

ARTICLE 1 DRAFTING COMMITTEE
REPORTER'S INTRODUCTORY MEMORANDUM

October 10, 1996

To: Article 1 Drafting Committee
From: Professor Neil B. Cohen
Re: The Tasks Before Us

This Drafting Committee has been given a broad charge by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI"). In particular, we have been given two related, but distinct, tasks. Our first task is to consider and draft revisions and additions to Article 1 in light of developments since the Article's promulgation. Our second task is to reexamine the other substantive Articles of the Uniform Commercial Code from a perspective of internal harmonization of the Code. In performing the latter role, it is our task (i) to identify concepts that appear in particular Articles of the Code that should be given general applicability and, therefore, relocate them to Article 1 and (ii) to identify provisions in the substantive Articles that appear to address the same or similar policy issues in different ways and determine whether those policies should be harmonized and, if so, whether they should be expressed in Article 1.

It is my expectation that much of the first meeting of the Drafting Committee will be spent discussing our charge and these tasks. We are guided in this endeavor by the efforts of the Article 1 Task Force of the Uniform Commercial Code Committee of the Business Law Section of the American Bar Association. We are greatly indebted to the Task Force for its initial examination of many of the issues before us and will be greatly assisted by its Report and by the expertise and knowledge of its members.

I. Summary of Sources of Issues for Drafting Committee Consideration

While Article 1 is relatively brief, containing only 18 sections (although one of them, section 1-201, contains 46 subsections), our agenda is not brief. Our tasks are extensive, and derive from a number of sources (some of which are, of course, overlapping). The following is a summary of the various sources of issues for our consideration:

A. Recommendations of the Article 1 Task Force

The Article 1 Task Force considered recommendations or proposals that eight sections in Article 1 be amended, and recommended revision or redrafting of four of those sections:

1. Section 1-105
2. Section 1-201 (many subsections)
3. Section 1-205
4. Section 1-206

The report of the Task Force is enclosed with the materials for this meeting.

B. Matters Addressed Consistently in a Number of Other Articles

The prime example of this category is the definition of "good faith." At present, UCC section 1-201(19) defines good faith as "honesty in fact in the contract or transaction concerned. Until recently, that definition applied throughout the Code with the exception of Article 2 which provided in section 2-103 that "in this Article good faith, in the case of a merchant, means "honesty in fact *and* the observance of reasonable commercial standards of fair dealing. Thus, the general definition appearing in Article 1 had, with that one exception, general applicability throughout the Code. As NCCUSL and the ALI began, in the late 1980s, the revision cycle that will culminate with the work of our Drafting Committee, however, this situation changed. First, Article 2A explicitly incorporated the Article 2 definition of good faith. Later, Articles 3, 4, 4A, and 8 adopted definitions incorporating both honesty in fact and reasonable commercial standards of fair dealing even as applied to non-merchants. Articles 2, 2B, and 9 appear likely to follow that path in their revisions. Only Article 5 and Article 6 among the revised Articles have not followed suit. In light of these developments and the emerging (although non-unanimous) consensus within the Code, the Drafting Committee must decide whether to redefine "good faith" in Article 1, subject, of course, to the decision in Article 5 (and, perhaps also Article 6) to define the term differently.

C. Revisions of Article 1 Definitions in Light of Action Taken in Other Articles

In some cases, definitions that appear in section 1-201 either have become anachronistic or have otherwise been found to be insufficient to fulfill a substantive task. As a result, drafters of the other substantive Articles have placed special definitions in those Articles. One example of the former is the definition of "conspicuous." UCC section 1-201(10) defines "conspicuous" as follows:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is conspicuous. Whether a term or clause is "conspicuous" or not is for decision by the court.

The Article 2 Drafting Committee, considering an Article that utilizes the concept of conspicuousness, has determined that the definition in section 1-201(10) is insufficient. Accordingly, recent drafts of revised Article 2 have contained a new definition of "conspicuous." For example, the 1996 Annual Meeting Draft of Article 2 defined conspicuous as follows:

"Conspicuous, with reference to a term or clause, means so displayed or presented that a reasonable person against whom it is to operate would likely have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable the recipient or the recipient's computer to take it into account or react to it without review of the message by an individual. A term or clause is conspicuous if it is:

- (i) in a record and is a printed heading in capitals;
- (ii) language in the body of a standard form record that is in larger or other contrasting type or color than other language in the form; or

(iii) a term or clause referred to in the body of a record by conspicuous language if the term or clause can be readily accessed from the record in which it is referred.

