

D R A F T
FOR DISCUSSION ONLY

**REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 1 – GENERAL PROVISIONS**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 1 – GENERAL PROVISIONS**

WITH PREFATORY NOTE AND REPORTER'S NOTES

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UNIFORM COMMERCIAL CODE
REVISED ARTICLE 1 — GENERAL PROVISIONS

PREFATORY NOTE

I. Introduction

Since its inception, the Article 1 Drafting Committee has performed two related, but distinct, tasks — revision of the current text of Uniform Commercial Code Article 1 and harmonization of ongoing UCC projects. This draft represents the product to date of one of those tasks — revision of the provisions of Article 1. The other task has entailed the Drafting Committee serving as a harmonization committee for the purpose of seeking to insure that the Uniform Commercial Code speaks with a single voice to the extent appropriate.

After lengthy analysis and discussion, the Drafting Committee decided to recommend a relatively small number of substantive changes to the law as it is currently set forth in Article 1. Those changes, concerning scope of the Article, applicability of supplemental principles of law, the concept of good faith, choice of law, the relevance of course of performance between the parties, and the existence of an independent statute of frauds, are described in some detail in Part II below. The changes with respect to choice of law are probably the most important changes in this draft and were the subject of more extensive Drafting Committee analysis and deliberation than any other topic.

In addition to these substantive changes, the Drafting Committee decided to make some structural changes to Article 1. These structural changes, intended to make this Article more closely fit with the drafting conventions of the more recently addressed Articles and to lessen some difficulties in interpretation, are described in Part III below. Other than these structural changes, the Drafting Committee generally decided to resist the temptation to make non-substantive changes to provisions that have not been a source of serious problems in the nearly four decades since the widespread enactment of the UCC. A few such changes should be noted, however. First, as in all of the other UCC Articles promulgated in the last decade, provisions have been reformulated in a gender-neutral fashion. Second, in a very small number of cases, minor changes in wording have been made when the current wording has proven confusing. Those changes are noted in

Uniform Commercial Code Article 1

the Reporter's Notes following each section but are not otherwise described in this Prefatory Note.

Examination of this draft will reveal a handful of definitional provisions in Section 1-201 the drafting of which has been deferred pending decisions by the Drafting Committee for Articles 2 and 2A. These provisions concern, in full or in part, issues raised by electronic commerce and communication. The definitions are located in Article 1 because the defined terms are used in more than one Article. For cases in which the only Articles concerned are Articles 2 and 2A, the decisions of the 2/2A Drafting Committee may be inserted in the appropriate place in Article 1. For cases in which the defined term is also used in other substantive Articles, the Article 1 Drafting Committee, with the aid of existing Drafting and Standby Committees, will assess whether the definition prepared for purposes of Articles 2 and 2A is also appropriate for the other relevant Articles. If the Article 2/2A definition is generally appropriate, it will be inserted in Article 1. If, on the other hand, the Article 2/2A definition is not appropriate for other Articles, either the current Article 1 definition will be retained for those purposes or the Article 1 Drafting Committee will revise that definition based on current commercial needs.

This draft contains relatively detailed Reporter's Notes for those sections that differ in substance from current law. Those Notes will be the basis for Official Comments for those sections. With respect to the sections that have been left substantively unchanged, it is likely that in most cases the Official Comments ultimately will consist of an updated version of the current Official Comments.

II. Substantive Issues

The following are significant substantive issues raised by changes from current Article 1, in the order of their appearance in the draft:

A. Scope

Article 1 contains a relatively small number of substantive rules, but those rules are of fundamental importance. Occasionally courts and commentators have expressed uncertainty as to which transactions are governed by the substantive rules. Section 1-102 expresses a point that is implicit in current Article 1 — namely, that the substantive rules in Article 1 apply only to transactions within the scope of the other Articles.

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B. Applicability of Supplemental Principles of Law

This draft merges subsections (1) and (2) of current Section 1-102 (concerning the underlying purposes and policies of the UCC) and current Section 1-103 (concerning the applicability of supplemental principles of law) into a revised Section 1-103. The provisions have been combined in this Section to reflect the interrelationship between the Code's purposes and policies and the extent to which other law is available to supplement it. Except for changing the form of reference to the Uniform Commercial Code, subsection (b) of this Section is identical to current Section 1-103. As reflected in the Reporter's Note to Section 1-103, though, the Comments to this Section will be rewritten extensively to give more helpful guidance as to the distinction between situations in which Code provisions preempt the application of other law and those in which such supplementation is permissible.

C. Good Faith

Section 1-201(22) replaces the current definition of "good faith" ("honesty in fact in the conduct or transaction concerned") with the definition adopted by all but one of the recently revised UCC Articles as well as drafts of Revised Articles 2 and 2A – "honesty in fact *and the observance of reasonable commercial standards of fair dealing.*" The Section explicitly provides, however, that its definition of "good faith" is subordinate to the narrower definition in UCC Article 5. In addition to centralizing the developments already taking place in other Articles, the new definition resolves any ambiguity as to the proper definition to apply to the general duty of good faith imposed by Article 1.

D. Choice of Law

Section 1-301 represents a significant rethinking of choice of law issues addressed in current UCC Section 1-105. The new section reexamines both the power of parties to select the jurisdiction whose law will govern their transaction and the determination of the governing law in the absence of such selection by the parties. With respect to the power to select governing law, the draft affords greater party autonomy, but with important safeguards protecting consumer interests and fundamental policies. While the Drafting Committee considered also addressing the related topic of forum selection clauses, it ultimately decided that there was no need for uniform commercial law to govern such clauses.

Uniform Commercial Code Article 1

1. Contractual Designation of Governing Law

Revised UCC section 1-301 addresses this issue somewhat differently than does current section 1-105. Current law allows the parties to designate a jurisdiction whose law governs if the transaction bears a “reasonable relation” to that jurisdiction. Revised Article 1 differs from this rule in two ways. First, in the context of consumer transactions, revised Article 1 provides greater protection against choice of law agreements that designate the law of a jurisdiction remote to the consumer, even if the transaction can be said to bear a reasonable relation to that jurisdiction. Revised UCC section 1-301(b) generally gives effect to a contractual designation of governing law only if the jurisdiction designated is the “State or country in which the consumer resides at the time the transaction becomes enforceable or within 30 days thereafter.”

