

D R A F T

FOR DISCUSSION ONLY

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

**ALI Council Draft
(November 22, 1999)**

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ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE TO REVISE UNIFORM COMMERCIAL CODE
ARTICLE 1 - GENERAL PROVISIONS**

BORIS AUERBACH, 332 Ardon Lane, Wyoming, OH 45215, *Chair*
MARION W. BENFIELD, JR., 10 Overlook Circle, New Braunfels, TX 78132
AMELIA H. BOSS, Temple University, School of Law, 1719 N. Broad Street, Philadelphia, PA 19122, *The American Law Institute Representative*
CURTIS R. REITZ, University of Pennsylvania, School of Law, 3400 Chestnut Street, Philadelphia, PA 19104
CARLYLE C. RING, JR., 1401 H Street, N.W., Suite 500, Washington, D.C. 20005, *Enactment Plan Coordinator*
JAMES J. WHITE, University of Michigan Law School, Hutchins Hall, Room 300, 625 S. State Street, Ann Arbor, MI 48109-1215
NEIL B. COHEN, Brooklyn Law School, Room 904A, 250 Joralemon Street, Brooklyn, NY 11201, *Reporter*
H. KATHLEEN PATCHEL, Indiana University - Indianapolis, School of Law, 735 W. New York Street, Indianapolis, IN 46202-5194, *National Conference Associate Reporter*

EX OFFICIO

JOHN L. McCLAUGHERTY, P.O. Box 553, Charleston, WV 25322, *President*
ROBERT J. TENNESSEN, 3400 City Center, 33 S. 6th Street, Minneapolis, MN 55402-3796, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

HARRY C. SIGMAN, P.O. Box 67E08, Los Angeles, CA 90067, *Advisor*
RICHARD R. GOLDBERG, 51st Floor, 1735 Market Street, Philadelphia, PA 19103, *Real Property, Probate & Trust Law Section Advisor*
WILLIAM J. WOODWARD, JR., Temple University School of Law, 1719 N. Broad Street, Philadelphia, PA 19122, *Business Law Section Advisor*

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

312/915-0195

**UNIFORM COMMERCIAL CODE
REVISED ARTICLE 1
GENERAL PROVISIONS**

NOVEMBER 22, 1999

Prefatory Note to ALI Council Draft	v
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PART 1

GENERAL PROVISIONS

Section 1-101.	Short Titles	1
Section 1-102.	Scope of Article	1
Section 1-103.	Construction of Act to Promote Its Purposes and Policies; Applicability of Supplemental Principles of Law	1
Section 1-104.	Construction Against Implied Repeal	5
Section 1-105.	Severability	5
Section 1-106.	Use of Singular and Plural; Gender	6

PART 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

Section 1-201.	General Definitions	7
Section 1-202.	Notice; Knowledge	16
Section 1-203.	Lease Distinguished from Security Interest	18
Section 1-204.	Value	20
Section 1-205.	Reasonable Time; Seasonableness	21

PART 3

TERRITORIAL APPLICABILITY AND GENERAL RULES

Section 1-301.	Territorial Applicability; Parties' Power to Choose Applicable Law	22
Section 1-302.	Variation by Agreement	28
Section 1-303.	Course of Performance, Course of Dealing, and Usage of Trade	29
Section 1-304.	Obligation of Good Faith	31
Section 1-305.	Remedies to be Liberally Administered	32
Section 1-306.	Waiver or Renunciation of Claim or Right After Breach	32
Section 1-307.	Prima Facie Evidence By Third Party Documents	33
Section 1-308.	Performance or Acceptance Under Reservation of Rights	33
Section 1-309.	Option to Accelerate at Will	34
Section 1-310.	Subordinated Obligations	34

UNIFORM COMMERCIAL CODE

REVISED ARTICLE 1 — GENERAL PROVISIONS

PREFATORY NOTE TO 1999 ALI COUNCIL DRAFT

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 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.

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.

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.

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:

(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.

