

D R A F T
FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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

WITH PREFATORY NOTE AND REPORTER'S NOTES

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REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 1 – GENERAL PROVISIONS

TABLE OF CONTENTS

PART 1. GENERAL PROVISIONS

SECTION 1-101. SHORT TITLES	6
SECTION 1-102. SCOPE OF ARTICLE	6
SECTION 1-103. CONSTRUCTION OF ACT TO PROMOTE ITS PURPOSES AND POLICIES; APPLICABILITY OF SUPPLEMENTAL PRINCIPLES OF LAW	7
SECTION 1-104. CONSTRUCTION AGAINST IMPLIED REPEAL	9
SECTION 1-105. SEVERABILITY	10
SECTION 1-106. USE OF SINGULAR AND PLURAL; GENDER	10

**PART 2. GENERAL DEFINITIONS AND
PRINCIPLES OF INTERPRETATION**

SECTION 1-201. GENERAL DEFINITIONS	11
SECTION 1-202. NOTICE; KNOWLEDGE	21
SECTION 1-203. LEASE DISTINGUISHED FROM SECURITY INTEREST	23
SECTION 1-204. VALUE	25
SECTION 1-205. REASONABLE TIME; SEASONABLENESS	26

PART 3. TERRITORIAL APPLICABILITY AND GENERAL RULES

SECTION 1-301. TERRITORIAL APPLICABILITY; PARTIES' POWER TO CHOOSE APPLICABLE LAW	27
SECTION 1-302. VARIATION BY AGREEMENT	33
SECTION 1-303. COURSE OF PERFORMANCE, COURSE OF DEALING, AND USAGE OF TRADE	34
SECTION 1-304. OBLIGATION OF GOOD FAITH	36
SECTION 1-305. REMEDIES TO BE LIBERALLY ADMINISTERED	36
SECTION 1-306. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER BREACH	37
SECTION 1-307. PRIMA FACIE EVIDENCE BY THIRD PARTY DOCUMENTS	37
SECTION 1-308. PERFORMANCE OR ACCEPTANCE UNDER RESERVATION OF RIGHTS	38
SECTION 1-309. OPTION TO ACCELERATE AT WILL	38
SECTION 1-310. SUBORDINATED OBLIGATIONS	39

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

3 **PREFATORY NOTE**

4 **I. INTRODUCTION**

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

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

21 In addition to these substantive changes, the Drafting Committee decided to
22 make some structural changes to Article 1. These structural changes, intended to
23 make this Article more closely fit with the drafting conventions of the more recently
24 addressed Articles and to lessen some difficulties in interpretation, are described in
25 Part III below. Other than these structural changes, the Drafting Committee
26 generally decided to resist the temptation to make non-substantive changes to
27 provisions that have not been a source of serious problems in the nearly four
28 decades since the widespread enactment of the UCC. A few such changes should be
29 noted, however. First, as in all of the other UCC Articles promulgated in the last
30 decade, provisions have been reformulated in a gender-neutral fashion. Second, in a
31 very small number of cases, minor changes in wording have been made when the
32 current wording has proven confusing. Those changes are noted in the Reporter's
33 Notes following each section but are not otherwise described in this Prefatory Note.

34 Examination of this draft will reveal a handful of definitional provisions in
35 Section 1-201 the drafting of which has been deferred pending decisions by the
36 Drafting Committee for Articles 2 and 2A. These provisions concern, in full or in
37 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

1 as to the distinction between situations in which Code provisions preempt the
2 application of other law and those in which such supplementation is permissible.