Second, outside the context of consumer transactions, revised Article 1 generally provides the parties with greater autonomy than does current Article 1 to designate a jurisdiction whose law will govern, but also provides some safeguards against abuse that do not appear in current Article 1. These changes are explored in detail in Reporter’s Notes, *a*, *c*, and *d* to revised UCC section 1-301. Greater autonomy is provided in subsection (a) by following emerging international norms and deleting the requirement of a “reasonable relation” to the jurisdiction in this non-consumer context. Safeguards not present in current law are provided in subsections (c) and (d). Subsection (c) indicates that the designation of a jurisdiction’s law is not effective (even if the transaction bears a reasonable relation to that jurisdiction) if that law is contrary to a fundamental policy of the jurisdiction whose law would govern in the absence of contractual designation. Subsection (d) indicates that a designation of foreign law is not effective unless the transaction is international in nature.

2. Choice of Law in the Absence of Contractual Designation of Governing Law

In the absence of an effective contractual designation of governing law, current UCC section 1-105(1) directs the forum to apply its own law if the transaction bears “an appropriate relation to this state.” This provision is frequently ignored by courts, though. Revised UCC section 1-301(a) provides simply that, in the absence of contractual designation, the court should apply the forum’s choice of law principles. The reasons for this change are set out more fully in Reporter’s Note *e* to section 1-301.

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E. Course of Performance

Section 1-304 adds the concept of “course of performance,” currently utilized only in Articles 2 and 2A, to course of dealing and usage of trade as the contextual clues that a court may use to interpret a contract.

F. Statute of Frauds

The Statute of Frauds “for kinds of personal property not otherwise covered” that appears in current Section 1-206 has been deleted. The Drafting Committee noted that the other Articles of the Uniform Commercial Code make individual determinations as to writing requirements for transactions within their scope, so that the only effect of Section 1-206 was to impose a writing requirement on transactions not otherwise governed by the UCC. The Drafting Committee decided that it is inappropriate for Article 1 to impose such writing requirements.

III. Structural Issues

A. General Organization

Current Article 1 is divided into two parts. Part 1 is entitled “Short Title, Construction, Application and Subject Matter of Act.” Part 2 is entitled “General Definitions and Principles of Interpretation.” The rationale for placement of particular sections in one part or the other is occasionally obscure. This draft reorganizes Article 1 into three parts. Part 1 — “General Provisions” — contains general rules about the UCC as a whole. Part 2 — “General Definitions and Principles of Interpretation” — contains the Code’s major definitional section as well as additional rules of interpretation. Part 3 — “Territorial Applicability and General Rules” — contains substantive rules that apply to all transactions that are within the scope of the Code.

B. Relocation of Substantive Rules Embedded in Definitions

The Drafting Committee identified four cases in which definitions in Section 1-201 were made unnecessarily complicated by substantive rules embedded within them. Extracting those substantive rules and placing them in their own sections enables those rules to be presented more effectively and is more consistent with current drafting principles in many states.

Uniform Commercial Code Article 1

1. Notice and knowledge

The rules concerning notice and knowledge have been moved from their current location in three subsections of Section 1-201 to a separate substantive section. The Drafting Committee believes that the concepts are more clearly articulated in this fashion.

2. Distinguishing leases from security interests

In current Article 1, the definition of “security interest” consists of a short paragraph elucidating a basic principle that resolves almost every issue, followed by over 50 lines of clarification and qualification that serve only one function — distinguishing “true leases” from transactions that are leases in form but security interests in substance. This extended rule even contains a nested definition of the term “present value,” which it uses as part of drawing the distinction between true leases and security interests. The portion of the definition of “security interest” that distinguishes true leases from security interests has been moved to a separate substantive section. As a result, the remaining portion of the definition of “security interest” is shorter and clearer. The definition of “present value” is moved to its own definitional subsection.

3. Value

Whether a person acquires rights “for value” is at present the subject of a definitional provision in current Section 1-201(44). Yet, as the NCCUSL Committee on Style correctly noted to the Drafting Committee, the provision is more appropriately articulated as a free-standing rule. It has been moved to Section 1-204.

PART 1
GENERAL PROVISIONS

SECTION 1–101. SHORT TITLES.

(a) This [Act] may be cited as the Uniform Commercial Code.

(b) This article may be cited as Uniform Commercial Code — General Provisions.

Reporter’s Note

Source: Current Section 1-101.

Changes from current law: Subsection (b) is new. It is added in order to make the structure of Article 1 parallel with that of the other Articles of the Uniform Commercial Code.

SECTION 1-102. SCOPE OF ARTICLE. This article applies to a transaction that is governed by any other article of the [Uniform Commercial Code].

Source: New. This section is intended to resolve confusion that has occasionally arisen as to the applicability of the substantive rules in this Article.

SECTION 1–103. CONSTRUCTION OF ACT TO PROMOTE ITS PURPOSES AND POLICIES; APPLICABILITY OF SUPPLEMENTAL PRINCIPLES OF LAW.

(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are:

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(1) to simplify, clarify, and modernize the law governing commercial transactions;

(2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

(3) to make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Source: Current Section 1-102 (1)-(2); Current Section 1-103.

Changes from current law: This Section is derived from subsections (1) and (2) of current Section 1-102 and from current Section 1-103. Subsection (a) of this Section combines subsections (1) and (2) of current Section 1-102. Except for changing the form of reference to the Uniform Commercial Code and minor stylistic changes, its language is the same as subsections (1) and (2) of current Section 1-102. Except for changing the form of reference to the Uniform Commercial Code, subsection (b) of this Section is identical to current Section 1-103. The provisions have been combined in this Section to reflect the interrelationship between them.

a. Construction of the Uniform Commercial Code to promote its purposes and policies. Comment 1 to current Section 1-102 will be retained.

b. Applicability of supplemental principles of law. Subsection (b) states the basic

1 relationship of the Uniform Commercial Code to supplemental bodies of law. The
2 Uniform Commercial Code is not intended to be a comprehensive Code in the civil law
3 tradition. Rather, it was drafted against the backdrop of existing bodies of law, including
4 the common law and equity, and relies on those bodies of law to supplement its provisions
5 in many important ways. At the same time, the Uniform Commercial Code is the primary
6 source of commercial law rules in areas that it governs, and those rules represent choices
7 made by its drafters and the enacting legislatures about the appropriate policies to be
8 furthered in the transactions it covers. Therefore, while other bodies of law may
9 supplement provisions of the Uniform Commercial Code, they may not be used to
10 supplant its provisions, including the purposes and policies those provisions reflect, unless
11 a specific provision of the Code provides otherwise. See, e.g., Section 9-201(b)-(c)
12 (Article 9 rules subject to applicable consumer laws and certain other law). In the
13 absence of such a provision, the Uniform Commercial Code preempts other state law that
14 is inconsistent with either its provisions, or its purposes and policies.