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

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

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

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

15 *b. Applicability of supplemental principles of law.* Subsection (b) states the basic relationship
16 of the Uniform Commercial Code to supplemental bodies of law. The Uniform Commercial Code
17 is not intended to be a comprehensive Code in the civil law tradition. Rather, it was drafted against
18 the backdrop of existing bodies of law, including the common law and equity, and relies on those
19 bodies of law to supplement its provisions in many important ways. At the same time, the Uniform
20 Commercial Code is the primary source of commercial law rules in areas that it governs, and those
21 rules represent choices made by its drafters and the enacting legislatures about the appropriate
22 policies to be furthered in the transactions it covers. Therefore, while other bodies of law may

1 supplement provisions of the Uniform Commercial Code, they may not be used to supplant its
2 provisions, including the purposes and policies those provisions reflect, unless a specific provision
3 of the Code provides otherwise. See, e.g., Section 9-201(b)-(c) (Article 9 rules subject to applicable
4 consumer laws and certain other law). In the absence of such a provision, the Uniform Commercial
5 Code preempts other state law that is inconsistent with either its provisions, or its purposes and
6 policies.

7 The language of subsection (b) is intended to reflect both the concept of supplementation and
8 the concept of preemption. Some courts, however, have had difficulty in applying the identical
9 language of current Section 1-103 to determine when other law appropriately may be applied to
10 supplement the Code, and when that law has been displaced by the Code. Some decisions have
11 applied other law in situations in which that application, while not inconsistent with the text of any
12 particular provision of the Code, clearly was inconsistent with the underlying purposes and policies
13 reflected in the relevant Code provisions. In part, this difficulty arose from comment 1 to current
14 Section 1-103, which states that “this section indicates the continued applicability to commercial
15 contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act.”
16 The “explicitly displaced” language of that comment does not accurately reflect the proper scope of
17 Code preemption, which extends to displacement of other law that is inconsistent with its purposes
18 and policies as well as its text.

19 The Drafting Committee considered several alternative formulations of subsection (b) designed
20 to reflect more accurately the appropriate scope of UCC preemption of other law. Ultimately,
21 however, the Drafting Committee decided to retain the language of current Section 1-103 with new
22 comments to make it clear that displacement of other law extends to displacement of law inconsistent

1 with Code purposes and policies as well as Code text. The comment also will provide examples of
2 cases that have appropriately applied these concepts.

3 *c. Sources of relevant code purposes and policies.* At least three different sources of UCC
4 purposes and policies are relevant to a court's determination as to whether other law is displaced by
5 particular provisions of the Uniform Commercial Code. First, subsection (a) lists the underlying
6 purposes and policies of the Uniform Commercial Code as a whole, and admonishes courts to liberally
7 construe and apply the Code's provisions to promote those underlying purposes and policies. In
8 determining whether other law may supplement the Code's provisions, the court should consider
9 whether application of that other law would be consistent with the rule of construction stated in
10 subsection (a). Second, although the Uniform Commercial Code is not intended to be a
11 comprehensive statute, it is intended to be an integrated one. Therefore, in determining the purposes
12 and policies relevant to a particular provision of the Code, the court should consider the operation of
13 that provision in light of the overall statutory scheme of which it is a part. For instance, the overall
14 statutory scheme of Article 9 reflects the importance of the policies of predictability and certainty in
15 the rules governing secured transactions. Thus, in determining whether supplementation of its
16 particular provisions by other law is appropriate, the court should take those policies into account.
17 Third, the court should consider whether supplementation with other law would be consistent with
18 the specific purposes of, and policies reflected in, the particular provisions relevant to the issue before
19 the court.

20 *d. Listing not exclusive.* The list of sources of supplemental law in subsection (b) is intended to
21 be merely illustrative of the other law that may supplement the Code, and is not exclusive. No listing
22 could be exhaustive. Further, the fact that a particular section of the Uniform Commercial Code

1 makes express reference to other law is not intended to suggest the negation of the general application
2 of the principles of subsection (b). (Note that the word “bankruptcy” in subsection (b), continuing the
3 use of that word from current Section 1-103, should be understood not as a specific reference to
4 federal bankruptcy law but, rather as a reference to general principles of insolvency, whether under
5 federal or state law.)

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

10 **Source:** Current Section 1-104.

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

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

18 **Source:** Current Section 1-108.

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

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

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

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

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

7 **Changes from current law:** Other than minor stylistic changes, this Section is identical to
8 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 1-304. (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.

(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.

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

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

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

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

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

20 (11a) *[A definition of “consumer” may be inserted here. The decision will be deferred until*
21 *completion of the Article 2/2A drafting process.]*

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

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

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

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

11 (16) “Document of title” means a document that in the regular course of business or financing
12 is treated as adequately evidencing that the person in possession of the record is entitled to receive,
13 hold and dispose of it and the goods it covers. “Document of title” includes a bill of lading, dock
14 warrant, dock receipt, warehouse receipt, or order for the delivery of goods contained in a document
15 that purports to be issued by or addressed to a bailee and purports to cover goods in the bailee’s
16 possession which are either identified or are fungible portions of an identified mass.