3 **C. Good Faith**

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

13 **D. Choice of Law**

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

23 **1. Contractual Designation of Governing Law**

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

35 Second, outside the context of consumer transactions, revised Article 1
36 generally provides the parties with greater autonomy than does current Article 1 to
37 designate a jurisdiction whose law will govern, but also provides some safeguards

1 against abuse that do not appear in current Article 1. These changes are explored in
2 detail in Reporter's Notes, *a*, *c*, and *d* to revised UCC Section 1-301. Greater
3 autonomy is provided in subsection (a) by following emerging international norms
4 and deleting the requirement of a "reasonable relation" to the jurisdiction in this
5 non-consumer context. Safeguards not present in current law are provided in
6 subsections (c) and (d). Subsection (c) indicates that the designation of a
7 jurisdiction's law is not effective (even if the transaction bears a reasonable relation
8 to that jurisdiction) if that law is contrary to a fundamental policy of the jurisdiction
9 whose law would govern in the absence of contractual designation. Subsection (d)
10 indicates that a designation of foreign law is not effective unless the transaction is
11 international in nature.

12 **2. Choice of Law in the Absence of Contractual Designation of** 13 **Governing Law**

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

21 **E. Course of Performance**

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

25 **F. Statute of Frauds**

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

33 **III. STRUCTURAL ISSUES**

34 **A. General Organization**

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

11 **B. Relocation of Substantive Rules Embedded in Definitions**

12 The Drafting Committee identified four cases in which definitions in Section
13 1-201 were made unnecessarily complicated by substantive rules embedded within
14 them. Extracting those substantive rules and placing them in their own sections
15 enables those rules to be presented more effectively and is more consistent with
16 current drafting principles in many States.

17 **1. Notice and knowledge**

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

22 **2. Distinguishing leases from security interests**

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

34 **3. Value**

35 Whether a person acquires rights “for value” is at present the subject of a
36 definitional provision in current Section 1-201(44). Yet, as the NCCUSL

1 Committee on Style correctly noted to the Drafting Committee, the provision is
2 more appropriately articulated as a free-standing rule. It has been moved to Section
3 1-204.

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

3 **PART 1**
4 **GENERAL PROVISIONS**

5 **SECTION 1-101. SHORT TITLES.**

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

7 (b) This article may be cited as Uniform Commercial Code – General
8 Provisions.

9 **Reporter’s Notes**

10 **Source:** Current Section 1-101.

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

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

16 **Reporter’s Notes**

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

1 **SECTION 1-103. CONSTRUCTION OF ACT TO PROMOTE ITS**
2 **PURPOSES AND POLICIES; APPLICABILITY OF SUPPLEMENTAL**
3 **PRINCIPLES OF LAW.**

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

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

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

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

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

16 **Reporter's Notes**

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

18 **Changes from current law:** This section is derived from subsections (1)
19 and (2) of current Section 1-102 and from current Section 1-103. Subsection (a) of
20 this section combines subsections (1) and (2) of current Section 1-102. Except for
21 changing the form of reference to the Uniform Commercial Code and minor stylistic
22 changes, its language is the same as subsections (1) and (2) of current Section
23 1-102. Except for changing the form of reference to the Uniform Commercial
24 Code, subsection (b) of this section is identical to current Section 1-103. The
25 provisions have been combined in this section to reflect the interrelationship
26 between them.

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

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

19 The language of subsection (b) is intended to reflect both the concept of
20 supplementation and the concept of preemption. Some courts, however, have had
21 difficulty in applying the identical language of current Section 1-103 to determine
22 when other law appropriately may be applied to supplement the Code, and when
23 that law has been displaced by the Code. Some decisions have applied other law in
24 situations in which that application, while not inconsistent with the text of any
25 particular provision of the Code, clearly was inconsistent with the underlying
26 purposes and policies reflected in the relevant Code provisions. In part, this
27 difficulty arose from Comment 1 to current Section 1-103, which states that “this
28 section indicates the continued applicability to commercial contracts of all
29 supplemental bodies of law except insofar as they are explicitly displaced by this
30 Act.” The “explicitly displaced” language of that Comment does not accurately
31 reflect the proper scope of Code preemption, which extends to displacement of
32 other law that is inconsistent with its purposes and policies as well as its text.

