

**D R A F T**  
**FOR DISCUSSION ONLY**

**UNIFORM COMMERCIAL CODE**  
**REVISED ARTICLE 1 – GENERAL PROVISIONS (199\_\_)**

THE AMERICAN LAW INSTITUTE  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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ON UNIFORM STATE LAWS

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**PART 1**

**TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT**

**§ 1–101. Short Title.**

- (a) This Act shall be known and may be cited as the Uniform Commercial Code.
- (b) This article may be cited as Uniform Commercial Code — General Provisions

**Revision Notes**

This section is based on current UCC section 1-101. Subsection (b) is new.

**§ 1–102. Construction of Act to Promote Its Purposes and Policies.**

- (a) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (b) The underlying purposes and policies of this Act are
  - (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;
  - (3) to make uniform the law among the various jurisdictions.

**Revision Notes**

Except for stylistic changes, this section is identical to subsections (1) and (2) of current UCC section 1-102.

**§ 1–103. Supplementary General Principles of Law Applicable.**

Except to the extent displaced by the particular provisions of this Act, 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.

**Revision Notes**

a. This provision is identical to current UCC § 1-103, with one change: "Except to the extent that" has replaced "Unless" at the beginning of the section.

b. Current comment 1 differs from the statutory text in that it states that supplementary principles of law apply "except insofar as they are explicitly displaced by this Act." This inconsistency should not be continued. Inasmuch as the word "explicitly" suggests a degree of specificity as to displacement of other legal principles rarely found in the Uniform Commercial Code, that adverb should be deleted from the comment.

**§ 1-104. Applicability of Act by Agreement.**

To the extent that a transaction is not subject to this Act, parties to that transaction may provide by agreement that one or more of the provisions of this Act shall determine any or all of their rights and obligations with respect to each other, unless such an agreement is not allowed under the law that would otherwise govern those rights and obligations.

**Revision Notes**

This section, if adopted, would explicitly authorize parties to "opt-in" to the rules in the Uniform Commercial Code with respect to rights and obligations between them. See generally, Robert A. Feldman and Frederick H. Miller, In and Out of (and Among?) the UCC Articles Via Contract, Commercial Law Newsletter (Nov. 1996). The last clause is intended to prevent parties contracting out of otherwise mandatory rules imposed by other law. Consideration should be given to whether this section replicates existing freedom of contract and should, therefore, be deleted as redundant. Consideration should also be given to whether parties should be allowed to "cherry pick" by selecting only part of the statutory scheme addressing a particular issue.

**§ 1-105. Construction Against Implicit Repeal.**

This Act 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.

**Revision Notes**

This section is identical to current UCC section 1-104.

1 § 1-106. Severability.

2

3

If any provision or clause of this Act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

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**Revision Notes**

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This section is identical to current UCC section 1-108.

10

11 § 1-107. Section Captions; Use of Particular Gender

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13

(a) Section captions are parts of this Act.

14

15

(b) In this Act, unless the context otherwise requires:

16

17

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

18

19

(2) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

20

21

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**Revision Notes**

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Subsection (a) is identical to current UCC section 1-109. Subsection (b) is identical to current UCC section 1-102(5).

25

PART 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

§ 1-201. General Definitions.

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

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

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-304, 2-xxx, and 2A-xxx). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). (Compare "Contract".)

(4) "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(5) "Authenticate" means to sign or to execute or adopt a symbol, including a digital signal or identifier, or to do an act that encrypts a record or an electronic message in whole or in part, with present intention to establish the authenticity of, or signify a party's acceptance and adoption of, a record or term that contains the authentication or to which a record containing the authentication refers.

(6) "Bank" means any person engaged in the business of banking.

(7) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(8) "Bill of lading" means a record evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill.

1 (9) "Branch" includes a separately incorporated foreign branch of a bank.

2  
3 (10) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence  
4 of the fact is more probable than its non-existence.

5  
6 (11) "Buyer in ordinary course of business" means a person that buys goods in good faith, without  
7 knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a  
8 person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary  
9 course if the sale to the person comports with the usual or customary practices in the kind of business in which  
10 the seller is engaged or with the seller's own usual or customary practices. A person that sells minerals or the like,  
11 including oil and gas, at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer  
12 in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit,  
13 and may acquire goods or documents of title under a pre-existing contract for sale. Only a buyer that takes  
14 possession of the goods or has a right to recover the goods from the seller (Section [2-xxx]) may be a buyer in  
15 ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or  
16 partial satisfaction of a money debt is not a buyer in ordinary course of business.

17  
18 (12) "Conspicuous," with reference to a term or clause, means so displayed or presented that a  
19 reasonable person against whom it is to operate would likely have noticed it. Whether a term or clause is  
20 "conspicuous" is for decision by the court.

21  
22 (13) "Contract" means the total legal obligation that results from the parties' agreement as affected  
23 by this Act and any other applicable rules of law. (Compare "Agreement.")

24  
25 (14) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative  
26 of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an  
27 executor or administrator of an insolvent debtor's or assignor's estate.

28  
29 (15) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

30  
31 (16) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities  
32 means voluntary transfer of possession.

33  
34 (17) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order  
35 for the delivery of goods, and also any other record that in the regular course of business or financing is treated  
36 as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the record  
37 and the goods it covers. To be a document of title a record must purport to be issued by or addressed to a bailee

1 and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an  
2 identified mass.

3  
4 (18) "Electronic agent" means a computer program or similar device designed, selected, or  
5 programmed by a party to initiate or respond to electronic messages or performances without review by an  
6 individual. The term does not include a common carrier employed or used in that capacity.

7  
8 (19) "Electronic message" means a record stored, generated, or transmitted for purposes of  
9 communication to another party or an electronic agent by electronic, optical scanner, or similar means. The term  
10 includes electronic data interchange, electronic mail, facsimile, telex, telecopying, and similar communication.

11  
12 (20) "Fault" means wrongful act, omission or breach.

13  
14 (21) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by  
15 nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed  
16 fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are  
17 treated as equivalents.

18  
19 (22) "Genuine" means free of forgery or counterfeiting.

