

D R A F T
FOR DISCUSSION ONLY

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

April 1997 Draft

THE AMERICAN LAW INSTITUTE
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ON UNIFORM STATE LAWS

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

APRIL 1997

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UNIFORM COMMERCIAL CODE

REVISED ARTICLE 1 — GENERAL PROVISIONS

REPORTER'S PREFATORY COMMENTS

I. Introduction

This document is the second complete draft of Phase One of the tasks before this Drafting Committee — preparation of Revised Article 1 of the Uniform Commercial Code. It consists of the full text of the proposed Article, revised in light of (i) the decisions of the Drafting Committee at its last meeting and (ii) the recommendations of the NCCUSL Style Committee. After each section is a brief explanation of changes made since the February Draft.

It is anticipated that this draft, with explanatory comments reinserted, will be the draft discussed at this summer's NCCUSL meeting.

II. Issues Raised by this Draft

While this draft essentially memorializes decisions made at the last meeting of the Drafting Committee, there are a few issues that the Drafting Committee should consider at its April meeting.

A. Applicability of Supplemental Principles of Law

This draft, at the suggestion of the Drafting Committee, merges former sections 1-102 and 1-103 into revised section 1-102, and states a somewhat more preemptive view of the relationship between the Uniform Commercial Code and other law than does current section 1-103. Does this section strike the appropriate balance?

B. Definition of Good Faith

Current section 1-201(19) defines good faith as "honesty in fact." Articles 2, 2A, 2B, 3, 4, 8, and 9, however, have adopted a broader standard that also incorporates the observance of reasonable commercial standards of fair dealing. Article 5, on the other hand, has retained the narrower test. The matter has not been addressed in Articles 6 and 7. At the last meeting of the Drafting Committee, it was decided that there would be no definition of good faith unique to Article 1. Yet, because the term "good faith" is used in Article 1, as well as in Articles 6 and 7, a definition for those uses must be articulated. Three alternative versions of section 1-201(22) are presented.

C. Definition of Holder

The current definition of "holder" is awkward and difficult to understand without knowing its meaning in advance. Is the slightly reorganized definition of holder in section 1-201(23) appropriate?

D. Notice and Knowledge

At the suggestion of the Style Committee, the rules concerning notice and knowledge have been moved from section 1-201 to a separate section — section 1-202. Does section 1-202 appropriately capture the concept? Will unnecessary confusion be caused by this reorganization?

D. Definition of Security Interest

At the Suggestion of the Style Committee, that portion of the definition of "security interest" that distinguishes true leases from security interests has been moved to a separate section. Does the remaining portion of the definition suffice as a stand-alone provision? Does the new section on distinguishing leases from security interests — section 1-203 — work well as a separate section?

E. Choice of Law

1. By agreement

Does section 1-302(a), which governs the effect of the parties' agreement as to the governing law, accurately reflect the decisions of the Drafting Committee as to the limits on party autonomy in non-consumer cases? In particular, is the "public policy" exception articulated appropriately? Is the requirement that the transaction bear a reasonable relationship to a country other than the United States before the parties can designate the law of another country articulated appropriately?

2. In the absence of agreement

Should the bracketed language in section 1-302(b), which overrides general choice of law principles if the forum state would select a jurisdiction whose law would render all or part of an agreement unenforceable when the forum's own law would enforce the agreement, be retained?

F. Obligation of Good Faith

The articulation of this obligation has been slightly reworked at the suggestion of the Drafting Committee. Does the rearticulation capture the concept?

PART 1

TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT

SECTION 1-101. SHORT TITLE.

- (a) This [Act] may be cited as the Uniform Commercial Code.
- (b) This Article may be cited as Uniform Commercial Code – General Provisions.

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-102. CONSTRUCTION OF ACT TO PROMOTE ITS PURPOSES AND POLICIES; APPLICABILITY OF SUPPLEMENTAL PRINCIPLES OF LAW.

(a) This [Act] shall 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.

(b) Principles of law and equity may be utilized to supplement this [Act], except to the extent that those principles are inconsistent with

- (1) either the terms or the purposes and policies of particular provisions of this [Act]; or

(2) the purposes and policies identified in subsection (a).

Revision Notes

This section is a merger of sections 1-102 and 1-103 from the February 1997 Draft, as suggested by the Drafting Committee. Subsection (a) is section 1-102 of the February 1997 Draft, with stylistic changes suggested by the Style Committee. Subsection (b) is based on Section 1-103 of the February 1997 Draft, and reflects a strengthening of the preemptive nature of the Uniform Commercial Code as suggested by the Drafting Committee.

SECTION 1-103. [DELETED]

Changes From February 1997 Draft

Section 1-103 of the February 1997 Draft has been reformulated as Section 1-102(b).

SECTION 1-104. APPLICABILITY OF [ACT] BY AGREEMENT.