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

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

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

22 (20) “Fungible goods” means either:

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

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

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

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

7 (23) “Holder” means:

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

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

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

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

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

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

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

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

1 (27) "Organization" means a person other than an individual.

2 (28) "Party", as distinct from a "third party", means a person that has engaged in a transaction
3 or made an agreement subject to [the Uniform Commercial Code].

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

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

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

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

18 (33) "Purchaser" means a person that takes by purchase.

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

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

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

3 (37) “Right” includes remedy.

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

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

16 (A) deposit in the mail properly addressed and, in the case of an instrument, to an address
17 specified thereon or otherwise agreed, or, if there is none, to any address reasonable under the
18 circumstances;

19 (B) transmit by any other usual means of communication in a form reasonable under the
20 circumstances;

21 (C) deliver for such transmission with postage or other cost of transmission provided for;

22 or

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

3 (40) “Signed” includes any symbol executed or adopted with present intention to authenticate
4 a writing.¹

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

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

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

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

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

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

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

17 **Changes from current law:**

18 *a. General.* In order to make it clear that all definitions in the Uniform Commercial Code — not
19 just those in Article 1 — do not apply if the statutory context otherwise requires, a new subsection
20 (a) to that effect has been added. The remainder of current Section 1-201, as revised, now appears
21 as subsection (b). Other than minor stylistic changes and renumbering as a result of moving some

¹If “authenticate” becomes a defined term, that word may be replaced in this definition by “identify, verify, or adopt”.

1 provisions to different sections, the definitions in this draft are as in current Article 1 (as amended,
2 most recently, in conjunction with revisions to Article 9) except as noted below.

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

6 *c. Agreement.* The sentence stating that the legal consequences of an agreement are determined
7 by the Uniform Commercial Code and contract law has been deleted from the text, but will appear in
8 a Comment.

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

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

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

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

15 *h. Good faith.* Current Section 1-201(19) defines “good faith” simply as honesty in fact; the
16 definition contains no element of commercial reasonableness. Initially, that definition applied
17 throughout the Code with only one exception. Section 2-103(1)(b) provides that “*in this Article . . .*
18 *good faith* in the case of a merchant means honesty in fact and the observance of reasonable
19 commercial standards of fair dealing in the trade.” This alternative definition is limited in applicability
20 in three ways. First, it applies only to transactions within the scope of Article 2. Second, it applies
21 only to merchants. Third, strictly construed it applies only to uses of the phrase “good faith” *in Article*

1 2; thus, so construed it would not define “good faith” for its most important use — the obligation of
2 good faith imposed by current UCC Section 1-203.

3 Over time, however, amendments to the UCC brought the Article 2 merchant concept of good
4 faith (subjective honesty and objective reasonableness) into other Articles. First, Article 2A explicitly
5 incorporated the Article 2 standard. See current UCC Section 2A-103(7). Then, other Articles
6 broadened the applicability of that standard by adopting it for all parties rather than just for merchants.
7 See, e.g., UCC Sections 3-103(a)(4), 4A-105(a)(6), 8-102(a)(10). See also Reporter’s Interim Draft
8 of Revised Article 2. All of these definitions are comprised of two elements — honesty in fact *and*
9 the observance of reasonable commercial standards of fair dealing. Only revised Article 5 defines
10 “good faith” solely in terms of subjective honesty, and only Article 6 and Article 7 are without
11 definitions of good faith. (It should be noted that, while revised Article 6 did not define good faith,
12 Comment 2 to revised UCC section 6-102 states that “this Article adopts the definition of ‘good faith’
13 in [current] Article 1 in all cases, even when the buyer is a merchant.”) Given this near unanimity, it
14 is appropriate to move the definition of “good faith” to Article 1. The section will, of course, clearly
15 indicate that this definition is subject to the applicability of the narrower definition in revised Article
16 5.

17 No drafting committee has considered the appropriate definition of “good faith” for purposes of
18 Article 7 of the UCC, but the Article 1 Drafting Committee will continue to consult with the relevant
19 ABA committee as to the effect of this proposed definition on transactions governed and rights
20 determined by Article 7.