20  
21 (23) "Good faith," except as provided with respect to letters of credit (Section 5-102(a)(7)), means  
22 honesty in fact and the observance of reasonable commercial standards of fair dealing.

23  
24 (24) "Holder," with respect to a negotiable instrument, means the person in possession if the  
25 instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified  
26 person is in possession. "Holder" with respect to a document of title means the person in possession if the goods  
27 are deliverable to bearer or to the order of the person in possession.

28  
29 (25) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount  
30 a draft complying with the terms of the credit.

31  
32 (26) "Insolvency proceedings" includes any assignment for the benefit of creditors or other  
33 proceedings intended to liquidate or rehabilitate the estate of the person involved.

34  
35 (27) A person is "insolvent" who either has ceased to pay that person's debts in the ordinary course  
36 of business or cannot pay those debts as they become due or is insolvent within the meaning of the federal  
37 bankruptcy law.

1 (28) "Money" means a medium of exchange authorized or adopted by a domestic or foreign  
2 government and includes a monetary unit of account established by an intergovernmental organization or by  
3 agreement between two or more nations.

4  
5 (29) A person has "notice" of a fact when

6  
7 (a) the person has actual knowledge of it; or

8  
9 (b) the person has received a notice or notification of it; or

10  
11 (c) from all the facts and circumstances known to the person at the time in question the  
12 person has reason to know that it exists.

13  
14 A person "knows" or has "knowledge" of a fact when the person has actual knowledge of it. "Discover"  
15 or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and  
16 circumstances under which a notice or notification may cease to be effective are not determined by this Act.

17  
18 (30) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be  
19 reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it.  
20 A person "receives" a notice or notification when

21  
22 (a) it comes to that person's attention; or

23  
24 (b) it is duly delivered in a form reasonable under the circumstances at the place of business  
25 through which the contract was made or at any other location or system held out by that person as the  
26 place for receipt of such communications.

27  
28 (31) Notice, knowledge or a notice or notification received by an organization is effective for a  
29 particular transaction from the time when it is brought to the attention of the individual conducting that transaction,  
30 and in any event from the time when it would have been brought to his attention if the organization had exercised  
31 due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating  
32 significant information to the person conducting the transaction and there is reasonable compliance with the  
33 routines. Due diligence does not require an individual acting for the organization to communicate information  
34 unless such communication is part of the individual's regular duties or unless the individual has reason to know  
35 of the transaction and that the transaction would be materially affected by the information.

36

- 1 (32) "Organization" includes a corporation, government or governmental subdivision or agency,  
2 business trust, estate, trust, partnership or association, two or more persons having a joint or common interest,  
3 or any other legal or commercial entity.  
4
- 5 (33) "Party," as distinct from "third party," means a person who has engaged in a transaction or made  
6 an agreement within this Act.  
7
- 8 (34) "Person" includes an individual or an organization (See Section 1-107(b)).  
9
- 10 (35) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact  
11 presumed unless and until evidence is introduced which would support a finding of its non-existence.  
12
- 13 (36) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest,  
14 issue or re-issue, gift, or any other voluntary transaction creating an interest in property.  
15
- 16 (37) "Purchaser" means a person who takes by purchase.  
17
- 18 (38) "Record" means information that is inscribed on a tangible medium or that is stored in an  
19 electronic or other medium and is retrievable in perceivable form.  
20
- 21 (39) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort  
22 to a tribunal.  
23
- 24 (40) "Representative" includes an agent, an officer of a corporation or association, and a trustee,  
25 executor or administrator of an estate, or any other person empowered to act for another.  
26
- 27 (41) "Rights" includes remedies.  
28
- 29 (42) "Security interest" means an interest in personal property or fixtures that secures payment or  
30 performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment  
31 or delivery to the buyer (Section 2-xxx) is limited in effect to a reservation of a "security interest." The term also  
32 includes any interest of a consignor and a buyer of accounts, chattel paper, or a payment intangible in a transaction  
33 that is subject to Article 9. The special property interest of a buyer of goods on identification of those goods to a  
34 contract for sale under Section 2-xxx is not a "security interest", but a buyer may also acquire a "security interest"  
35 by complying with Article 9.  
36

1 Whether a transaction creates a lease or security interest is determined by the facts of each case;  
2 however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right  
3 to possession and use of the goods is an obligation for the term of the lease not subject to termination by the  
4 lessee, and

5  
6 (a) the original term of the lease is equal to or greater than the remaining economic life of  
7 the goods,

8  
9 (b) the lessee is bound to renew the lease for the remaining economic life of the goods or  
10 is bound to become the owner of the goods,

11  
12 (c) the lessee has an option to renew the lease for the remaining economic life of the goods  
13 for no additional consideration or nominal additional consideration upon compliance with the lease  
14 agreement, or

15  
16 (d) the lessee has an option to become the owner of the goods for no additional  
17 consideration or nominal additional consideration upon compliance with the lease agreement.

18  
19 A transaction does not create a security interest merely because it provides that

20  
21 (a) the present value of the consideration the lessee is obligated to pay the lessor for the  
22 right to possession and use of the goods is substantially equal to or is greater than the fair market value  
23 of the goods at the time the lease is entered into,

24  
25 (b) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing,  
26 recording, or registration fees, or service or maintenance costs with respect to the goods,

27  
28 (c) the lessee has an option to renew the lease or to become the owner of the goods,

29  
30 (d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater  
31 than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the  
32 time the option is to be performed, or

33  
34 (e) the lessee has an option to become the owner of the goods for a fixed price that is equal  
35 to or greater than the reasonably predictable fair market value of the goods at the time the option is to be  
36 performed.