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

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

21 **d. Listing not exclusive.** The list of sources of supplemental law in
22 subsection (b) is intended to be merely illustrative of the other law that may
23 supplement the Code, and is not exclusive. No listing could be exhaustive. Further,
24 the fact that a particular section of the Uniform Commercial Code makes express
25 reference to other law is not intended to suggest the negation of the general
26 application of the principles of subsection (b). (Note that the word "bankruptcy" in
27 subsection (b), continuing the use of that word from current Section 1-103, should
28 be understood not as a specific reference to federal bankruptcy law but, rather as a
29 reference to general principles of insolvency, whether under federal or state law.)

30 **SECTION 1-104. CONSTRUCTION AGAINST IMPLIED REPEAL.**

31 [The Uniform Commercial Code] being a general act intended as a unified coverage
32 of its subject matter, no part of it shall be deemed to be impliedly repealed by
33 subsequent legislation if such construction can reasonably be avoided.

34 **Reporter's Notes**

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

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

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

Reporter's Notes

Source: Current Section 1-108.

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

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

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

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

Reporter's Notes

Source: Current Section 1-102(5).

Changes from current law: Other than minor stylistic changes, this section is identical to current UCC Section 1-102(5).

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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.*]

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

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

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

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

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

14 (10) “Buyer in ordinary course of business” means a person that buys
15 goods in good faith, without knowledge that the sale violates the rights of another
16 person in the goods, and in the ordinary course from a person, other than a
17 pawnbroker, in the business of selling goods of that kind. A person buys goods in
18 the ordinary course if the sale to the person comports with the usual or customary
19 practices in the kind of business in which the seller is engaged or with the seller’s
20 own usual or customary practices. A person that sells oil, gas, or other minerals at
21 the wellhead or minehead is a person in the business of selling goods of that kind. A
22 buyer in ordinary course of business may buy for cash, by exchange of other

1 property, or on secured or unsecured credit, and may acquire goods or documents
2 of title under a pre-existing contract for sale. Only a buyer that takes possession of
3 the goods or has a right to recover the goods from the seller under Article 2 may be
4 a buyer in ordinary course of business. A person that acquires goods in a transfer in
5 bulk or as security for or in total or partial satisfaction of a money debt is not a
6 buyer in ordinary course of business.

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

10 (11a) [*A definition of “consumer” may be inserted here. The decision will*
11 *be deferred until completion of the Article 2/2A drafting process.*]

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

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

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

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

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

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

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

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

16 (20) “Fungible goods” means either:

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

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

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

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

1 (23) “Holder” means:

2 (A) with respect to a negotiable instrument, the person in possession

3 of the negotiable instrument if it is either payable to bearer or payable to an

4 identified person that is the person in possession; or

5 (B) with respect to a document of title, the person in possession of it

6 if the goods are deliverable either to bearer or to the order of the person in

7 possession.

8 (24) “Insolvency proceeding” includes an assignment for the benefit of

9 creditors or other proceeding intended to liquidate or rehabilitate the estate of the

10 person involved.

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

12 (A) has generally ceased to pay debts in the ordinary course of

13 business other than as a result of bona fide dispute as to them;

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

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

16 (26) “Money” means a medium of exchange authorized or adopted by a

17 domestic or foreign government. The term includes a monetary unit of account

18 established by an intergovernmental organization or by agreement between two or

19 more countries.

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

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

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

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

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

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

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

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

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

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

9 (37) “Right” includes remedy.

10 (38) “Security interest” means an interest in personal property or
11 fixtures which secures payment or performance of an obligation. The term also
12 includes any interest of a consignor and a buyer of accounts, chattel paper, a
13 payment intangible, or a promissory note in a transaction that is subject to Article 9.
14 The special property interest of a buyer of goods on identification of those goods to
15 a contract for sale under Section 2- 401 is not a “security interest,” but a buyer may
16 also acquire a “security interest” by complying with Article 9. Except as otherwise
17 provided in Section 2-505, the right of a seller or lessor of goods under Article 2 or
18 2A to retain or acquire possession of the goods is not a “security interest,” but a
19 seller or lessor may also acquire a “security interest” by complying with Article 9.
20 The retention or reservation of title by a seller of goods notwithstanding shipment or
21 delivery to the buyer (Section 2-401) is limited in effect to a reservation of a

1 “security interest ”. Whether a transaction in the form of a lease is a “security
2 interest” is determined by Section 1-203.