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

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

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

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

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

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

8 *o. Present value.* This term is used in both Articles 1 and 2A. The embedded definition in
9 current Section 1-201(37) has been moved to its own subsection. The identical definition in Article
10 2A will no longer be necessary.

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

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

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

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

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

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

20 (1) has actual knowledge of it;

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

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

3 (b) “Knowledge” means actual knowledge.

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

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

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

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

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

13 (f) Notice, knowledge, or a notice or notification received by an organization is effective for
14 a particular transaction from the time it is brought to the attention of the individual conducting that
15 transaction and, in any event, from the time it would have been brought to the individual’s attention
16 if the organization had exercised due diligence. An organization exercises due diligence if it maintains
17 reasonable routines for communicating significant information to the person conducting the transaction
18 and there is reasonable compliance with the routines. Due diligence does not require an individual
19 acting for the organization to communicate information unless the communication is part of the
20 individual’s regular duties or the individual has reason to know of the transaction and that the
21 transaction would be materially affected by the information.²

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

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

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

5 **SECTION 1-203. LEASE DISTINGUISHED FROM SECURITY INTEREST.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 (1) when the option to renew the lease is granted to the lessee, the rent is stated to be the
18 fair market rent for the use of the goods for the term of the renewal determined at the time the option
19 is to be performed; or

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

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

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

5 **Changes from current law:** This Section is substantively identical to those portions of current
6 UCC Section 1-201(37) that distinguish “true” leases from security interests, except that the definition
7 of “present value” currently embedded in Section 1-201(37) has been placed in UCC Section
8 1-201(30).

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

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

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

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

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

17 **Source:** Current Section 1-201(44).

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

1 **SECTION 1-205. REASONABLE TIME; SEASONABLENESS.**

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

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

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

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

PART 3

TERRITORIAL APPLICABILITY AND GENERAL RULES

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

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

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

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

(2) the State or country in which, under the contract between the parties, the goods, services, or other consideration flowing to the consumer are to be received or are used by the consumer or a person designated by the consumer.

(c) An agreement referred to in subsection (a) is not effective to the extent that the law of the State or country designated is contrary to a fundamental policy of the State or country whose law would otherwise govern.

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

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

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

8 (2) *Sections 2A-xxx [subject to the drafting of Article 2A]*

9 (3) Section 4-102

10 (4) Section 4A-507

11 (5) Section 5-116

12 (6) Section 6-103

13 (7) Section 8-110

14 (8) Sections 9-301 through 9-307.

15 (f) For purposes of this section, a “consumer” is an individual who enters into a transaction
16 primarily for personal, family, or household purposes. Personal, family, or household purposes do not
17 include professional or commercial purposes, including agriculture, business management, and
18 investment management other than management of the individual’s personal or family investments.³

19 **Reporter’s Note**

20 **Source:** Current Section 1-105.

³This subsection may be replaced by a general definition of “consumer” in § 1-201. See § 1-201(b)(11a).

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

3 *a. Contractual choice of law.* This section allows parties broad autonomy, with several important
4 limitations, to select the law governing their transaction, even if the transaction bears no relation to
5 the State or country whose law is selected. This recognition of party autonomy with respect to
6 governing law has already been established in several Articles of the Uniform Commercial Code (see
7 UCC Sections 4A-507, 5-116, and 8-110) and is consistent with international norms. See, e.g., Inter-
8 American Convention on the Law Applicable to International Contracts, Article 7 (Mexico City 1994);
9 Convention on the Law Applicable to Contracts for the International Sale of Goods, Article 7(1) (The
10 Hague 1986); EC Convention on the Law Applicable to Contractual Obligations, Article 3(1) (Rome
11 1980).

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

19 The Drafting Committee considered whether this Section should expressly provide for the ability
20 of parties to designate non-legal codes such as trade codes as the set of rules governing their
21 transaction, but decided that the principles of Section 1-302 allowing parties broad freedom of
22 contract to structure their relation are adequate for this purpose. A similar decision was made with

1 respect to the ability of the parties to designate recognized bodies of rules or principles applicable to
2 commercial transactions that are promulgated by intergovernmental authorities such as UNCITRAL
3 or UNIDROIT.

4 *b. Consumer transactions.* If one of the parties is a consumer (as defined in subsection (f)),
5 subsection (b) restricts the parties' ability to select contractually the jurisdiction whose law will govern
6 to selection of the state or country in which either (i) the consumer party resides at the time the
7 transaction becomes enforceable or within 30 days thereafter or (ii) pursuant to the contract
8 establishing the transaction, the consumer party is to receive or use the goods, services, or other
9 consideration flowing to the consumer. This limitation is adapted from a similar limitation in current
10 Section 2A-106.