37

1 For purposes of this subsection (42):  
2

3 (x) Additional consideration is not nominal if (i) when the option to renew the lease is granted  
4 to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the  
5 renewal determined at the time the option is to be performed, or (ii) when the option to become the owner  
6 of the goods is granted to the lessee the price is stated to be the fair market value of the goods  
7 determined at the time the option is to be performed. Additional consideration is nominal if it is less than  
8 the lessee's reasonably predictable cost of performing under the lease agreement if the option is not  
9 exercised;

10  
11 (y) "Reasonably predictable" and "remaining economic life of the goods" are to be  
12 determined with reference to the facts and circumstances at the time the transaction is entered into; and  
13

14 (z) "Present value" means the amount as of a date certain of one or more sums payable in  
15 the future, discounted to the date certain. The discount is determined by the interest rate specified by the  
16 parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the  
17 discount is determined by a commercially reasonable rate that takes into account the facts and  
18 circumstances of each case at the time the transaction was entered into.  
19

20 (43) "Send" in connection with any record or notice means to deposit in the mail or deliver for  
21 transmission by any other usual means of communication in a form reasonable under the circumstances with  
22 postage or cost of transmission provided for and properly addressed and in the case of an instrument to an  
23 address specified thereon or otherwise agreed, or if there be none to any address reasonable under the  
24 circumstances. The receipt of any record or notice within the time at which it would have arrived if properly sent  
25 has the effect of a proper sending.  
26

27 (44) "Surety" includes guarantor or other secondary obligor.  
28

29 (45) "Term" means that portion of an agreement which relates to a particular matter.  
30

31 (46) "Unauthorized" signature means one made without actual, implied, or apparent authority and  
32 includes a forgery.  
33

34 (47) "Value." Except as otherwise provided with respect to negotiable instruments and bank  
35 collections (Sections 3-303, 4-210 and 4-211) a person gives "value" for rights if the person acquires them  
36

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

4 (b) as security for or in total or partial satisfaction of a pre-existing claim; or

5 (c) by accepting delivery pursuant to a pre-existing contract for purchase; or

6 (d) generally, in return for any consideration sufficient to support a simple contract.

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10  
11 (48) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing  
12 goods for hire.

13  
14  
15 **Revision Notes**

16  
17 a. *Airbill*. The definition of airbill is moved from current UCC section 1-201(6), where it was part of the  
18 definition of "bill of lading." "Document" has been changed to "record."

19  
20 b. *Authenticate*. The definition of "authenticate" appears in the January 1997 draft of revised Article 2B.  
21 Inasmuch as the definition of "authenticate" includes the concept of signing, the separate definition of "sign" has  
22 been deleted. Of course, this cannot be done without replacing the use of "sign" in the other, older Articles with  
23 "authenticate."

24  
25 c. *Bill of lading*. The definition of bill of lading is identical to that in current UCC section 1-201(6), except  
26 that "record" has replaced "document," and the definition of "airbill" has been moved to its own subsection.

27  
28 d. *Buyer in ordinary course of business*. The revised definition of buyer in ordinary course of business  
29 is the product of the Article 9 Drafting Committee. As noted by that Committee:

30  
31 Many of the revisions to the definition of "buyer in ordinary course of business" in subsection  
32 [(11)] are for clarification and style. The second sentence of the subsection is new. It provides  
33 that the "ordinary course" requirement is met only if the sale is in the ordinary course of the  
34 seller's business. The third sentence, which tracks Section 6-102(1)(m), explains when a sale  
35 is in the ordinary course of the seller's business.  
36

1 The penultimate sentence of subsection [(11)] also is new. It prevents a buyer that does not have  
2 the right to possession against the seller from taking free of the rights of third parties. The Article  
3 2 sections referred to would be Sections 2-707 (specific performance) and 2-724 (prepaying  
4 buyer) of the March 1, 1996, Article 2 draft.

5  
6 *e. Conspicuous.* The definition of “conspicuous” is essentially identical to the language proposed by the  
7 Working Group on Electronic Writings and Notices of the Committee on the Law of Commerce in Cyberspace and  
8 Uniform Commercial Code Committee of the Section on Business Law of the American Bar Association. Inasmuch  
9 as it differs from language proposed in drafts of revised Articles 2 and 2A, this definition should be discussed in  
10 harmonization and coordination meetings involving the representatives of the revision projects for Articles 1, 2,  
11 2A, 2B, and 9.

12  
13 *f. Consumer.* This section does not contain a definition of “consumer” or “consumer transaction.” Articles  
14 2, 2A, 2B, and 9 contain definitions that are similar but differ in light of their differing contexts. This draft defines  
15 those terms in revised section 1-302 solely for purposes of that section. Consideration should be given to placing  
16 a uniform definition in section 1-201.

17  
18 *g. Document of title.* The definition of “document of title” is identical to current UCC section 1-201(15),  
19 except that “document” is replaced with “record.”

20  
21 *h. Electronic agent.* The definition of “electronic agent” appears in the January 1997 draft of revised  
22 Article 2B.

23  
24 *i. Electronic message.* The definition of “electronic message” appears in the January 1997 draft of revised  
25 Article 2B.

26  
27 *j. Good faith.* Current UCC section 1-201(19) defines “good faith” simply as honesty in fact; the definition  
28 contains no element of commercial reasonableness. Initially, that definition applied throughout the Code with only  
29 one exception. UCC section 2-103(1)(b) provided that “*in this Article . . . good faith* in the case of a merchant  
30 means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” This  
31 alternative definition was limited in applicability in three ways. First, it only applied to transactions within the scope  
32 of Article 2. Second, it applied only to merchants. Third, strictly construed it applied only to uses of the phrase  
33 “good faith” *in Article 2*; thus, so construed it would not define “good faith” for its most important use — the  
34 obligation of good faith imposed by current UCC section 1-203.