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

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

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

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

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

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

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

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

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

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

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

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

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

7 **Reporter’s Notes**

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

9 **Changes from current law:**

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

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

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

25 **d. Bank.** Revised definition derived from the first sentence of Section
26 4A-105(a)(2).

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

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

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

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

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

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

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

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

- 1 **k. Insolvent.** A reference to bona fide disputes has been added.
- 2 **l. Notice and knowledge.** These concepts have been moved to Section
3 1-202.
- 4 **m. Organization.** Former definition has been replaced with standard
5 NCCUSL definition.
- 6 **n. Person.** Former definition has been replaced with standard NCCUSL
7 definition.
- 8 **o. Present value.** This term is used in both Articles 1 and 2A. The
9 embedded definition in current Section 1-201(37) has been moved to its own
10 subsection. The identical definition in Article 2A will no longer be necessary.
- 11 **p. Security interest.** The first paragraph of this definition remains as
12 revised in conjunction with Revised Article 9. The remainder of the definition in
13 current Article 1, that distinguishes a “true” lease from a security interest, has been
14 moved to Section 1-203.
- 15 **r. State.** The standard NCCUSL definition has been inserted.
- 16 **s. Surety.** The definition of “surety” has been expanded to include all
17 secondary obligors. The Comment will refer to the Restatement of Suretyship and
18 Guaranty.
- 19 **t. Value.** This concept has been moved to Section 1-204.

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

- 21 (a) Subject to subsection (f), a person has “notice” of a fact if the person:
- 22 (1) has actual knowledge of it;
- 23 (2) has received a notice or notification of it; or
- 24 (3) from all the facts and circumstances known to the person at the time
- 25 in question, has reason to know that it exists.
- 26 (b) “Knowledge” means actual knowledge.

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

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

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

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

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

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

1 regular duties or the individual has reason to know of the transaction and that the
2 transaction would be materially affected by the information.²

3 **Reporter's Notes**

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

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

8 **SECTION 1-203. LEASE DISTINGUISHED FROM SECURITY**
9 **INTEREST.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reporter's Notes

Source: Current Section 1-201(37).

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

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

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

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

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

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

7 **Reporter's Notes**

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

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

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

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

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

18 **Reporter's Notes**

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

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

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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
2 other than the United States, an agreement referred to in subsection (a) is effective
3 only if it designates the law of a State.

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

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

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

11 (3) Section 4-102

12 (4) Section 4A-507

13 (5) Section 5-116

14 (6) Section 6-103

15 (7) Section 8-110

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

17 (f) For purposes of this section, a “consumer” is an individual who enters
18 into a transaction primarily for personal, family, or household purposes. Personal,
19 family, or household purposes do not include professional or commercial purposes,

1 including agriculture, business management, and investment management other than
2 management of the individual's personal or family investments.³

3 **Reporter's Note**

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

5 **Changes from current law:** This section replaces current UCC Section
6 1-105, with several significant changes.

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

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

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

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

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

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

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

16 **a. Contractual choice of law.** This section allows parties broad autonomy,
17 with several important limitations, to select the law governing their transaction, even
18 if the transaction bears no relation to the State or country whose law is selected.
19 This recognition of party autonomy with respect to governing law has already been
20 established in several Articles of the Uniform Commercial Code (see UCC Sections
21 4A-507, 5-116, and 8-110) and is consistent with international norms. *See, e.g.,*
22 *Inter-American Convention on the Law Applicable to International Contracts*,
23 *Article 7 (Mexico City 1994)*; *Convention on the Law Applicable to Contracts for*
24 *the International Sale of Goods, Article 7(1) (The Hague 1986)*; *EC Convention on*
25 *the Law Applicable to Contractual Obligations, Article 3(1) (Rome 1980)*.