11 *c. Fundamental policy.* Subsection (c) provides that an agreement choosing the governing law
12 will not be given effect to the extent that the law of the jurisdiction specified is contrary to a
13 fundamental policy of the State or country whose law would otherwise govern. This rule provides a
14 narrow exception to the broad autonomy afforded to parties in subsection (a). One of the prime
15 objectives of contract law is to protect the justified expectations of the parties and to make it possible
16 for them to foretell with accuracy what will be their rights and liabilities under the contract. In this
17 way, certainty and predictability of result are most likely to be secured. See Restatement (Second)
18 Conflict of Laws, § 187, comment *e*. Under the fundamental policy exception, a court should not
19 refrain from applying the chosen law merely because this would lead to a result different than would
20 be obtained under the local law of the State or country whose law would otherwise govern. Rather,
21 the difference must be contrary to a public policy that is so substantial that it would not only cause a
22 court to forego application of general choice of law rules that would otherwise have pointed to that

1 rule but also justify overriding the concerns for certainty and predictability underlying modern
2 commercial law as well as concerns for judicial economy generally. A fundamental public policy will
3 rarely be found in a requirement, such as a statute of frauds, that relates to formalities, or in general
4 rules of contract law, such as those concerned with the need for consideration. On the other hand, a
5 rule that makes the selling of body parts or human embryos illegal may reflect such a policy.

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

9 Our own scheme of legislation may be different. We may even have no legislation on the
10 subject. That is not enough to show that public policy forbids us to enforce the foreign right.

11 A right of action is property. If a foreign statute gives the right, the mere fact that we do not
12 give a like right is no reason for refusing to help the plaintiff in getting what belongs to him.

13 We are not so provincial as to say that every solution of a problem is wrong because we deal
14 with it otherwise at home. Similarity of legislation has indeed this importance; its presence
15 shows beyond question that the foreign statute does not offend the local policy. But its
16 absence does not prove the contrary. It is not to be exalted into an indispensable condition.

17 The misleading word 'comity' has been responsible for much of the trouble. It has been fertile
18 in suggesting a discretion unregulated by general principles.

19 * * *

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

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

3 120 N.E. at 201-02 (citations to authorities omitted).

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

10 *e. Choice of law in the absence of contractual designation.* The second sentence of subsection
11 (b), which replaces the second sentence of current UCC Section 1-105(1), determines which
12 jurisdiction's law governs a transaction in the absence of an effective contractual choice by the parties.
13 Current Section 1-105(1), by providing that the law of the forum (*i.e.*, the UCC) applies if the
14 transaction bears "an appropriate relation to this state" rather than, say, requiring that the forum be
15 the location of the "most significant" contact, expresses a bias in favor of applying the forum's law.
16 This bias, while not universally respected by the courts, was justifiable in light of the uncertainty that
17 existed at the time of drafting as to whether the UCC would be adopted by all the states; the
18 pro-forum bias would assure that the UCC would be applied so long as the transaction bore an
19 "appropriate" relation to the forum. Inasmuch as the UCC has been adopted, at least in part, in all
20 American jurisdictions, the vitality of this point is minimal in the domestic context, and international
21 comity concerns militate against continuing the pro-forum, pro-UCC bias in transnational transactions.
22 When the choice is between the law of two jurisdictions that have adopted the UCC, but whose law

1 differs (whether because of differences in enacted language or differing judicial interpretations), there
2 is no strong justification for directing a court to apply different choice of law rules to its determination
3 than it would apply if the matter were not governed by the UCC. Similarly, given the wide variety of
4 choice of law principles applied by the states, it would not be prudent to designate only one such
5 principle as the proper one for transactions governed by the UCC. Accordingly, in cases in which the
6 parties have not made an effective choice of law, Section 1-301(a) simply directs the forum to apply
7 its ordinary choice of law principles to determine which jurisdiction's law governs.

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

11 *g. Choice of forum.* The use of contractual choice of forum clauses has expanded as judicial
12 hostility to them has faded. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *The*
13 *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See also Restatement of the Law (Second),
14 Conflict of Laws § 80 (1971); Model Choice of Forum Act (1968, withdrawn 1975). The Drafting
15 Committee considered whether to add a provision governing the effect of such clauses, as
16 recommended by the ABA Task Force on Article 1, but decided not to do so.