(a) To the extent that a transaction is not subject to this [Act], parties to the transaction may, subject to subsection (b), provide by agreement that one or more of the provisions of this [Act] determine any or all of their rights and obligations with respect to each other.

(b) An agreement described in subsection (a) is ineffective to vary a rule that, under the law that would otherwise apply to the transaction, is not variable by agreement.

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-105. CONSTRUCTION AGAINST IMPLICIT REPEAL. This [Act] is a general act intended as a unified coverage of its subject matter. No part of this [Act] is to be construed as having been implicitly repealed by subsequent legislation if this construction reasonably can be avoided.

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-106. SEVERABILITY. If a provision of this [Act], or an application thereof to any person or circumstances, is held invalid, the invalidity does not affect other provisions or applications of the [Act] that can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-107. SECTION CAPTIONS; USE OF PARTICULAR GENDER

- (a) Section captions are parts of this [Act].
 - (b) In this [Act], unless the context otherwise requires:
 - (1) words in the singular number include the plural, and in the plural include the singular;
 - (2) words of any gender also refer to any other gender.
- Subsection (b) is identical to current UCC section 1-102(5).

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

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

SECTION 1-201. GENERAL DEFINITIONS. Subject to additional definitions contained in the subsequent Articles of this [Act] that are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this [Act]:

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

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

(3) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances including course of dealing, usage of trade, or course of performance as provided in this [Act]. The legal consequences of an agreement are determined by the provisions of this [Act], if applicable, or, otherwise, by the law of contracts.

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

contains the authentication or to which a record containing the authentication refers.

(5) "Bank," except as provided in Articles 3, 4, 4A, and 5, means any person engaged in the business of banking.

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

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

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

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

(10) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells minerals or the like, including oil and gas, at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy

for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller (Section [2-xxx]) may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(11) "Conspicuous" means so displayed or presented that a reasonable person against whom it is to operate would likely have noticed it. Whether a term or clause is "conspicuous" is for decision by the court. The following are conspicuous:

[insert list from latest draft of Article 2, 2A, or 2B]

(12) "Contract" means the total legal obligation that results from the parties' agreement as determined by this [Act] and by any other applicable laws.

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

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

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

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

(17) "Electronic agent" means a computer program or similar device designed, selected, or programmed by a party to initiate or respond to electronic messages or performances without review by an individual.

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

(19) "Fault" means a wrongful act, omission, or breach.

(20) "Fungible" goods are goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods that are not fungible are deemed fungible for the purposes of this [Act] to the extent that, under a particular agreement or document, unlike units are treated as equivalents.

[(21) "Genuine" means free of forgery or counterfeiting.]

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SECTION 1-201(22) ALTERNATIVE A

[DELETED]

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SECTION 1-201(22) ALTERNATIVE B

(22) "Good faith," as used in this Article with respect to a particular transaction, has the same meaning as "good faith" in the Article of this [Act] that governs the transaction.

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SECTION 1-201(22) ALTERNATIVE C

(22) "Good faith," except with respect to letters of credit, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

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(23) "Holder,"

(i) with respect to a negotiable instrument, means the person in possession of the negotiable instrument if it is

(A) payable to bearer or

(B) payable to an identified person who is the person in possession;

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

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

(25) "Insolvent" means either

(a) having ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute as to those debts;

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

(c) insolvent within the meaning of the federal bankruptcy law.

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

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

(28) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this [Act].

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

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

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

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

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

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

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

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

(37) "Rights" includes remedies.

(38) "Security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, or a payment intangible in a transaction that is subject to Article 9. The special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-xxx is not a "security interest",

but a buyer may also acquire a "security interest" by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-xxx) is limited in effect to a reservation of a "security interest."

(39) "Send" in connection with a writing, record, or notice means to

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

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

(iii) deliver for such transmission with postage or other cost of transmission provided for.

The receipt of any record or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(40) "Signed" includes any symbol executed or adopted by a party with a present intent to authenticate a writing.

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

(42) "Surety" includes a guarantor or other secondary obligor.

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

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

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

(46) "Written" or "writing" includes printing, typewriting, or any other intentional reduction to tangible form.

Changes From February 1997 Draft

Minor stylistic changes throughout as suggested by Drafting Committee or Style Committee. Renumbering as a result of moving some provisions to other sections. In addition:

Airbill. Deleted.

Bank. Inasmuch as Articles 3, 4, and 4A contain their own definitions of "bank," this definition has limited utility. The term is used sporadically in Article 2 and Article 9. This would seem to be a possible candidate for harmonization.

Conspicuous. A safe harbor will be added, based on the latest drafts of Articles 2, 2A, and 2B.

Delivery. The reference to certificated securities has been deleted because Article 8 contains its own definition of delivery.

Fungible. The reference to securities has been deleted because Article 8 no longer uses the term "fungible" to describe securities.