Is the definition of “conspicuous” that appears in drafts of revised Article 2 preferable to the current definition in section 1-201(10)? Is the revised Article 2 definition a product of concerns that are unique to the law of sales and are not generally applicable? It will be the task of this Committee to examine this and other revisions of Article 1 definitions that are appearing elsewhere in drafts of Code revisions.

Another example of an Article 1 definition that may not be sufficient to fulfill its task is provided by current UCC section 2A-103(1)(o). Article 2 (see section 2-403(2)) and Article 9 (see section 9-307(1)) give important rights to a “buyer in ordinary course of business” — a term that is defined in UCC section 1-201(9). In drafting Article 2A, it was determined to give similar protection to those who take by lease rather than sale, but the existing protective rules referred only to *buyers* in ordinary course of business. Accordingly, Article 2A parallels those other provisions, but with an important change — in Article 2A the protected parties are *lessees* in ordinary course of business, and that term is defined in section 2A-103(1)(o). It will be the task of this Committee to assess whether the concept of “lessee in ordinary course of business” should be folded into the existing concept of buyer in ordinary course of business.

D. Concepts Now Appearing in Only Some of the Substantive Articles That Might Be Appropriate for General Applicability

Some concepts that appear in only some of the Articles of the UCC might be considered for relocation to Article 1 and, therefore, more general applicability. One example is the concept of “course of performance,” which appears only in Articles 2 and 2A of the present Code. The Article 1 Task Force recommended that this concept be incorporated into Article 1 and a draft of such a provision is included in the materials for this meeting. Other possibilities to be considered include contract formation rules from Articles 2 and 2A, damages principles from those Articles, unconscionability, etc.

E. Electronic Commerce

The definitions in Article 1 predate the onset of electronic commerce. Many of them will have to be reconsidered in light of this development. Also, as the other Articles begin to accommodate electronic commerce, they have been utilizing, and defining, terms that fulfill that function. Many of those definitions might be more appropriately located in Article 1.

F. Issues Arising from the Coordination of Articles 2, 2A, and 2B

On May 31-June 2, 1996, a coordinating group consisting of the chairs and reporters of the Drafting Committees for Articles 1, 2, 2A, and 2B met to institute coordination of policies, provisions, and language among the Articles. As a result of that meeting, it was determined that certain matters now appearing in drafts of Articles 2, 2A, and 2B should be relocated to Article 1. A copy of the coordinating group's report is included in the materials for this meeting.

II. The Tasks for Our First Meeting

A. Organizational

The primary purpose of this meeting is to organize the pursuit of our endeavor so as to produce, in a reasonably short time, an enactable draft of a revised Article 1. We must organize both aspects of the effort — Article 1 revision and Code harmonization. Some portions of our work will be technical, involving little policy choice, while other aspects will involve major policy decisions. When such policy decisions must be made, it will be critical to hear the views of those affected so that the committee's choices will be properly informed. Accordingly, we should devote considerable resources at this first meeting to set an agenda and priority scheme to guide our future efforts. One very important task will be the identification of experts and interested groups that should be encouraged to attend some or all of the Drafting Committee's meetings so that the Drafting Committee will be fully informed.

One important organizational item that must be attended to, of course, is the establishment of a schedule for future meetings. Please bring your calendars.

B. Consideration of Drafts

While the purpose of this meeting is primarily organizational, I have prepared drafts of three sections for your consideration. The three sections chosen represent three different strands of our agenda. The first — section 1-201(19) — is the definition of “good faith,” a term that is now defined in most of the substantive Articles differently than it is defined in current Article 1.

The second — section 1-205 — adds course of performance (a concept now dealt with only in Articles 2 and 2A) to the roster of generally applicable principles in Article 1. I have prepared two alternative versions of this section. Alternative A is a redraft submitted by the Article 1 Task Force. Alternative B attempts to integrate the concepts in such a way as to produce a section more homogeneous in approach.

The third — section 1-105 — is the Code's choice of law section. This section is likely to be quite controversial no matter what decisions this Committee makes; accordingly, it is important to begin the process of formulating the redraft of this section now in order to allow sufficient time in the process for feedback and redrafting. You will note that the draft of this section that I have submitted incorporates, through the use of brackets and alternatives, a wide array of possibilities.