35  
36 Over time, however, amendments to the UCC brought the Article 2 concept of good faith (subjective  
37 honesty and objective reasonableness) into other Articles. First, Article 2A explicitly incorporated the Article 2

1 standard. See UCC section 2A-103(7). Then, other Articles broadened the applicability of that standard by  
2 adopting it for all parties rather than just for merchants. See, e.g., UCC sections 3-103(a)(4), 4A-105(a)(6), 8-  
3 102(a)(10). See also drafts of section 2B-102(16) (Sept. 1996 draft) and of revised sections 2-102(a)(24) (Sept.  
4 1996 draft) and 9-105(a)(18) (Annual Meeting draft). All of these definitions are comprised of two elements —  
5 honesty in fact *and* the observance of reasonable commercial standards of fair dealing. Only revised Article 5  
6 defined “good faith” solely in terms of subjective honesty, and if the revisions currently in progress are  
7 promulgated, only Article 6 and Article 7 will be without definitions of good faith. (It should be noted that, while  
8 revised Article 6 did not define good faith, Comment 2 to revised UCC section 6-102 states that “this Article adopts  
9 the definition of ‘good faith’ in [current] Article 1 in all cases, even when the buyer is a merchant.”) Given this near  
10 unanimity, it is appropriate to move the definition of “good faith” to Article 1. The section will, of course, clearly  
11 indicate that this definition is subject to the more specific definition in revised Article 5. [In the event that the  
12 Drafting Committee concludes, in light of Comment 2 to revised UCC section 6-102, that “good faith,” for purposes  
13 of revised Article 6 should mean only “honesty in fact,” bracketed language is supplied that would defer to an  
14 Article 6 definition. At present, however, revised Article 6 addresses this definitional issue only in the Comment;  
15 thus, if that choice is made, a new provision would be required in revised section 6-102.]  
16

17 No drafting committee has considered the appropriate definition of “good faith” for purposes of Article 7  
18 of the UCC. Accordingly, careful consideration should be given to the effects of this proposed revision on  
19 transactions governed and rights determined by that Article.  
20

21 There is a small risk that the augmented definition of “good faith” could be misinterpreted by courts as a  
22 floating commission to avoid the effects of UCC provisions perceived as being utilized in a commercially  
23 unreasonable way. For example, is it “commercially unreasonable” for a secured party to assert priority under  
24 Article 9 over an prior unperfected security interest of which the subsequent secured party was aware? The duty  
25 and definition of good faith should not inappropriately encourage courts to so revise substantive decisions made  
26 elsewhere in the Code. Perhaps Comments to sections 1-201 and 1-305 should elaborate along the lines of PEB  
27 Commentary No. 10.  
28

29 *k. Notices.* The definition has been adapted to account for electronic notification.  
30

31 *l. Purchase.* At the suggestion of the Article 9 Drafting Committee, an explicit reference to security  
32 interests has been added.  
33

34 *m. Record.* The definition of “record” appears in UCC section 5-102(a)(14). Query, however, whether,  
35 “stored in an electronic . . . medium” captures the concept that it intends inasmuch as, for all but some types of  
36 “dynamic” storage, that which is commonly thought of as “electronic” storage (such as on a hard disk, digital  
37 voicemail, etc.) is actually stored by stable physical arrangement of tangible matter.

1 Inasmuch as the definition of “record” includes the concept of a writing, the separate definition of “written”  
2 and “writing” has been deleted. Of course, this cannot be done without replacing the use of “writing” in the other,  
3 older Articles with “record,” and similarly replacing “written” with “in a record.”  
4

5 *n. Security interest.* The first paragraph of the definition of “security interest” has been revised, pursuant  
6 to decision of the Article 9 Drafting Committee, to turn the interests of all “consignors” (as defined in draft Section  
7 2-xxx) into “security interests.” See generally the Comments to revised section 9-102. It should be noted that this  
8 issue is still under consideration by the Article 2 Drafting Committee.  
9

10 *o. Send.* The definition has been adapted to account for electronic transmission.  
11

12 *p. Surety.* The definition of “surety” has been expanded to include all secondary obligors. The Comment  
13 should reference the Restatement of Suretyship and Guaranty.  
14

15 **§ 1-202. Time; Reasonable Time; "Seasonably".**  
16

17 (a) What is a reasonable time for taking any action required by this Act depends on the nature,  
18 purpose and circumstances of such action.  
19

20 (b) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed  
21 at or within a reasonable time.  
22

23 **Revision Notes**  
24

25 This section is identical to subsections (2) and (3) of current UCC section 1-204. Subsection (1) of that  
26 section has been dropped because it is redundant in light of revised UCC section 1-303.

PART 3

SCOPE, TERRITORIAL APPLICATION, AND RULES OF GENERAL APPLICABILITY

§ 1-301. Scope

Unless the context otherwise requires, the provisions in this Part apply to transactions governed by Article 2, 2A, 2B, 3, 4, 4A, 5, [6,] 7, 8, or 9 of this Act.

Revision Note

This section is new. It clarifies confusion that has occasionally arisen as to the applicability of the substantive rules in this Article.

§ 1-302. Territorial Application of the Act; Parties' Power to Choose Applicable Law and Judicial Forum

(a) Except as provided in subsection (c), the parties to a transaction governed in whole or in part by this Act may agree that any or all of their rights and obligations with respect to each other shall be determined:

.....

Subsection (a)(1) — Alternative A

(1) by the local law of this state or another state or nation

(i) if the transaction bears a reasonable relationship to such state or nation [or if, under this state's principles governing conflict of laws generally, the parties may otherwise agree that such rights and obligations shall be determined by the law of such state or nation]"; provided, however, that if the transaction is a consumer transaction, such state or nation is the state or nation in which the consumer party resides at the time the transaction becomes enforceable or

\*In states that have repealed Article 6, the reference to this Article would, of course, be omitted.

\*\*Optional language for consideration of the Drafting Committee.

1 within 30 days thereafter or is the state or nation in which, pursuant to the contract establishing  
2 the transaction, the consumer party is to receive the goods, services, or other consideration  
3 provided to the consumer; or

4  
5 (ii) if subparagraph (i) does not apply, to the extent that, under this Act (Section  
6 1-303), the parties could effectively agree to the rights and obligations that would result from  
7 application of such law.  
8

9 .....

10  
11 *Subsection (a)(1) — Alternative B*

12  
13 (1) by the local law of this state or another state or nation

14  
15 (i) if the transaction is not a consumer transaction;

16  
17 (ii) if the transaction is a consumer transaction, the transaction bears a reasonable  
18 relationship to such state or nation and such state or nation is where the consumer party resides  
19 at the time the transaction becomes enforceable or will reside within 30 days thereafter or is the  
20 state or nation in which, pursuant to the contract establishing the transaction, the consumer party  
21 is to receive the goods, services, or other consideration provided to the consumer; or

22  
23 (iii) if the transaction is a consumer transaction, to the extent that, under this Act  
24 (Section 1-303), the parties could effectively agree to the rights and obligations that would result  
25 from application of such law.  
26

27 .....