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

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

20 (b) The obligations of good faith, diligence, reasonableness and care prescribed by [the
21 Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may

1 determine the standards by which the performance of those obligations is to be measured if those
2 standards are not manifestly unreasonable. Whenever the [Uniform Commercial Code] requires any
3 action to be taken within a reasonable time, any time which is not manifestly unreasonable may be
4 fixed by agreement.

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

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

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

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

13 (a) A "course of performance" is a sequence of conduct between the parties to a particular
14 transaction that exists if:

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

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

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

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

6 (d) A course of performance or course of dealing between the parties or usage of trade in the
7 vocation or trade in which they are engaged or of which they are or should be aware is relevant in
8 ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of
9 the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable
10 in the place in which part of the performance under the agreement is to occur may be so utilized as to
11 that part of the performance.

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

- 15 (1) express terms prevail over course of performance, course of dealing, and usage of trade;
16 (2) course of performance prevails over course of dealing and usage of trade; and
17 (3) course of dealing prevails over usage of trade.

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

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

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

2 **Changes from current law:** As suggested by the ABA Task Force on Article 1, this section
3 integrates the “course of performance” concept from Articles 2 and 2A into the principles of current
4 Section 1-205, which deals with course of dealing and usage of trade. In so doing, the section slightly
5 modifies the articulation of the course of performance rules to fit more comfortably with the approach
6 and structure of current UCC Section 1-205. There are also slight modifications to be more consistent
7 with the definition of “agreement” in current section 1-201(3). It should be noted that a course of
8 performance that might otherwise establish a defense to the obligation of a party to a negotiable
9 instrument is not available as a defense against a holder in due course who took the instrument without
10 notice of that course of performance. A Comment in Section 3-302 should make this point.

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

13 **Source:** Current Section 1-203.

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

16 **SECTION 1–305. REMEDIES TO BE LIBERALLY ADMINISTERED.**

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

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

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

4 **Changes from current law:** This section is substantively identical to current UCC Section
5 1-106.

6 **SECTION 1-306. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER**
7 **BREACH.** A claim or right arising out of an alleged breach may be discharged in whole or in part
8 without consideration by agreement of the aggrieved party in an authenticated record.

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

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

16 **SECTION 1-307. PRIMA FACIE EVIDENCE BY THIRD PARTY DOCUMENTS.** A
17 document in due form purporting to be a bill of lading, policy or certificate of insurance, official
18 weigher's or inspector's certificate, consular invoice, or any other document authorized or required by

1 the contract to be issued by a third party shall be prima facie evidence of its own authenticity and
2 genuineness and of the facts stated in the document by the third party.⁴

3 **Source:** Current Section 1-202.

4 **Changes from current law:** No changes.

5 **SECTION 1-308. PERFORMANCE OR ACCEPTANCE UNDER RESERVATION OF**
6 **RIGHTS.**

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

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

12 **Source:** Current Section 1-207.

13 **Changes from current law:** This section is substantively identical to current UCC Section
14 1-207.

15 **SECTION 1-309. OPTION TO ACCELERATE AT WILL.** A term providing that one party
16 or that party's successor in interest may accelerate payment or performance or require collateral or
17 additional collateral "at will" or when the party "deems itself insecure", or words of similar import,
18 means that the party has power to do so only if that party in good faith believes that the prospect of

⁴The Reporter for the Uniform Evidence Act will consult with the Article 1 Drafting Committee with respect to this section. After resolution of electronic commerce issues, the language may be broadened to cover "records" rather than documents.

1 payment or performance is impaired. The burden of establishing lack of good faith is on the party
2 against which the power has been exercised.

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

4 **Changes from current law:** This section is substantively identical to current UCC Section
5 1-208.

6 **SECTION 1-310. SUBORDINATED OBLIGATIONS.** An obligation may be issued as
7 subordinated to payment of another obligation of the person obligated, or a creditor may subordinate
8 its right to payment of an obligation by agreement with either the person obligated or another creditor
9 of the person obligated. Subordination does not create a security interest as against either the common
10 debtor or a subordinated creditor.

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

12 **Changes from current law:** This section is identical to current Section 1-209, except that the
13 language in that Section stating that it “shall be construed as declaring the law as it existed prior to
14 the enactment of this Section and not as modifying it” has been deleted.