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

35 The Drafting Committee considered whether this section should expressly
36 provide for the ability of parties to designate non-legal codes such as trade codes as
37 the set of rules governing their transaction, but decided that the principles of Section
38 1-302 allowing parties broad freedom of contract to structure their relation are

adequate for this purpose. A similar decision was made with respect to the ability of the parties to designate recognized bodies of rules or principles applicable to commercial transactions that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT.

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

c. Fundamental policy. Subsection (c) provides that an agreement choosing the governing law will not be given effect to the extent that the law of the jurisdiction specified is contrary to a fundamental policy of the State or country whose law would otherwise govern. This rule provides a narrow exception to the broad autonomy afforded to parties in subsection (a). One of the prime objectives of contract law is to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. In this way, certainty and predictability of result are most likely to be secured. See Restatement (Second) Conflict of Laws, § 187, comment *e*. Under the fundamental policy exception, a court should not refrain from applying the chosen law merely because this would lead to a result different than would be obtained under the local law of the State or country whose law would otherwise govern. Rather, the difference must be contrary to a public policy that is so substantial that it would not only cause a court to forego application of general choice of law rules that would otherwise have pointed to that rule but also justify overriding the concerns for certainty and predictability underlying modern commercial law as well as concerns for judicial economy generally. A fundamental public policy will rarely be found in a requirement, such as a statute of frauds, that relates to formalities, or in general rules of contract law, such as those concerned with the need for consideration. On the other hand, a rule that makes the selling of body parts or human embryos illegal may reflect such a policy.

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

Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. A right of action is property. If a foreign statute

1 gives the right, the mere fact that we do not give a like right is no reason for
2 refusing to help the plaintiff in getting what belongs to him. We are not so
3 provincial as to say that every solution of a problem is wrong because we deal
4 with it otherwise at home. Similarity of legislation has indeed this importance;
5 its presence shows beyond question that the foreign statute does not offend the
6 local policy. But its absence does not prove the contrary. It is not to be exalted
7 into an indispensable condition. The misleading word ‘comity’ has been
8 responsible for much of the trouble. It has been fertile in suggesting a discretion
9 unregulated by general principles.

10 * * *

11 The courts are not free to refuse to enforce a foreign right at the pleasure of the
12 judges, to suit the individual notion of expediency or fairness. They do not close
13 their doors, unless help would violate some fundamental principle of justice,
14 some prevalent conception of good morals, some deep-rooted tradition of the
15 common weal.

16 120 N.E. at 201-02 (citations to authorities omitted).

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

24 **e. Choice of law in the absence of contractual designation.** The second
25 sentence of subsection (a), which replaces the second sentence of current UCC
26 Section 1-105(1), determines which jurisdiction’s law governs a transaction in the
27 absence of an effective contractual choice by the parties. Current Section 1-105(1),
28 by providing that the law of the forum (*i.e.*, the UCC) applies if the transaction bears
29 “an appropriate relation to this State” rather than, say, requiring that the forum be
30 the location of the “most significant” contact, expresses a bias in favor of applying
31 the forum’s law. This bias, while not universally respected by the courts, was
32 justifiable in light of the uncertainty that existed at the time of drafting as to whether
33 the UCC would be adopted by all the States; the pro-forum bias would assure that
34 the UCC would be applied so long as the transaction bore an “appropriate” relation
35 to the forum. Inasmuch as the UCC has been adopted, at least in part, in all
36 American jurisdictions, the vitality of this point is minimal in the domestic context,
37 and international comity concerns militate against continuing the pro-forum, pro-
38 UCC bias in transnational transactions. When the choice is between the law of two

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

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

14 **g. Choice of forum.** The use of contractual choice of forum clauses has
15 expanded as judicial hostility to them has faded. *See, e.g., Carnival Cruise Lines,*
16 *Inc. v. Shute*, 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S.
17 1 (1972). *See also* Restatement of the Law (Second), Conflict of Laws § 80 (1971);
18 Model Choice of Forum Act (1968, withdrawn 1975). The Drafting Committee
19 considered whether to add a provision governing the effect of such clauses, as
20 recommended by the ABA Task Force on Article 1, but decided not to do so.