28  
29 (2) by any recognized body of rules or principles applicable to commercial transactions to  
30 the extent that, under this Act (Section 1-303), the parties could effectively agree to the rights and  
31 obligations that would result from application of such body of rules.  
32

33 (b) Except as provided in subsection (c), if subsection (a) does not apply the law determining the  
34 rights and obligations of parties with respect to any aspect of a transaction governed by this Act is the law that  
35 would ordinarily be selected by application of this state's conflict of laws principles; provided, however, that if  
36 application of such principles to a transaction that is not a consumer transaction would result in the invalidation

1 of all or part of a contract that is valid under the law of this state and the transaction bears an appropriate  
2 relationship to this state, the law governing those rights and obligations is the law of this state]\*\*\*.

3  
4 (c) To the extent that the law of this state would otherwise govern in the absence of agreement  
5 between the parties, the following provisions of this Act specify the governing law, and a contrary agreement is  
6 effective only to the extent permitted by those provisions:

- 7  
8 (1) Section 2-xxx (Rights of creditors against sold goods)  
9  
10 (2) Sections 2A-xxx (Applicability of the Article on Leases)  
11  
12 (3) Section 2B-xxx  
13  
14 (4) Section 4-102 (Applicability of the Article on Bank Deposits and Collections)  
15  
16 (5) Section 4A-507 (Governing law in the Article on Funds Transfers)  
17  
18 (6) Section 5-116 (Letters of Credit)  
19  
20 (7) Section 6-103 (Bulk sales subject to the Article on Bulk Sales)  
21  
22 (8) Section 8-110 (Applicability of the Article on Investment Securities)  
23  
24 (9) Section 9-xxx (Perfection provisions of the Article on Secured Transactions)  
25

26 (d) An agreement of the parties that, in an authenticated record, designates a particular judicial forum  
27 for resolving disputes arising out of or relating to a transaction a significant aspect of which is transaction governed  
28 by this Act is effective:

29  
30 (1) if that forum is in this state, to confer non-exclusive jurisdiction on that forum to resolve  
31 such disputes unless:

- 32  
33 (i) for reasons other than lack of personal jurisdiction, the judicial forum designated  
34 does not have the power to adjudicate the dispute under the law of this state;

---

\*\*\*Optional language for consideration of the Drafting Committee.

1 (ii) utilization of that forum would effectively deprive a party against whom an action  
2 is brought of the ability to defend against that action [or would otherwise unfairly disadvantage  
3 that party]\*\*\*\*; or  
4

5 (iii) if the transaction is a consumer transaction and the action is brought against  
6 the consumer, the judicial forum would not otherwise have jurisdiction over the consumer; and  
7

8 (2) if that forum is in this state, to confer exclusive jurisdiction on that forum to resolve such  
9 disputes if the agreement so provides, unless:  
10

11 (i) for reasons other than lack of personal jurisdiction, the judicial forum designated  
12 does not have the power to adjudicate the dispute under the law of this state;  
13

14 (ii) utilization of that forum would effectively deprive a party of the ability to bring  
15 or defend against that action [or would otherwise unfairly disadvantage that party]\*\*\*\*\*; or  
16

17 (iii) if the transaction is a consumer transaction and the action is brought against  
18 the consumer, the judicial forum would not otherwise have jurisdiction over the consumer;  
19

20 (3) if that forum is not in this state, to preclude a party from bringing an action in this state  
21 to resolve such disputes if the agreement provides that such forum shall have exclusive jurisdiction with  
22 respect to such disputes unless:  
23

24 (i) under the law governing that forum, that forum does not have the power to  
25 adjudicate the dispute;  
26

27 (ii) utilization of that forum would effectively deprive a party of the ability to bring  
28 or defend against that action [or would otherwise unfairly disadvantage that party]\*\*\*\*\*; or  
29

30 (iii) if the transaction is a consumer transaction and the action is brought against  
31 the consumer, the judicial forum would not otherwise have jurisdiction over the consumer.

---

\*\*\*\* Optional language for consideration of the Drafting Committee.

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1  
2 (f) For purposes of this section, a “consumer” is a person who enters into a transaction (a “consumer  
3 transaction”) for personal, family, or household purposes.  
4

#### 5 Revision Notes

6  
7 This section is based on current UCC section 1-105.  
8

9 a. *Contractual choice of law.* Many commercial contracts include a provision selecting the  
10 jurisdiction whose law will govern the transaction. Subsection (a) determines the extent to which such provisions  
11 are effective. Selecting the “law” governing a transaction, of course, involves two related, but separate, choices.  
12 The first choice is that of the substantive rules that will govern the relationship between the parties making the  
13 choice. With limited exceptions, parties are given great autonomy to order the relationship between them by  
14 revised UCC section 1-303. To the extent that selecting the law of a jurisdiction is, in effect, accomplishing no  
15 more than what is within the parties’ power under revised UCC section 1-303, this section makes such a selection  
16 effective without regard to the relationship between the parties or the transaction and the jurisdiction whose rules  
17 are used to set the parameters of the relationship between the parties. See Alternative A, subsection (a)(1)(ii);  
18 Alternative B, subsection (a)(i)(iii).  
19

20 The second choice that is made by parties when they select the law of a particular jurisdiction to govern  
21 their transaction is the choice of that jurisdiction’s rules of validity and enforceability; that is, rules that the parties  
22 could not have adopted simply by application of revised UCC section 1-303. There is significant difference of  
23 opinion as to the appropriate rule here. Some believe that only jurisdictions bearing a reasonable relationship to  
24 the transaction or the parties may be selected. Under this approach, set out in Alternative A of subsection (a)(i),  
25 the parties would be able, in effect, to select only from among those states that would be potential candidates for  
26 the choice of law under subsection (b) in the absence of a contractual designation. Others believe that the parties  
27 should, within the general bounds of autonomy of contract, have freedom to designate the law of any jurisdiction.  
28 This approach is set out in Alternative B of subsection (a)(i).  
29