15 The language of subsection (b) is intended to reflect both the concept of
16 supplementation and the concept of preemption. Some courts, however, have had
17 difficulty in applying the identical language of current Section 1-103 to determine when
18 other law appropriately may be applied to supplement the Code, and when that law has
19 been displaced by the Code. Some decisions have applied other law in situations in which
20 that application, while not inconsistent with the text of any particular provision of the
21 Code, clearly was inconsistent with the underlying purposes and policies reflected in the

relevant Code provisions. In part, this difficulty arose from comment 1 to current Section 1-103, which states that “this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act.” The “explicitly displaced” language of that comment does not accurately reflect the proper scope of Code preemption, which extends to displacement of other law that is inconsistent with its purposes and policies as well as its text.

The Drafting Committee considered several alternative formulations of subsection (b) designed to reflect more accurately the appropriate scope of UCC preemption of other law. Ultimately, however, the Drafting Committee decided to retain the language of current Section 1-103 with new comments to make it clear that displacement of other law extends to displacement of law inconsistent with Code purposes and policies as well as Code text. The comment also will provide examples of cases that have appropriately applied these concepts.

c. Sources of relevant code purposes and policies. At least three different sources of UCC purposes and policies are relevant to a court’s determination as to whether other law is displaced by particular provisions of the Uniform Commercial Code. First, subsection (a) lists the underlying purposes and policies of the Uniform Commercial Code as a whole, and admonishes courts to liberally construe and apply the Code’s provisions to promote those underlying purposes and policies. In determining whether other law may supplement the Code’s provisions, the court should consider whether application of that other law would be consistent with the rule of construction stated in subsection (a).

1 Second, although the Uniform Commercial Code is not intended to be a comprehensive
2 statute, it is intended to be an integrated one. Therefore, in determining the purposes and
3 policies relevant to a particular provision of the Code, the court should consider the
4 operation of that provision in light of the overall statutory scheme of which it is a part.
5 For instance, the overall statutory scheme of Article 9 reflects the importance of the
6 policies of predictability and certainty in the rules governing secured transactions. Thus,
7 in determining whether supplementation of its particular provisions by other law is
8 appropriate, the court should take those policies into account. Third, the court should
9 consider whether supplementation with other law would be consistent with the specific
10 purposes of, and policies reflected in, the particular provisions relevant to the issue before
11 the court.

12 *d. Listing not exclusive.* The list of sources of supplemental law in subsection (b) is
13 intended to be merely illustrative of the other law that may supplement the Code, and is
14 not exclusive. No listing could be exhaustive. Further, the fact that a particular section of
15 the Uniform Commercial Code makes express reference to other law is not intended to
16 suggest the negation of the general application of the principles of subsection (b). (Note
17 that the word “bankruptcy” in subsection (b), continuing the use of that word from current
18 Section 1-103, should be understood not as a specific reference to federal bankruptcy law
19 but, rather as a reference to general principles of insolvency, whether under federal or
20 state law.)

SECTION 1-104. CONSTRUCTION AGAINST IMPLIED REPEAL. [The Uniform Commercial Code] being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

Source: Current Section 1-104.

Changes from current law: Except for changing the form of reference to the Uniform Commercial Code, this Section is identical to current UCC Section 1-104.

SECTION 1-105. SEVERABILITY. If any provision or clause of [the Uniform Commercial Code] or application thereof to any person or circumstances is held invalid, such invalidity does not affect other provisions or applications of [the Uniform Commercial Code] which can be given effect without the invalid provision or application, and to this end the provisions of [the Uniform Commercial Code] are declared to be severable.

Source: Current Section 1-108.

Changes from current law: Except for changing the form of reference to the Uniform Commercial Code, this Section is identical to current UCC Section 1-108.

SECTION 1-106. USE OF SINGULAR AND PLURAL; GENDER. In [the Uniform Commercial Code], unless the context otherwise requires:

- (1) words in the singular number include the plural, and those in the plural include

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1 the singular; and

2 (2) words of any gender also refer to any other gender.

3 **Source:** Current Section 1-102(5).

4 **Changes from current law:** Other than minor stylistic changes, this Section is

5 identical to current UCC section 1-102(5).

PART 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

SECTION 1-201. GENERAL DEFINITIONS.

(a) Unless the statutory context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof:

(1) “Action”, in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.

(2) “Aggrieved party” means a party entitled to pursue a remedy.

(3) “Agreement” means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303. (Compare “Contract.”)

(4) “Authenticate” [*Consideration of the definition of this term, which appears in several articles, will be deferred until completion of the Article 2/2A drafting process.*]

(5) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

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(6) “Bearer” means a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank.

(7) “Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods.

(8) “Branch” includes a separately incorporated foreign branch of a bank.

(9) “Burden of establishing” a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(10) “Buyer in ordinary course of business” means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(11) “Conspicuous” [*Consideration of the definition of this term, which appears in several articles, will be deferred until completion of the Article 2/2A drafting process.*]

(11a) [*A definition of “consumer” may be inserted here, replacing the definition of “consumer” in section 1-301(f). The decision will be deferred until completion of the Article 2/2A drafting process.*]

(12) “Contract” means the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws. (Compare “Agreement.”)

(13) “Creditor” includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor’s or assignor’s estate.

(14) “Defendant” includes a person in the position of defendant in a counterclaim or third party claim.

(15) “Delivery”, with respect to an instrument, document of title, or chattel paper, means voluntary transfer of possession.

(16)¹ “Document of title” means a document that in the regular course of business or financing is treated as adequately evidencing that the person in possession of the document is entitled to receive, hold and dispose of it and the goods it covers. “Document of title” includes a bill of lading, dock warrant, dock receipt, warehouse receipt, or order

¹This version of § 1-201(16) has been approved by the Drafting Committee and was in the Annual Meeting Draft.

1 for the delivery of goods contained in a document that purports to be issued by or
2 addressed to a bailee and purports to cover goods in the bailee's possession which are
3 either identified or are fungible portions of an identified mass.

4 (16)² “Document of title” includes bill of lading, dock warrant, dock receipt,
5 warehouse receipt or order for the delivery of goods, and also any other document which
6 in the regular course of business or financing is treated as adequately evidencing that the
7 person in possession of it is entitled to receive, hold and dispose of the document and the
8 goods it covers. To be a document of title a document must purport to be issued by or
9 addressed to a bailee and purport to cover goods in the bailee's possession which are
10 either identified or are fungible portions of an identified mass.

11 (17) “Electronic agent” *[If this term is used in Articles 2 and 2A, the definition*
12 *provided by the Drafting Committees for those Articles will be inserted here.]*

13 (18) “Electronic message” *[If this term is used in Articles 2 and 2A, the definition*
14 *provided by the Drafting Committees for those Articles will be inserted here.]*

15 (19) “Fault” means a wrongful act, omission, breach, or default.

16 (20) “Fungible goods” means either:

17 (A) goods of which any unit, by nature or usage of trade, is the equivalent of any
18 other like unit; or

19 (B) goods which by agreement are treated as equivalent.