Good faith. At the February-March meeting of the Drafting Committee, it was decided that there would be no unique Article 1 definition of "good faith." The sentiment of the Drafting Committee seemed to be that the Article 1 definition should simply be deleted. This is reflected in Alternative A. There is a problem with this formulation, though — the term "good faith" is used in Article 1 and failing to define it in Article 1 would leave those uses of the term without a definition. Accordingly, Alternatives B and C are presented as possible solutions. Alternative B provides that, as used in Article 1, "good faith"

gets its meaning from the definition of the term in the substantive Article that governs the transaction. This would cause a problem in Articles 6 and 7, which do not contain definitions of "good faith." Accordingly, Alternative C is provided. That alternative states that "good faith" means both honesty and the observance of reasonable commercial standards of fair dealing, except with respect to letters of credit.

Holder. Reorganized for clarity.

Honor. Deleted. The term is used only once (in Article 2) outside of Article 5, where it is defined. Article 2 should simply cross-reference the Article 5 definition.

Insolvent. Reference to bona fide disputes added.

Notice and knowledge. Moved to Section 1-202.

Organization. Revised to reflect standard NCCUSL language.

Person. Revised to reflect standard NCCUSL language.

Present value. Added. The term is used in both Articles 1 and 2A. Embedded definition removed from Section 1-203. Definition in Article 2A should be deleted.

Security interest. That portion of definition that distinguishes "true" lease from security interest has been moved to Section 1-203.

Send. Revised to reflect self-transmission of a message by sender.

Signed. Definition reinstated.

State. Standard NCCUSL definition added.

Value. Moved to Section 1-204.

Written. Definition reinstated.

SECTION 1-202. NOTICE; KNOWLEDGE

(a) A person has "notice" of a fact if

(1) the person has actual knowledge of it;

(2) the person has received a notice or notification of

it; or

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

(b) "Knowledge" means actual knowledge.

(c) "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to notice.

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

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

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

(e) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the

organization to communicate information unless such communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(f) The time and circumstances under which a notice or notification may cease to be effective are not determined by this Act.

Changes From February 1997 Draft

At the suggestion of the Style Committee, Sections 1-201(25)-(27) have been relocated from the definitional section to this section.

SECTION 1-203. DISTINGUISHING LEASES FROM SECURITY INTERESTS.

(a) Whether a transaction creates a lease or security interest is determined by the facts of each case. A transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

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

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

(3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional

consideration or nominal additional consideration upon compliance with the lease agreement; or

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

(b) A transaction does not create a security interest merely because it provides that:

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

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

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

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

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

(c) 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 (i) 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 (ii) 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.

(d) "Reasonably predictable" and "remaining economic life of the goods" must be determined with reference to the facts and circumstances at the time the transaction is entered into.

Changes From February 1997 Draft

Relocated from the definition of "security interest" at the suggestion of Style Committee.

SECTION 1-204. VALUE. Except as otherwise provided with respect to negotiable instruments, bank collections, and letters of credit, a person gives "value" for rights if the person acquires them:

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

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

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

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

Changes From February 1997 Draft

Relocated from Section 1-201 at the suggestion of the Style Committee.

SECTION 1-205. REASONABLE TIME; SEASONABLENESS.

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

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

Changes From February 1997 Draft

Formerly Section 1-202.

PART 3**SCOPE, TERRITORIAL APPLICABILITY, AND GENERAL RULES**

SECTION 1-301. SCOPE. Unless the context otherwise requires, the provisions in this Part apply to a transaction to the extent that it is governed by Article 2, 2A, 2B, 3, 4, 4A, 5, [6,]* 7, 8, or 9 of this Act.

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-302. TERRITORIAL APPLICATION OF THE ACT; PARTIES' POWER TO CHOOSE APPLICABLE LAW.

(a) Except as otherwise provided in subsection (c), an agreement by parties to a transaction governed in whole or in part by this [Act] that any or all of their rights and obligations with respect to each other are to be determined by the law of this state or another state or country is effective, whether or not the transaction bears a reasonable relation to that state or country, unless:

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

(1) the transaction is a consumer transaction and that state or country is neither

(A) the state or country in which the consumer resides at the time the transaction becomes enforceable or will reside within 30 days thereafter, nor

(B) the state or country in which, pursuant to the contract establishing the transaction, the goods, services, or other consideration flowing to the consumer are to be received by the consumer or a person designated by the consumer;

(2) the law of that state or country is contrary to a fundamental public policy of the state or country whose law would govern if the parties had not selected the governing law by agreement; or

(3) the agreement of the parties selects the law of a country other than the United States and the transaction does not bear a reasonable relationship to a country other than the United States.