30 b. *Designation of non-legal codes.* Subsection (a)(2) authorizes the parties to designate “any  
31 recognized body of rules or principles applicable to commercial transactions” as supplying governing principles  
32 for their transaction. As such bodies of rules gain currency, this authorization may take on added importance.  
33 Bracketed language at the end of this provision would limit the effect of the authorization to authorizing terms that  
34 the parties could agree upon pursuant to revised UCC section 1-303. See also UCC section 5-116(c).  
35

36 c. *Choice of law in the absence of contractual designation; generally.* Subsection (b) replaces the  
37 last sentence of current UCC section 1-105(1), which determines which jurisdiction’s law governs a transaction

1 in the absence of an effective contractual choice by the parties. Current section 1-105(1), by providing that the  
2 law of the forum (*i.e.*, the UCC) applies if the transaction bears “an appropriate relation to this state” rather than,  
3 say, requiring that the forum be the location of the “most significant” contact, expresses a bias in favor of applying  
4 the forum’s law. This bias, while not universally respected by the courts, was most justifiable in light of the  
5 uncertainty that existed at the time of drafting as to whether the UCC would be adopted by all the states; the pro-  
6 forum bias would assure that the UCC would be applied so long as the transaction bore an “appropriate” relation  
7 to the forum. Inasmuch as the UCC has been adopted, at least in part, in all American jurisdictions, the vitality of  
8 this point is minimal in the domestic context, and international comity concerns militate against continuing the pro-  
9 forum, pro-UCC bias in transnational transactions. When the choice is between the law of two jurisdictions that  
10 have adopted the UCC, but whose law differs (whether because of differences in enacted language or differing  
11 judicial interpretations), there is no strong justification for directing a court to apply different choice-of-law principles  
12 to its determination than it would apply if the matter were not governed by the UCC. Similarly, given the wide  
13 variety of operative choice of law principles applied by the states, it would not be prudent to designate only one  
14 such principle as the proper principle for transactions governed by the UCC. Accordingly, with the exception noted  
15 in Revision Note *d, infra*, revised UCC section 1-302(b) simply directs the forum to apply its general choice of law  
16 principles to determine which jurisdiction’s law governs.

17  
18 *d. Invalidating law.* Once it is determined that there has been sufficient agreement to conclude that  
19 a contract has been formed, the law, with very few exceptions, treats the parties as intending to be bound by the  
20 terms of that contract. Nonetheless, the Uniform Commercial Code limits freedom of contract in several contexts,  
21 and the law of particular jurisdictions may limit such freedom in additional contexts. If a contract is formed that has  
22 an appropriate relation with more than one jurisdiction, and the law of one of those jurisdictions would invalidate  
23 the contract or a portion thereof while the law of another of those jurisdictions would validate it, the choice of law  
24 issue is critical. Given the intent to be bound that is presumed by the law, a strong argument can be made that  
25 if the forum’s general choice of law principles would result in the application of the law of a different jurisdiction that  
26 would invalidate the contract or a portion of it, even though under the Uniform Commercial Code and other law of  
27 the forum that contract or portion would be held valid, the forum should apply its own validating law so as to  
28 effectuate the parties’ intent. See ABA Task Force Report. Such a rule would also prevent transactions valid  
29 under the forum state’s UCC from invalidation by application of another jurisdiction’s non-UCC law. The bracketed  
30 language in subsection (b) would effectuate this principle.

31  
32 *e. Consumer transactions.* Several provisions in this draft embody a distinction between “consumer  
33 transactions” and other transactions. Those terms are defined in subsection (f) of this Section.

34  
35 Both alternative versions of subsection (a)(1) of this Section limit the parties’ ability in a consumer  
36 transaction to select contractually the jurisdiction whose law will govern to the selection of a state or nation to which  
37 the transaction bears a reasonable relation and in which the consumer party resides at the time the transaction

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

5 In subsection (b) of this section, the preference for judicial selection of a law that validates the parties'  
6 transaction does not apply in the case of consumer transactions. Limits that a state imposes on freedom of  
7 contract in consumer transactions are usually representative of a strong public policy interest. If the law that would  
8 be judicially selected but for the application of the rule in subsection (b) would invalidate a contract or portion  
9 thereof in a consumer transaction, the preference for a rule of validation would be in conflict with such public policy  
10 interests. Accordingly, this draft excludes application to consumer transactions of the preference for a rule of  
11 validation. The Drafting Committee ought to consider whether this formulation is appropriate or sufficient in the  
12 case of a transaction among many parties, only one of whom is a consumer, with respect to the law governing the  
13 relationship between parties who are not consumers.  
14

15 Similarly, subsection (d)(3) declines to enforce forum selection clauses in consumer transactions if the  
16 judicial forum selected "would not otherwise have jurisdiction over the consumer." This provision, too, is adapted  
17 from Section 2A-106.  
18

19 *f. Primacy of other UCC choice of law rules.* Subsection (c) repeats the list in current Section  
20 1-105(2) and adds a placeholder for Article 2B.  
21

22 *g. Contractual choice of forum.* The use of contractual choice of forum clauses has expanded as  
23 judicial hostility to them has faded. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *The*  
24 *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See also Restatement of the Law (Second), Conflict of Laws  
25 § 80 (1971); Model Choice of Forum Act (1968, withdrawn 1975). Subsection (d) would govern the designation  
26 of a particular forum to adjudicate disputes arising from a transaction a significant aspect of which is governed by  
27 this Act whether that designation is exclusive or non-exclusive. Paragraph (1) determines whether the courts of  
28 this state may adjudicate the dispute in light of the contractual choice. Of course, this statute cannot govern the  
29 power of a court in another state or nation to adjudicate a matter. Paragraphs (2) and (3) determine whether the  
30 selection of a forum as the exclusive location for litigation will be effective.  
31

### 32 **§1-303. Variation by Agreement**

33

34 (a) The effect of provisions of this Act may be varied by agreement, except as otherwise provided  
35 in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act  
36 may not be disclaimed by agreement but the parties may by agreement determine the standards by which the  
37 performance of such obligations is to be measured if such standards are not manifestly unreasonable.

1 (b) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words  
2 of similar import does not imply that the effect of other provisions may not be varied by agreement under  
3 subsection (a).