20 (21) “Genuine” means free of forgery or counterfeiting.

²This definition of “document of title” is in current Article 1.

(22) “Good faith,” except as provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(23) “Holder” means:

(A) with respect to a negotiable instrument, the person in possession of the negotiable instrument if it is either payable to bearer or payable to an identified person that is the person in possession; or

(B) with respect to a document of title, the person in possession of it if the goods are deliverable either to bearer or to the order of the person in possession.

(24) “Insolvency proceeding” includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(25) An “insolvent” person is a person that

(A) has generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute as to them;

(B) is unable to pay debts as they become due; or

(C) is insolvent within the meaning of federal bankruptcy law.

(26) “Money” means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(27) “Organization” means a person other than an individual.

(28) “Party”, as distinct from a “third party”, means a person that has engaged in a

1 transaction or made an agreement subject to [the Uniform Commercial Code].

2 (29) “Person” means an individual, corporation, business trust, estate, trust,
3 partnership, limited liability company, association, joint venture, government, government
4 subdivision or agency or instrumentality, or any other legal or commercial entity.

5 (30) “Present value” means the amount as of a date certain of one or more sums
6 payable in the future, discounted to the date certain by use of either an interest rate
7 specified by the parties if that rate is not manifestly unreasonable at the time the
8 transaction is entered into or, if an interest rate is not so specified, a commercially
9 reasonable rate that takes into account the facts and circumstances at the time the
10 transaction is entered into.

11 (31) “Presumption” or “presumed” means that the trier of fact must find the
12 existence of the fact presumed unless and until evidence is introduced which would
13 support a finding of its nonexistence.

14 (32) “Purchase” means taking by sale, lease, discount, negotiation, mortgage,
15 pledge, lien, security interest, issue or re-issue, gift, or any other voluntary transaction
16 creating an interest in property.

17 (33) “Purchaser” means a person that takes by purchase.

18 (34) “Record” means information that is inscribed on a tangible medium or that is
19 stored in an electronic or other medium and is retrievable in perceivable form.

20 (35) “Remedy” means any remedial right to which an aggrieved party is entitled
21 with or without resort to a tribunal.

1 (36) “Representative” means any person empowered to act for another, including
2 an agent, an officer of a corporation or association, and a trustee, executor, or
3 administrator of an estate.

4 (37) “Right” includes remedy.

5 (38) “Security interest” means an interest in personal property or fixtures which
6 secures payment or performance of an obligation. The term also includes any interest of a
7 consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory
8 note in a transaction that is subject to Article 9. The special property interest of a buyer of
9 goods on identification of those goods to a contract for sale under Section 2- 401 is not a
10 “security interest”, but a buyer may also acquire a “security interest” by complying with
11 Article 9. Except as otherwise provided in Section 2-505, the right of a seller or lessor of
12 goods under Article 2 or 2A to retain or acquire possession of the goods is not a “security
13 interest”, but a seller or lessor may also acquire a “security interest” by complying with
14 Article 9. The retention or reservation of title by a seller of goods notwithstanding
15 shipment or delivery to the buyer (Section 2–401) is limited in effect to a reservation of a
16 “security interest ”. Whether a transaction in the form of a lease is a “security interest” is
17 determined pursuant to Section 1-203.

18 (39) “Send” in connection with a writing, record, or notice means to:

19 (A) deposit in the mail or deliver for transmission by any other usual means of
20 communication with postage or cost of transmission provided for and properly addressed
21 and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if

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1 there be none to any address reasonable under the circumstances; or

2 (B) in any other way cause to be received any record or notice within the time if
3 would have arrived if properly sent.

4 (40) “Signed” includes any symbol executed or adopted with present intention to
5 authenticate a writing.³

6 (41) “State” means a State of the United States, the District of Columbia, Puerto
7 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
8 jurisdiction of the United States.

9 (42) “Surety” includes a guarantor or other secondary obligor.

10 (43) “Term” means a portion of an agreement that relates to a particular matter.

11 (44) “Unauthorized signature” means a signature made without actual, implied, or
12 apparent authority. The term includes a forgery.

13 (45) “Warehouse receipt” means a receipt issued by a person engaged in the
14 business of storing goods for hire.

15 (46) “Writing” includes printing, typewriting, or any other intentional reduction to
16 tangible form. “Written” has a corresponding meaning.

17 **Source:** Current Section 1-201.

³If “authenticate” becomes a defined term, that word may be replaced in this definition by “identify, verify, or adopt”.

Changes from annual meeting draft:

a. “Documents of title.” The definition in current UCC § 1-201(15) is presented as an alternative to the slightly revised definition approved by the Drafting Committee.

b. “Money.” The word “currently” has been added at the suggestion of Professor Paul Shupack in order to make it clear that former currency (such as, for example, coins issued by the Confederate States of America) does not constitute money.

c. “Security interest.” Stylistic change to last sentence.

d. “Send.” Slight reorganization to avoid change in meaning from current definition.

Changes from current law:

a. General. In order to make it clear that all definitions in the Uniform Commercial Code — not just those in Article 1 — do not apply if the statutory context otherwise requires, a new subsection (a) to that effect has been added. The remainder of current Section 1-201, as revised, now appears as subsection (b). Other than minor stylistic changes and renumbering as a result of moving some provisions to different sections, the definitions in this draft are as in current Article 1 (as amended, most recently, in conjunction with revisions to Article 9) except as noted below.

b. Electronic commerce. As noted throughout the draft, consideration of several definitions that may require updating to reflect electronic commerce and communication, has been deferred pending possible resolution of those issues in the Article 2/2A process.

c. Agreement. The sentence stating that the legal consequences of an agreement are determined by the Uniform Commercial Code and contract law has been deleted from the

1 text, but will appear in a Comment.

2 *d. Bank.* Revised definition derived from the first sentence of Section 4A-105(a)(2).

3 *e. Bill of lading.* The definition of bill of lading is identical to that in current Section
4 1-201(6), except the reference to, and definition of, “airbill” have been deleted.

5 *f. Fault.* “Default” added to list of acts constituting fault.

6 *g. Fungible.* The reference to securities has been deleted because Article 8 no longer
7 uses the term “fungible” to describe securities.

8 *h. Good faith.* Current Section 1-201(19) defines “good faith” simply as honesty in
9 fact; the definition contains no element of commercial reasonableness. Initially, that
10 definition applied throughout the Code with only one exception. Section 2-103(1)(b)
11 provides that “*in this Article . . . good faith in the case of a merchant means honesty in*
12 *fact and the observance of reasonable commercial standards of fair dealing in the trade.*”
13 This alternative definition is limited in applicability in three ways. First, it applies only to
14 transactions within the scope of Article 2. Second, it applies only to merchants. Third,
15 strictly construed it applies only to uses of the phrase “good faith” *in Article 2*; thus, so
16 construed it would not define “good faith” for its most important use — the obligation of
17 good faith imposed by current UCC Section 1-203.