(b) Except as otherwise provided in subsection (c), if subsection (a) does not apply, the law determining the rights and obligations of parties with respect to any aspect of a transaction governed by this [Act] is the law that would ordinarily be selected by application of this state's conflict of laws principles[; provided, however, that if application of such principles to a transaction that is not a consumer transaction would result in the unenforceability of all or part of an agreement that is enforceable under the law of this state, the law governing those rights and

obligations is the law of this state unless the transaction does not bear an appropriate relationship to this state].

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

- (1) Section 2-xxx
- (2) Sections 2A-xxx
- (3) Section 2B-xxx
- (4) Section 4-102
- (5) Section 4A-507
- (6) Section 5-116
- (7) Section 6-103
- (8) Section 8-110
- (9) Section 9-xxx

(d) For purposes of this section, a "consumer" is a person who enters into a transaction (a "consumer transaction") for personal, family, or household purposes.

Changes From February 1997 Draft

Significantly rewritten since last draft.

Subsection (a) incorporates Alternative B of subsection (a)(1) of the February 1997 Draft, allowing parties broad freedom to select governing law, even if the transaction bears no relation to the state or country whose law is selected, with two additional limitations that did not appear in that draft. First, such a choice will not be given effect if it would be contrary to a fundamental public policy of the state or country whose law would otherwise be chosen under subsection (b). Second, the agreement of the parties may not select the law of a country other than the

United States unless the transaction bears a reasonable relationship to a country other than the United States (not necessarily the country selected).

Subsections (a)(1)(iii) and (a)(2) of the February 1997 Draft have been deleted as redundant in light of Section 1-303. The suggestion was made at the last Drafting Committee meeting that parties should be able to select recognized bodies of rules or principles applicable to commercial transactions that could not have been selected via Section 1-303 in the case of rules promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT, but no action was taken on the suggestion.

Subsection (b), which deals with cases in which the parties have not chosen the jurisdiction whose law governs, contains bracketed language that would select the forum law if that law would render the parties' agreement enforceable while the law that would otherwise be chosen under choice of law principles would result in unenforceability. The Drafting Committee should determine whether to retain the bracketed language.

Subsection (d), concerning choice of forum clauses, has been deleted pursuant to the Drafting Committee's decision.

SECTION 1-303. VARIATION BY AGREEMENT

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

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

Changes From February 1997 Draft

No changes.

SECTION 1-304. COURSE OF PERFORMANCE, COURSE OF DEALING, AND USAGE OF TRADE.

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

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

(2) that party performs on one or more occasions; and

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

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

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

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

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

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

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

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

(f) Subject to Sections [on modification and waiver], a course of performance is relevant to show a waiver or modification of any term inconsistent with such course of performance.

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

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee. It has been suggested that subsection (g) be moved to a new section concerned with litigation matters.

SECTION 1-305. OBLIGATION OF GOOD FAITH. There is an obligation to act in good faith in the performance and enforcement of every contract and duty within the scope of this [Act].

Changes From February 1997 Draft

Rewritten in light of suggestions of Drafting Committee.

[SECTION 1-306. UNCONSCIONABLE CONTRACT OR TERM.

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

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

(c) This section does not apply to the extent that an agreement is governed by Article 5 of this [Act].]

Changes From February 1997 Draft

Entire section placed in brackets to indicate tentative nature of this section. If it is decided to include this section in Revised Article 1, the bracketed language on inducement by unconscionable conduct should be considered separately for determination as to whether it is appropriate for inclusion.

SECTION 1-307. STATUTE OF FRAUDS FOR PERSONAL PROPERTY NOT OTHERWISE COVERED. [DELETED]

Changes From February 1997 Draft

Section deleted by decision of Drafting Committee. Drafting Committee decided at February meeting that Article 1 should not contain rules that govern non-UCC transactions.

SECTION 1-308. REMEDIES TO BE LIBERALLY ADMINISTERED.

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

(b) A right or obligation provided for by this [Act] is enforceable by action unless the provision declaring it specifies a different and limited effect.

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-309. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER BREACH. A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-310. PRIMA FACIE EVIDENCE BY THIRD PARTY DOCUMENTS. A record 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 is prima facie evidence of its own authenticity and genuineness and of the facts stated in the record by the third party.

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-311. PERFORMANCE OR ACCEPTANCE UNDER RESERVATION OF RIGHTS.

(a) Except as provided in subsection (b), a party that, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other

party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.

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

Changes From February 1997 Draft

No substantive changes. Minor stylistic changes suggested by Drafting Committee or Style Committee.

SECTION 1-312. OPTION TO ACCELERATE AT WILL. A term providing that one party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure" or in words of similar import shall be construed to mean that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised.

Changes From February 1997 Draft

No changes.

SECTION 1-313. SUBORDINATED OBLIGATIONS. An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate its right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor.

Changes From February 1997 Draft

Bracketed language stating that the section "shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it" was deleted at the recommendation of the Drafting Committee.