change of position.129 Read as a whole, presumably subsection (c) meant that any agreement, language, or conduct that induced a party to rely in a manner inconsistent with the NOM clause barred its enforcement.

Although the revisers followed Article 29(2) of CISG130 by omitting any reference to the cloudy waiver concept in subsection (c), they introduced it in subsection (d) to "make[ ] it clear

125. Id.
127. See supra notes 95-96 and accompanying text (discussing U.C.C. § 2-209's "attempt" language).
129. Id.
130. See supra note 109 and accompanying text.
that other terms in the agreement can be modified . . . by forms of waiver that do not require proof of reliance." Subsection (d) was to be "subject to subsection (c)." Although the precise relationship of (c) and (d) needed further elaboration, apparently subsection (d) was to apply only when an agreement did not contain a NOM clause.

As of this writing, the draft currently in circulation clarifies some issues and makes additional changes. For example, the draft withdraws the option of deleting all reference to NOM clauses and, in subsection (b), commits to their enforcement in all but consumer contracts. Nevertheless, subsection (c) bars enforcement of a NOM clause if a party, in "effecting a modification," induces a reasonable, good faith change of position. The "effecting a modification" language does not seem much clearer than the "attempting a modification" language of the earlier draft. Perhaps the revisers should follow Article 29(2) of the CISG which, we have seen, may bar a party from asserting a NOM clause simply when her "conduct" induces reliance.

On the other hand, the current revisers of section 2-209, like others facing the NOM question, appear to be ambivalent about the wisdom of enforcing NOM clauses. Perhaps they should avoid the murky results of compromise and abolish NOM clauses. Conditions may be ripe for such an action, given the complex and unsatisfactory current approach and the questionable value of NOM clauses, especially in light of coming technological changes. Still, the revisers should gather more information

132. See U.C.C. § 2-209 (Discussion Draft Dec. 21, 1993). In pertinent part the draft provides:

(b) Except in a consumer contract or as provided in subsection (c), a contract that excludes modification or rescission except by a signed writing or record may not be otherwise modified or rescinded.

(c) A party may not assert a term requiring a signed writing or record to modify or rescind a contract if that party's language or conduct in effecting a modification or rescission is inconsistent with the [sic] such term and induces the other party to change its position reasonably and in good faith.

(d) Except as provided in subsection (c), a contract term may be modified or rescinded by waiver. . . .

Id.
133. See supra notes 109-10 and accompanying text.
about the uses and abuses of NOM clauses before they conclude that the NOM experiment has failed and return to the common law approach. For the sake of clarity, if the revisers decide to abolish NOM clauses, they should do so expressly in section 2-209.

IV. CONCLUSION

This study of the NOM clause problem does not prove that the revisers must proceed cautiously on all the issues presented by Article 2. It does suggest, however, the wisdom of adhering to concrete indicators of the need for change, such as case law, technological improvements, and empirical proof. The NOM clause experience also suggests the limited value of broad normative principles as guides for revision.