18 Over time, however, amendments to the UCC brought the Article 2 merchant concept
19 of good faith (subjective honesty and objective reasonableness) into other Articles. First,
20 Article 2A explicitly incorporated the Article 2 standard. See current UCC Section
21 2A-103(7). Then, other Articles broadened the applicability of that standard by adopting

1 it for all parties rather than just for merchants. See, e.g., UCC Sections 3-103(a)(4),
2 4A-105(a)(6), 8-102(a)(10), and 9-102(a)(43). See also Reporter’s Interim Draft of
3 Revised Article 2. All of these definitions are comprised of two elements — honesty in
4 fact *and* the observance of reasonable commercial standards of fair dealing. Only revised
5 Article 5 defines “good faith” solely in terms of subjective honesty, and only Article 6 and
6 Article 7 are without definitions of good faith. (It should be noted that, while revised
7 Article 6 did not define good faith, Comment 2 to revised UCC section 6-102 states that
8 “this Article adopts the definition of ‘good faith’ in [current] Article 1 in all cases, even
9 when the buyer is a merchant.”) Given this near unanimity, it is appropriate to move the
10 definition of “good faith” to Article 1. The section will, of course, clearly indicate that this
11 definition is subject to the applicability of the narrower definition in revised Article 5.

12 No drafting committee has considered the appropriate definition of “good faith” for
13 purposes of Article 7 of the UCC, but the Article 1 Drafting Committee will consult with
14 the new Article 7 Drafting Committee as to the effect of this proposed definition on
15 transactions governed and rights determined by Article 7.

16 *i. Holder.* The definition has been reorganized for clarity.

17 *j. Honor.* The definition of “honor” has been deleted. The term is used only once (in
18 current Article 2) outside of revised Article 5, where it is defined. Revised Article 2
19 should simply cross-reference the Article 5 definition.

20 *k. Insolvent.* A reference to bona fide disputes has been added.

21 *l. Notice and knowledge.* These concepts have been moved to Section 1-202.

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1 *m. Organization.* Former definition has been replaced with standard NCCUSL
2 definition.

3 *n. Person.* Former definition has been replaced with standard NCCUSL definition.

4 *o. Present value.* This term is used in both Articles 1 and 2A. The embedded
5 definition in current Section 1-201(37) has been moved to its own subsection. The
6 identical definition in Article 2A will no longer be necessary.

7 *p. Security interest.* The first paragraph of this definition remains as revised in
8 conjunction with Revised Article 9. The remainder of the definition in current Article 1,
9 that distinguishes a “true” lease from a security interest, has been moved to Section 1-203.

10 *r. State.* The standard NCCUSL definition has been inserted.

11 *s. Surety.* The definition of “surety” has been expanded to include all secondary
12 obligors. The Comment will refer to the Restatement of Suretyship and Guaranty.

13 *t. Value.* This concept has been moved to Section 1-204.

14 **SECTION 1-202. NOTICE; KNOWLEDGE.**

15 (a) Subject to subsection (f), a person has “notice” of a fact if the person:

16 (1) has actual knowledge of it;

17 (2) has received a notice or notification of it; or

18 (3) from all the facts and circumstances known to the person at the time in
19 question, has reason to know that it exists.

20 (b) “Knowledge” means actual knowledge.

(c) “Discover”, “learn”, or words of similar import refer to knowledge rather than to notice.

(d) A person “notifies” or “gives” a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course, whether or not the other person actually comes to know of it.

(e) Subject to subsection (f), a person “receives” a notice or notification when:

(1) it comes to that person’s attention; or

(2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual’s attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual’s regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.⁴

⁴This subsection may be slightly modified if electronic commerce provisions are added to Articles 2 and 2A.

Source: Derived from current Sections 1-201(25)-(27).

Changes from current law: As noted by the NCCUSL Style Committee, these provisions are substantive rather than purely definitional. Accordingly, they have been relocated from Section 1-201 to this Section.

SECTION 1-203. LEASE DISTINGUISHED FROM SECURITY INTEREST.

(a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

(1) the original term of the lease is equal to or greater than the remaining economic life of the goods;

(2) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

(3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or

(4) the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease

1 agreement.

2 (c) A transaction in the form of a lease does not create a security interest merely
3 because:

4 (1) the present value of the consideration the lessee is obligated to pay the lessor
5 for the right to possession and use of the goods is substantially equal to or is greater than
6 the fair market value of the goods at the time the lease is entered into;

7 (2) the lessee assumes risk of loss of the goods;

8 (3) the lessee agrees to pay taxes, insurance, filing, recording, or registration
9 fees, or service or maintenance costs with respect to the goods;

10 (4) the lessee has an option to renew the lease or to become the owner of the
11 goods;

12 (5) the lessee has an option to renew the lease for a fixed rent that is equal to or
13 greater than the reasonably predictable fair market rent for the use of the goods for the
14 term of the renewal at the time the option is to be performed; or

15 (6) the lessee has an option to become the owner of the goods for a fixed price
16 that is equal to or greater than the reasonably predictable fair market value of the goods at
17 the time the option is to be performed.

18 (d) Additional consideration is nominal if it is less than the lessee's reasonably
19 predictable cost of performing under the lease agreement if the option is not exercised.

20 Additional consideration is not nominal if:

21 (1) when the option to renew the lease is granted to the lessee, the rent is stated

1 to be the fair market rent for the use of the goods for the term of the renewal determined
2 at the time the option is to be performed; or

3 (2) when the option to become the owner of the goods is granted to the lessee,
4 the price is stated to be the fair market value of the goods determined at the time the
5 option is to be performed.

6 (e) The “remaining economic life of the goods” and “reasonably predictable” fair
7 market rent, fair market value, or cost of performing under the lease agreement must be
8 determined with reference to the facts and circumstances at the time the transaction is
9 entered into.

10 **Source:** Current Section 1-201(37).

11 **Changes from current law:** This Section is substantively identical to those portions
12 of current UCC Section 1-201(37) that distinguish “true” leases from security interests,
13 except that the definition of “present value” currently embedded in Section 1-201(37) has
14 been placed in UCC Section 1-201(30).

15 **SECTION 1-204. VALUE.** Except as otherwise provided in articles 3, 4, 5, [and
16 6], a person gives value for rights if the person acquires them:

17 (1) in return for a binding commitment to extend credit or for the extension of
18 immediately available credit, whether or not drawn upon and whether or not a
19 charge-back is provided for in the event of difficulties in collection;

20 (2) as security for, or in total or partial satisfaction of, a preexisting claim;

(3) by accepting delivery under a preexisting contract for purchase; or

(4) in return for any consideration sufficient to support a simple contract.