4  
5 **Revision Notes**

6  
7 This section is identical to subsections (3) and (4) of current UCC section 1-102.  
8

9 **§ 1-304. Course of Performance, Course of Dealing, and Usage of Trade**

10  
11 (a) A "course of performance" is a sequence of conduct between the parties to a particular  
12 transaction that exists when:

13  
14 (1) the agreement of the parties with respect to the transaction involves repeated occasions  
15 for performance by a party;

16  
17 (2) that party performs [on one or more occasions]\*; and

18  
19 (3) the other party, with knowledge of the nature of the performance and opportunity for  
20 objection to it, accepts the performance or acquiesces in it without objection.

21  
22 (b) A "course of dealing" is a sequence of previous conduct between the parties to a particular  
23 transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their  
24 expressions and other conduct.

25  
26 (c) A "usage of trade" is any practice or method of dealing having such regularity of observance in  
27 a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in  
28 question. The existence and scope of such a usage are to be proved as facts. If it is established that such a  
29 usage is embodied in a trade code or similar record the interpretation of the record is for the court.

30  
31 (d) Any course of performance or course of dealing between the parties or usage of trade in the  
32 vocation or trade in which they are engaged or of which they are or should be aware (i) is relevant in ascertaining  
33 the meaning of the parties' agreement, (ii) may give particular meaning to specific terms of the agreement, and

---

\*Optional language for consideration of the Drafting Committee.

1 (iii) may supplement or qualify the terms of the agreement. A usage of trade applicable where only part of the  
2 performance under the agreement is to occur may be so utilized as to that part of the performance.  
3

4 (e) The express terms of an agreement and any applicable course of performance, course of dealing  
5 or usage of trade shall be construed wherever reasonable as consistent with each other but when such  
6 construction is unreasonable:

7  
8 (1) express terms control course of performance, course of dealing and usage of trade;

9  
10 (2) course of performance controls course of dealing and usage of trade; and

11  
12 (3) course of dealing controls usage of trade.  
13

14 (f) Notwithstanding subsection (e), and subject to specific provisions of this Act on modification and  
15 waiver (Sections 2-xxx, 2A-xxx, 2B-xxx), a course of performance is relevant to show a waiver or modification of  
16 any term inconsistent with such course of performance.  
17

18 (g) Evidence of a relevant usage of trade offered by one party is not admissible unless and until that  
19 party has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.  
20

#### 21 Revision Notes

22  
23 *a. Alternative approaches.* As suggested by the ABA Task Force, this section integrates the “course  
24 of performance” concept into current section 1-205, which deals with course of dealing and usage of trade. In so  
25 doing, the section slightly modifies the articulation of the course of performance rules to fit more comfortably with  
26 the approach and structure of current UCC section 1-205. There are also slight modifications to be more  
27 consistent with the definition of “agreement” in current section 1-201(3).  
28

29 *b. Possible side effects of incorporating course of performance into Article 1.* Incorporation of  
30 course of performance into Article 1 will require close examination of at least two issues. First, a course of  
31 performance that might otherwise create a defense to the obligation of a party to an instrument should not be  
32 available to assert that defense against a holder in due course who took the instrument without notice of the course  
33 of performance. A comment in this section or in section 3-302 may be sufficient to make this point, but it is  
34 possible that some statutory tweaking may be required.  
35

1 Second, in light of the rule that course of performance may be relevant to establish a waiver or  
2 modification, consideration should be given to whether those concepts should be articulated in Article 1 or, rather,  
3 if the current treatment of these concepts in Articles 2, 2A and 2B is sufficient.  
4

5 **§ 1-305. Obligation of Good Faith.**

6  
7 Every contract or duty [within this Act] imposes an obligation of good faith in its performance or  
8 enforcement.  
9

10 **Revision Notes**

11  
12 This section is identical to current UCC section 1-203. The substantive import of the section, however,  
13 will be affected by the revised definition of "good faith" appearing in UCC section 1-201.  
14

15 The phrase "within this Act" may be unnecessary as redundant in light of revised section 1-301.  
16

17 **§ 1-306. Unconscionable Contract or Term.**

18  
19 (a) If a court finds as a matter of law that an agreement or any term thereof was unconscionable at  
20 the time it was made or was induced by unconscionable conduct, the court may refuse to enforce the agreement,  
21 enforce the remainder of the agreement without the unconscionable term, or so limit the application of any  
22 unconscionable term as to avoid an unconscionable result.  
23

24 (b) Before making a finding of unconscionability under subsection (a), the court, on motion of a party  
25 or its own motion, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose,  
26 and effect of the agreement or term thereof or of the conduct.  
27

28 **Revision Notes**

29  
30 a. This section is identical to § 2-105 of the January 1997 draft of Article 2, except that it uses the term  
31 "agreement" instead of "contract" to avoid circularity with the definition of "contract" in § 1-201. Moreover, except  
32 for the language "induced by unconscionable conduct", Section 1-306(a) is substantively the same as §2-302 in  
33 the 1990 Official Text. Given this section's origins, decisions with respect to this section should be subject to future  
34 developments in the Article 2 drafting process. The Drafting Committee should also consider whether to adopt

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\*Optional language for consideration of the Drafting Committee.

1 the broader language of §2A-108. In this regard, it should be noted that a proposal to conform original §2-302 to  
2 §2A-108(2) & (3) was rejected by the Article 2 Drafting Committee at its October, 1993 meeting. The phrase  
3 "induced by unconscionable conduct," taken from §2A-108(2), was added and approved at the Annual Meeting  
4 of the Conference in July, 1996. The "induced" phrase, however, does not appear in 2B-109(Nov. 1996).

5  
6 b. The decision to move the unconscionability provision from Articles 2 and 2A to Article 1 reflects a policy  
7 decision that, in light of almost two decades of experience applying unconscionability principles to contracts  
8 generally under Restatement, Second, Contracts, § 208, and similar experience under California Civil code §  
9 1670.5, there is no longer any compelling reason to limit application of the principle in the Uniform Commercial  
10 Code to only sales and leases.