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

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

25 (b) The obligations of good faith, diligence, reasonableness and care
26 prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement.
27 The parties, by agreement, may determine the standards by which the performance
28 of those obligations is to be measured if those standards are not manifestly
29 unreasonable. Whenever the [Uniform Commercial Code] requires any action to be

1 taken within a reasonable time, any time which is not manifestly unreasonable may
2 be fixed by agreement.

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

7 **Reporter’s Notes**

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
10 current Section 1-102 and subsection (1) of current Section 1-204. No substantive
11 changes are made.

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

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

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

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

21 (b) A “course of dealing” is a sequence of conduct concerning previous
22 transactions between the parties to a particular transaction that is fairly to be

1 regarded as establishing a common basis of understanding for interpreting their
2 expressions and other conduct.

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

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

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

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

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

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

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

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

9 **Reporter's Notes**

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

11 **Changes from current law:** As suggested by the ABA Task Force on
12 Article 1, this section integrates the “course of performance” concept from Articles
13 2 and 2A into the principles of current Section 1-205, which deals with course of
14 dealing and usage of trade. In so doing, the section slightly modifies the articulation
15 of the course of performance rules to fit more comfortably with the approach and
16 structure of current UCC Section 1-205. There are also slight modifications to be
17 more consistent with the definition of “agreement” in current Section 1-201(3). It
18 should be noted that a course of performance that might otherwise establish a
19 defense to the obligation of a party to a negotiable instrument is not available as a
20 defense against a holder in due course who took the instrument without notice of
21 that course of performance. A Comment in Section 3-302 should make this point.

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

25 **Reporter's Notes**

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

1 **Changes from current law:** Except for changing the form of reference to
2 the Uniform Commercial Code, this section is identical to current UCC Section
3 1-203.

4 **SECTION 1-305. REMEDIES TO BE LIBERALLY ADMINISTERED.**

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

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

13 **Reporter's Notes**

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

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

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

21 **Reporter's Notes**

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

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

SECTION 1-307. PRIMA FACIE EVIDENCE BY THIRD PARTY

DOCUMENTS. A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.⁴

Reporter's Notes

Source: Current Section 1-202.

Changes from current law: No changes.

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

(a) Except as otherwise provided in subsection (b), a party that, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby

⁴ The 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 prejudice the rights reserved. Words such as “without prejudice,” “under protest”
2 or the like are sufficient.

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

4 **Reporter’s Notes**

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

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

8 **SECTION 1-309. OPTION TO ACCELERATE AT WILL.** A term
9 providing that one party or that party’s successor in interest may accelerate payment
10 or performance or require collateral or additional collateral “at will” or when the
11 party “deems itself insecure,” or words of similar import, means that the party has
12 power to do so only if that party in good faith believes that the prospect of payment
13 or performance is impaired. The burden of establishing lack of good faith is on the
14 party against which the power has been exercised.

15 **Reporter’s Notes**

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

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

19 **SECTION 1-310. SUBORDINATED OBLIGATIONS.** An obligation may
20 be issued as subordinated to payment of another obligation of the person obligated,
21 or a creditor may subordinate its right to payment of an obligation by agreement
22 with either the person obligated or another creditor of the person obligated.

1 Subordination does not create a security interest as against either the common
2 debtor or a subordinated creditor.

3 **Reporter's Notes**

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

5 **Changes from current law:** This section is identical to current Section
6 1-209, except that the language in that section stating that it “shall be construed as
7 declaring the law as it existed prior to the enactment of this section and not as
8 modifying it” has been deleted.