Source: Current Section 1-201(44).

Changes from current law: As noted by the NCCUSL Style Committee, these provisions are substantive rather than purely definitional. Accordingly, they have been relocated from Section 1-201 to this Section.

SECTION 1-205. REASONABLE TIME; SEASONABLENESS.

(a) Whether a time for taking an action required by [the Uniform Commercial Code] is reasonable depends on the nature, purpose, and circumstances of the action.

(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

Source: Current Section 1-204(2)-(3).

Changes from current law: This Section is derived from subsections (2) and (3) of current Section 1-204. Subsection (1) of that Section is now incorporated in Section 1-302(b).

1 **PART 3**

2 **TERRITORIAL APPLICABILITY AND GENERAL RULES**

3 **SECTION 1-301. TERRITORIAL APPLICABILITY; PARTIES' POWER TO**
4 **CHOOSE APPLICABLE LAW.**

5 (a) Except as provided in this section, an agreement by parties to a transaction that
6 any or all of their rights and obligations are to be determined by the law of this State or of
7 another State or country is effective, whether or not the transaction bears a relation to the
8 State or country designated. In the absence of such an effective agreement, their rights
9 and obligations are determined, except as provided in subsection (e), by the law that
10 would be selected by application of this State's conflict of laws principles.

11 (b) If one of the parties to an agreement referred to in subsection (a) is a consumer,
12 the agreement is not effective unless the State or country designated is either:

13 (1) the State or country in which the consumer habitually resides at the time the
14 transaction becomes enforceable or within 30 days thereafter; or

15 (2) the State or country in which the goods, services, or other consideration
16 flowing to the consumer are to be received or are used by the consumer or a person
17 designated by the consumer.

18 (c) An agreement referred to in subsection (a) is not effective to the extent that the
19 law of the State or country designated is contrary to a fundamental policy of the State or
20 country whose law would otherwise govern. In addition, a court may decline to enforce
21 an agreement referred to in subsection (a) to the extent that the law of the State or

country designated is contrary to a fundamental policy of this State.

(d) If the transaction does not bear a reasonable relation to any country other than the United States, an agreement referred to in subsection (a) is effective only if it designates the law of a State.

(e) To the extent that the [Uniform Commercial Code] governs a transaction, where one of the following provisions of the [Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of law rules) so specified:

(1) *Section 2A-xxx [subject to the drafting of Article 2A]*

(2) Section 4-102

(3) Section 4A-507

(4) Section 5-116

(5) Section 6-103

(6) Section 8-110

(7) Sections 9-301 through 9-307.

(f) For purposes of this section, a “consumer” is an individual who enters into a transaction primarily for personal, family, or household purposes. [Personal, family, or household purposes do not include professional or commercial purposes, including agriculture, business management, and investment management other than management of the individual’s personal or family investments.]⁵

⁵This subsection may be replaced by a general definition of “consumer” in § 1-201. See § 1-201(b)(11a).

Reporter's Note

Source: Current Section 1-105.

Changes from annual meeting draft:

a. Subsection (b). “Habitually” added in paragraph (1). “Under the contract between the parties” deleted in paragraph (2).

b. Subsection (c). Additional sentence added to make it clear that court may decline to enforce a choice of law agreement to the extent that the law chosen is contrary to a fundamental policy of the forum state.

c. Subsection (e)(1). Reference to section 2-xxx deleted.

d. Subsection (f). Brackets placed around second sentence.

Changes from current law: This section replaces current UCC Section 1-105, with several significant changes.

Summary of changes: Section 1-301 represents a significant rethinking of choice of law issues addressed in current UCC Section 1-105. The new section reexamines both the power of parties to select the jurisdiction whose law will govern their transaction and the determination of the governing law in the absence of such selection by the parties. With respect to the power to select governing law, the draft affords greater party autonomy, but with important safeguards protecting consumer interests and fundamental policies. While the Drafting Committee considered also addressing the related topic of forum selection clauses, it ultimately decided that there was no need for uniform commercial law to govern such clauses.

Revised UCC section 1-301 addresses contractual designation of governing law somewhat differently than does current section 1-105. Current law allows the parties to designate a jurisdiction whose law governs if the transaction bears a “reasonable relation” to that jurisdiction. Revised Article 1 differs from this rule in two ways. First, in the context of consumer transactions, revised Article 1 provides greater protection against choice of law agreements that designate the law of a jurisdiction remote to the consumer, even if the transaction can be said to bear a reasonable relation to that jurisdiction. Revised UCC section 1-301(b) generally gives effect to a contractual designation of governing law only if the jurisdiction designated is the State or country in which the consumer resides at the time the transaction becomes enforceable or within 30 days thereafter or is the State or country in which the goods, services, or other consideration flowing to the consumer are to be received or used by the consumer or a person designated by the consumer.

Second, outside the context of consumer transactions, revised Article 1 generally provides the parties with greater autonomy than does current Article 1 to designate a jurisdiction whose law will govern, but also provides some safeguards against abuse that do not appear in current Article 1. These changes are explored in detail in Reporter’s Notes, *a*, *c*, and *d* to revised UCC section 1-301. Greater autonomy is provided in subsection (a) by following emerging international norms and deleting the requirement of a “reasonable relation” to the jurisdiction in this non-consumer context. Safeguards not

1 present in current law are provided in subsections (c) and (d). Subsection (c) indicates
2 that the designation of a jurisdiction's law is not effective (even if the transaction bears a
3 reasonable relation to that jurisdiction) if that law is contrary to a fundamental policy of
4 the jurisdiction whose law would govern in the absence of contractual designation.
5 Subsection (d) indicates that a designation of foreign law is not effective unless the
6 transaction is international in nature.

7 In the absence of an effective contractual designation of governing law, current UCC
8 section 1-105(1) directs the forum to apply its own law if the transaction bears "an
9 appropriate relation to this state." This provision is frequently ignored by courts, though.
10 Revised UCC section 1-301(a) provides simply that, in the absence of contractual
11 designation, the court should apply the forum's choice of law principles. The reasons for
12 this change are set out more fully in Reporter's Note *e* to section 1-301.

13 **Notes relating to specific provisions of this section:**

14 *a. Contractual choice of law.* This section allows parties broad autonomy, with
15 several important limitations, to select the law governing their transaction, even if the
16 transaction bears no relation to the State or country whose law is selected. This
17 recognition of party autonomy with respect to governing law has already been established
18 in several Articles of the Uniform Commercial Code (see UCC Sections 4A-507, 5-116,
19 and 8-110) and is consistent with international norms. See, e.g., Inter-American
20 Convention on the Law Applicable to International Contracts, Article 7 (Mexico City

1994); Convention on the Law Applicable to Contracts for the International Sale of Goods, Article 7(1) (The Hague 1986); EC Convention on the Law Applicable to Contractual Obligations, Article 3(1) (Rome 1980).