11  
12 c. The following passage from the comments to draft § 2-105 should be noted:

13  
14 What is "unconscionable conduct" that induces a contract that is otherwise conscionable?  
15 Possible examples include cases where excessive pressure is place upon senior citizens (a used  
16 car dealer takes the keys to the car of prospective buyers and won't let them leave for food or  
17 medication until they buy the used car) or the contract is presented in a manner so that the  
18 purchaser cannot see that an important term has been changed. In short, the conduct  
19 approaches but does not clearly reach defenses such as duress or fraud. (It should be noted that  
20 these examples and the concept of "inducement" were criticized at the Meeting of the ALI Article  
21 2 Consultative Group in November, 1996. The issue will be revisited after revised 2-206 is  
22 completed.)

23  
24 **§ 1-307. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered.**

25  
26 .....

27  
28 **Alternative A**

29  
30 (a) Except as provided in subsection (b), a contract for the sale of personal property is not  
31 enforceable by way of action or defense beyond [five thousand] dollars in amount or value of remedy unless there  
32 is a record, authenticated by the party against whom enforcement is sought or by the party's authorized agent, that  
33 is sufficient to indicate that a contract for sale has been made between the parties.

34  

---

\*Optional language for consideration of the Drafting Committee.

1 (b) Subsection (a) of this section does not apply to contracts for the sale of goods (Section 2-xxx)  
2 nor of securities (Section 8-113) nor to security agreements (Section 9-xxx).

3  
4 .....  
5  
6 **Alternative B**

7  
8 Except as otherwise provided in this Act, a contract or modification of a contract for the sale or purchase  
9 of personal property [within the scope of this Part]<sup>\*</sup> is enforceable whether or not there is a record authenticated  
10 by a party against whom enforcement is sought, even if the contract or modification is not capable of performance  
11 within one year of its making.

12 .....  
13  
14  
15 **Revision Notes**

16  
17 Alternative A is based on current UCC section 1-206, amended in light of the January 1997 draft of revised  
18 section 2-201. This section does not follow the articulation of that draft in referring to an “agreement . . . otherwise  
19 valid as a contract” because that formulation might suggest that an agreement unenforceable because of the  
20 statute of frauds is not a contract. That suggestion would be inconsistent with doctrines in some states that, for  
21 example, allow a claim for tortious interference with a contract unenforceable because of the statute of frauds.

22  
23 Alternative B would abolish the statute of frauds for any transaction governed by the UCC, except to the  
24 extent that the UCC otherwise requires a writing or record. The articulation, which is based on UCC section 8-113,  
25 is designed to emphasize that not only does the UCC not impose a writing or record requirement, but that it  
26 affirmatively eliminates the application of any other state statute of frauds.

27  
28 **§ 1-308. Remedies to Be Liberally Administered.**

29  
30 (a) The remedies provided by this Act shall be liberally administered to the end that the aggrieved  
31 party may be put in as good a position as if the other party had fully performed but neither consequential or special  
32 nor penal damages may be had except as specifically provided in this Act or by other rule of law.  
33

---

\*Optional language for consideration of the Drafting Committee.

1 (b) Any right or obligation declared by this Act is enforceable by action unless the provision declaring  
2 it specifies a different and limited effect

3  
4 **Revision Notes**

5  
6 This section is identical to current UCC section 1-106.

7  
8 **§ 1-309. Waiver or Renunciation of Claim or Right After Breach.**

9  
10 Any claim or right arising out of an alleged breach can be discharged in whole or in part without  
11 consideration by agreement of the aggrieved party in an authenticated record.

12  
13 **Revision Notes**

14  
15 This section is based on current UCC section 1-107. It has been revised in two respects. First, the  
16 current section, requiring the “delivery” of a “written waiver or renunciation” merges the separate concepts of the  
17 aggrieved party’s agreement to forego rights and the manifestation of that agreement. Revised section 1-309  
18 separates those concepts, and explicitly requires *agreement* of the required party. Second, the revised section  
19 reflects developments in electronic commerce by providing for memorialization in an authenticated record.

20  
21 It should be noted that the breaching party’s ability to resort to this section is subject to the duty of good  
22 faith imposed by revised UCC section 1-305 and is affected by the augmented definition of “good faith” in revised  
23 UCC section 1-201.

24  
25 **§ 1-310. Prima Facie Evidence by Third Party Documents.**

26  
27 A record in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s  
28 or inspector’s certificate, consular invoice, or any other document authorized or required by the contract to be  
29 issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated  
30 in the record by the third party.

31  
32 **Revision Notes**

33  
34 This section is identical to current UCC section 1-202, except that “document” has been changed to  
35 “record.” This section has been cited by courts only a handful of times in thirty years, and has been relied on as

1 the basis for a decision even more rarely. Consideration ought to be given to deleting this section from revised  
2 Article 1.

3  
4  
5 **§ 1-311. Performance or Acceptance Under Reservation of Rights.**

6  
7 (a) A party who, with explicit reservation of rights, performs or promises performance or assents to  
8 performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved.  
9 Such words as "without prejudice", "under protest" or the like are sufficient.

10  
11 (b) Subsection (a) does not apply to an accord and satisfaction.

12  
13 **Revision Notes**

14  
15 This section is identical to current UCC section 1-207.

16  
17 **§ 1-312. Option to Accelerate at Will.**

18  
19 A term providing that one party or that party's successor in interest may accelerate payment or  
20 performance or require collateral or additional collateral "at will" or when the party "deems itself insecure" or in  
21 words of similar import shall be construed to mean that the party shall have power to do so only if that party in good  
22 faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good  
23 faith is on the party against whom the power has been exercised.

24  
25 **Revision Notes**

26  
27 This section is identical to current UCC section 1-208, with the exception of minor editorial changes to  
28 make references gender-neutral.

29  
30 **§ 1-313. Subordinated Obligations.**

31  
32 An obligation may be issued as subordinated to payment of another obligation of the person obligated,  
33 or a creditor may subordinate his right to payment of an obligation by agreement with either the person obligated  
34 or another creditor of the person obligated. Such a subordination does not create a security interest as against  
35 either the common debtor or a subordinated creditor. [This section shall be construed as declaring the law as it  
36 existed prior to the enactment of this section and not as modifying it.]

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**Revision Notes**

This section is identical to current UCC section 1-209. It is questionable whether the bracketed language is still necessary.