There are three important limitations on this party autonomy to select governing law. First, there are significant limitations in the context of consumer transactions (see note *b*). Second, contractual choice of law will not be given effect if it would be contrary to a fundamental policy of the forum or the State or country whose law would be applied in the absence of contractual designation (see note *c*). Third, the agreement of the parties may not select the law of a country other than the United States unless the transaction is international, i.e., it bears a reasonable relationship to a country other than the United States (but not necessarily to the country selected) (see note *d*).

The Drafting Committee considered whether this Section should expressly provide for the ability of parties to designate non-legal codes such as trade codes as the set of rules governing their transaction, but decided that the principles of Section 1-302 allowing parties broad freedom of contract to structure their relation are adequate for this purpose. A similar decision was made with respect to the ability of the parties to designate recognized bodies of rules or principles applicable to commercial transactions that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT.

b. Consumer transactions. If one of the parties is a consumer (as defined in subsection (f)), subsection (b) restricts the parties' ability to select contractually the jurisdiction whose law will govern to selection of the state or country in which either (i)

1 the consumer party resides at the time the transaction becomes enforceable or within 30
2 days thereafter or (ii) pursuant to the contract establishing the transaction, the consumer
3 party is to receive or use the goods, services, or other consideration flowing to the
4 consumer. This limitation is adapted from a similar limitation in current Section 2A-106.

5 *c. Fundamental policy.* Subsection (c) provides that an agreement choosing the
6 governing law will not be given effect to the extent that the law of the jurisdiction
7 specified is contrary to a fundamental policy of the State or country whose law would
8 otherwise govern. This rule provides a narrow exception to the broad autonomy afforded
9 to parties in subsection (a). One of the prime objectives of contract law is to protect the
10 justified expectations of the parties and to make it possible for them to foretell with
11 accuracy what will be their rights and liabilities under the contract. In this way, certainty
12 and predictability of result are most likely to be secured. See Restatement (Second)
13 Conflict of Laws, § 187, comment *e*. Under the fundamental policy exception, a court
14 should not refrain from applying the chosen law merely because this would lead to a result
15 different than would be obtained under the local law of the State or country whose law
16 would otherwise govern. Rather, the difference must be contrary to a public policy that is
17 so substantial that it would not only cause a court to forego application of choice of law
18 rules that would otherwise have pointed to the state or country that has that law but also
19 justify overriding the concerns for certainty and predictability underlying modern
20 commercial law as well as concerns for judicial economy generally. A fundamental policy
21 will rarely be found in a requirement, such as a statute of frauds, that relates to formalities,

1 or in general rules of contract law, such as those concerned with the need for
2 consideration. On the other hand, a rule that makes the selling of body parts or human
3 embryos illegal may reflect such a policy.

4 The opinion of Judge Cardozo in *Loucks v. Standard Oil Co. of New York*, 120 N.E.
5 198 (1918), regarding the related issue of when a state court may decline to apply the law
6 of another state, is a helpful touchstone here:

7 Our own scheme of legislation may be different. We may even have no
8 legislation on the subject. That is not enough to show that public policy forbids
9 us to enforce the foreign right. A right of action is property. If a foreign statute
10 gives the right, the mere fact that we do not give a like right is no reason for
11 refusing to help the plaintiff in getting what belongs to him. We are not so
12 provincial as to say that every solution of a problem is wrong because we deal
13 with it otherwise at home. Similarity of legislation has indeed this importance; its
14 presence shows beyond question that the foreign statute does not offend the local
15 policy. But its absence does not prove the contrary. It is not to be exalted into
16 an indispensable condition. The misleading word 'comity' has been responsible
17 for much of the trouble. It has been fertile in suggesting a discretion unregulated
18 by general principles.

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20 The courts are not free to refuse to enforce a foreign right at the pleasure of the
21 judges, to suit the individual notion of expediency or fairness. They do not close

1 their doors, unless help would violate some fundamental principle of justice,
2 some prevalent conception of good morals, some deep-rooted tradition of the
3 common weal.

4 120 N.E. at 201-02 (citations to authorities omitted).

5 *d. Wholly domestic transactions.* While this Section provides parties broad
6 autonomy to select governing law, there is an important limit placed on their ability to
7 designate foreign law. Subsection (d) provides that foreign law may not be designated
8 unless the transaction bears a reasonable relationship to a country other than the United
9 States. Thus, in a wholly domestic transaction, parties may (subject to the limitations set
10 out in subsections (b), (c), and (e)) designate the law of any State but not the law of a
11 foreign country.

12 *e. Choice of law in the absence of contractual designation.* The second sentence of
13 subsection (a), which replaces the second sentence of current UCC Section 1-105(1),
14 determines which jurisdiction's law governs a transaction in the absence of an effective
15 contractual choice by the parties. Current Section 1-105(1), by providing that the law of
16 the forum (*i.e.*, the UCC) applies if the transaction bears "an appropriate relation to this
17 state" rather than, say, requiring that the forum be the location of the "most significant"
18 contact, expresses a bias in favor of applying the forum's law. This bias, while not
19 universally respected by the courts, was justifiable in light of the uncertainty that existed at
20 the time of drafting as to whether the UCC would be adopted by all the states; the
21 pro-forum bias would assure that the UCC would be applied so long as the transaction

bore an “appropriate” relation to the forum. Inasmuch as the UCC has been adopted, at least in part, in all American jurisdictions, the vitality of this point is minimal in the domestic context, and international comity concerns militate against continuing the pro-forum, pro-UCC bias in transnational transactions. When the choice is between the law of two jurisdictions that have adopted the UCC, but whose law differs (whether because of differences in enacted language or differing judicial interpretations), there is no strong justification for directing a court to apply different choice of law rules to its determination than it would apply if the matter were not governed by the UCC. Similarly, given the wide variety of choice of law principles applied by the states, it would not be prudent to designate only one such principle as the proper one for transactions governed by the UCC. Accordingly, in cases in which the parties have not made an effective choice of law, Section 1-301(a) simply directs the forum to apply its ordinary choice of law principles to determine which jurisdiction’s law governs.

f. Primacy of other UCC choice of law rules. Subsection (e), which is essentially identical to current UCC Section 1-105(2), indicates that choice of law rules provided in the other Articles govern when applicable.

g. Choice of forum. The use of contractual choice of forum clauses has expanded as judicial hostility to them has faded. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See also Restatement of the Law (Second), Conflict of Laws § 80 (1971); Model Choice of Forum Act (1968, withdrawn 1975). The Drafting Committee considered whether to add a

1 provision governing the effect of such clauses, as recommended by the ABA Task Force
2 on Article 1, but decided not to do so.

3 **SECTION 1-302. VARIATION BY AGREEMENT.**

4 (a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform
5 Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be
6 varied by agreement.

7 (b) The obligations of good faith, diligence, reasonableness and care prescribed by
8 [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by
9 agreement, may determine the standards by which the performance of those obligations is
10 to be measured if those standards are not manifestly unreasonable. Whenever the [Uniform
11 Commercial Code] requires any action to be taken within a reasonable time, any time
12 which is not manifestly unreasonable may be fixed by agreement.

13 (c) The presence in certain provisions of [the Uniform Commercial Code] of the
14 phrase "unless otherwise agreed", or words of similar import, does not imply that the
15 effect of other provisions may not be varied by agreement under this section.

16 **Source:** Current Sections 1-102(3)-(4) and 1-204(1).

17 **Changes:** This section combines the rules from subsections (3) and (4) of current
18 Section 1-102 and subsection (1) of current Section 1-204. No substantive changes are
19 made.

**SECTION 1-303. COURSE OF PERFORMANCE, COURSE OF DEALING,
AND USAGE OF TRADE.**

(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.

(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.

(c) A “usage of trade” is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular

1 meaning to specific terms of the agreement, and may supplement or qualify the terms of
2 the agreement. A usage of trade applicable in the place in which part of the performance
3 under the agreement is to occur may be so utilized as to that part of the performance.

4 (e) Except as otherwise provided in subsection (f), the express terms of an
5 agreement and any applicable course of performance, course of dealing, or usage of trade
6 must be construed whenever reasonable as consistent with each other. If such a
7 construction is unreasonable:

8 (1) express terms prevail over course of performance, course of dealing, and
9 usage of trade;

10 (2) course of performance prevails over course of dealing and usage of trade;
11 and

12 (3) course of dealing prevails over usage of trade.

13 (f) Subject to Section [2-209], a course of performance is relevant to show a
14 waiver or modification of any term inconsistent with the course of performance.

15 (g) Evidence of a relevant usage of trade offered by one party is not admissible
16 unless that party has given the other party notice that the court finds sufficient to prevent
17 unfair surprise to the other party.

18 **Source:** Current Sections 1-205, 2-208, and 2A-207.

19 **Changes from current law:** As suggested by the ABA Task Force on Article 1, this
20 section integrates the “course of performance” concept from Articles 2 and 2A into the
21 principles of current Section 1-205, which deals with course of dealing and usage of trade.

In so doing, the section slightly modifies the articulation of the course of performance rules to fit more comfortably with the approach and structure of current UCC Section 1-205. There are also slight modifications to be more consistent with the definition of “agreement” in current section 1-201(3). It should be noted that a course of performance that might otherwise establish a defense to the obligation of a party to a negotiable instrument is not available as a defense against a holder in due course who took the instrument without notice of that course of performance.

SECTION 1–304. OBLIGATION OF GOOD FAITH. Every contract[, right] or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance[, exercise] and enforcement.

Source: Current Section 1-203.

Changes from annual meeting draft: “Right” and “exercise” added to make it clear that rights may be exercised only in good faith.

Changes from current law: Except for changing the form of reference to the Uniform Commercial Code, this Section is identical to current UCC Section 1-203.

SECTION 1–305. REMEDIES TO BE LIBERALLY ADMINISTERED.

(a) The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal

1 damages may be had except as specifically provided in [the Uniform Commercial Code] or
2 by other rule of law.

3 (b) Any right or obligation declared by [the Uniform Commercial Code] is
4 enforceable by action unless the provision declaring it specifies a different and limited
5 effect.

6 **Source:** Current Section 1-106.

7 **Changes from current law:** This section is substantively identical to current UCC
8 Section 1-106.

9 **SECTION 1–306. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT**

10 **AFTER BREACH.** A claim or right arising out of an alleged breach may be discharged
11 in whole or in part without consideration by agreement of the aggrieved party in an
12 authenticated record.

13 **Source:** Current Section 1-107.

14 **Changes from current law:** This section changes current law in two respects. First,
15 current Section 1-107, requiring the “delivery” of a “written waiver or renunciation”
16 merges the separate concepts of the aggrieved party’s agreement to forego rights and the
17 manifestation of that agreement. This section separates those concepts, and explicitly
18 requires *agreement* of the aggrieved party. Second, the revised section reflects
19 developments in electronic commerce by providing for memorialization in an authenticated
20 record.

SECTION 1–307. PRIMA FACIE EVIDENCE BY THIRD PARTY

DOCUMENTS. A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.⁶

Source: Current Section 1-202.

Changes from current law: No changes.

**SECTION 1–308. PERFORMANCE OR ACCEPTANCE UNDER
RESERVATION OF RIGHTS.**

(a) Except as otherwise provided in subsection (b), a party that, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Words such as "without prejudice", "under protest" or the like are sufficient.

(b) Subsection (a) does not apply to an accord and satisfaction.

Source: Current Section 1-207.

Changes from current law: This section is substantively identical to current UCC Section 1-207.

⁶Subject to input from the Reporter and the Drafting Committee for the Uniform Evidence Act. After resolution of electronic commerce issues, the language may be broadened to cover "records" rather than documents.

1 **SECTION 1–309. OPTION TO ACCELERATE AT WILL.** A term providing
2 that one party or that party’s successor in interest may accelerate payment or performance
3 or require collateral or additional collateral "at will" or when the party “deems itself
4 insecure", or words of similar import, means that the party has power to do so only if that
5 party in good faith believes that the prospect of payment or performance is impaired. The
6 burden of establishing lack of good faith is on the party against which the power has been
7 exercised.

8 **Source:** Current Section 1-208.

9 **Changes from current law:** This section is substantively identical to current UCC
10 Section 1-208.

11 **SECTION 1–310. SUBORDINATED OBLIGATIONS.** An obligation may be
12 issued as subordinated to performance of another obligation of the person obligated, or a
13 creditor may subordinate its right to performance of an obligation by agreement with
14 either the person obligated or another creditor of the person obligated. Subordination
15 does not create a security interest as against either the common debtor or a subordinated
16 creditor.

17 **Source:** Current Section 1-209.

18 **Change from annual meeting draft:** “Payment” changed to “performance.”

19 **Changes from current law:** This section is identical to current Section 1-209,
20 except that the language in that Section stating that it “shall be construed as declaring the

1 law as it existed prior to the enactment of this Section and not as modifying it” has been
2 deleted.