SECOND REPORT ON REVISED ARTICLE 1 OF THE UNIFORM COMMERCIAL CODE

Committee on Commercial Law and Uniform State Laws

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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Article 1 of the Uniform Commercial Code ("UCC") sets forth basic definitions and concepts that are utilized throughout the other articles of the UCC. In December 2001, the joint sponsors of the UCC, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI"), promulgated a revision of Article 1.[1] RA 1 has been enacted in thirty-seven States and in the United States Virgin Islands.[2]

This Report of the Committee on Commercial Law and Uniform State Laws of the Association of the Bar of the City of New York ("Committee") analyzes RA 1 and compares it to existing New York law. This Report is organized in parts. Part A is a section-by-section comparison, in chart form, of the provisions of RA 1 against the provisions of NYA 1, the version of Article 1 of the UCC currently in effect in New York. Part B discusses RA § 1-301, the section

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[1] This report and the accompanying chart uses the following abbreviations in referring to the various relevant texts of UCC Article 1: "NYA" (New York Article) will refer to New York's current statute, N.Y. U.C.C. (McKinney 2002); "FUA" (Former Uniform Article) will refer to the 2000 Uniform Text, U.C.C. (2000); and "RA" (Revised Article) will refer to the 2001 Uniform Text, U.C.C. (2001). As the text of NYA 1 usually conforms to FUA 1, only in those cases where there are differences will reference be made to the Former Uniform Article.

[2] National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Revised Uniform Commercial Code, Article 1, General Provisions (*2001*)*, at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucc1.asp (last visited March 19, 2010). The states that have adopted RA 1 are:

Alabama	Montana
Alaska	Nebraska
Arizona	Nevada
Arkansas	New Hampshire
California	New Mexico
Colorado	North Carolina
Connecticut	North Dakota
Delaware	Oklahoma
Florida	Oregon
Hawaii	Pennsylvania
Idaho	Rhode Island
Illinois	South Dakota
Indiana	Tennessee
Iowa	Texas
Kansas	U.S. Virgin Is-
Kentucky	Utah
Louisiana	Vermont
Maine	Virginia
Minnesota	West Virginia

In addition, three states have introduced bills to adopt RA 1: Massachusetts, Mississippi, and Washington. *Id.*

dealing with choice of law. Part C of the Report discusses the statute of frauds section currently found at NYA § 1-206 and which, because RA 1 contains no statutory analogue to NYA § 1-206, would be repealed if RA 1 were enacted. Part D of the Report discusses the definition of "good faith" in RA 1 in comparison with current law. Part E of the Report lists other New York statutes that refer to definitions contained in or provisions of NYA 1. These other statutes would need to be amended to reflect references to RA 1 if RA 1 were enacted in New York. Finally, Part F of this Report contains the recommendations of the Committee as to whether New York should enact RA 1.

The Committee, then named the Committee on Uniform State Laws, issued its first report on RA 1 in April 2004.[3] At that time the Committee was unable to reach consensus upon a recommendation concerning adoption of RA 1 because of disagreements over RA § 1-301 (conflict of laws) and RA § 1-201(b)(20) (definition of "good faith"). Since 2004, RA § 1-301 has itself been revised by NCCUSL and ALI in response to an almost universal rejection of RA § 1-301 (2004). RA § 1-301 (2008) is now virtually identical to the pre-revision choice of law provision.[4] The Committee, therefore, now is able to recommend passage of RA § 1-301 (2008). In addition, the Committee has been able to resolve its differences over the definition of good faith and now recommends retention of New York's existing definition of good faith.

A. Section-by-Section Comparison

RA 1, with the exceptions of the revision of the definition of "good faith" in RA § 1-201(b)(20) and the repeal of NYA § 1-206, does not substantially change existing New York law.[5] Accordingly, the Committee determined that the chart attached as Exhibit A to this Report

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[3] The first version of this report is available at 59 REC. 466 (2004) (abbreviated version without the exhibits) and http://www.abcny.org/pdf/report/LEGALDOCS-1.pdf (full version). The first version contains a full discussion of RA § 1-301 (2004) and the Committee's disagreements over RA § 1-301 (2004) and RA § 1-201.

[4] This report uses RA § 1-301 (2004) to refer to RA § 1-301 as originally promulgated and RA § 1-301 (2008) to refer to RA § 1-301 as revised in 2008.

[5] RA § 1-102 arguably also changes existing New York law by providing that Article 1 "applies to a transaction to the extent that it is governed by another article of [the Uniform Commercial Code]" (brackets in the original). The preliminary comments indicate that the drafters believe that this scope section only "makes clear what has always been the case." In fact, as the preliminary comment recognizes, there has been "confusion" over this issue. Some New York cases and cases applying New York law have applied Article 1 to transactions that are not within the UCC. *See, e.g.,* Asphalt Int'l Inc. v. Enter. Shipping Corp., 667 F.2d 261 (2d Cir. 1981). The court applied section 1-207, "industry custom", to determine whether the risk of loss was allocated in a ship charter contract. Although the lease of goods is presently governed by Article 2A, it was not governed by the UCC in 1981 when this case was decided. *See also* IMI Sys. Inc, v. Sterline Software Inc., 1991 WL 222107 (S.D.N.Y. 1991) (citing section 1-203 of the Uniform Commercial Code to support the proposition that "the covenant of good faith and fair dealing is implied in *every* contract in New York") (emphasis added); Gautieri v. Cowper Constr. Co., 599 N.Y.S.2d 766 (3d Dep't 1993) (applying "course of dealing" in section 1-205(1) to a construction contract); N.H. Ins. Co. v. Cruise Shops, Inc., 323 N.Y.S.2d 352 (Sup. Ct. 1971) (applying definition of "usage of trade" in section 1-205(3) to an insurance coverage dispute).

Other New York cases have borrowed Article 1 provisions and applied them to non-UCC transactions. For example, in *United States v. Consolidated Edison Co. of N.Y.,* 590 F. Supp 266 (S.D.N.Y. 1984), the court recognized that a contract for electricity was not covered by the UCC, but nonetheless held that the reservation of rights provision in section 1-207 of the Code should be applied. *Id.* at 270. In *Ayer v. Sky Club,* 418 N.Y.S.2d 57 (1st Dep't 1979), the court held that section 1-207 of the Uniform Commercial Code should apply to a dispute about a

("Comparison Chart") would be the most user-friendly means of conveying in a concise fashion the differences between RA 1 and NYA 1.

The Comparison Chart contains a section-by-section comparison of the provisions of RA 1 against the provisions of NYA 1. The provisions of RA 1 appear in the leftmost column of the Comparison Chart in the order of their appearance in RA 1. Their NYA 1 analogues appear in the middle column. At times, analogues to one RA 1 section are found in several provisions of NYA 1. For ease of comparison these separate provisions have been brought together in the middle column alongside the relevant RA 1 section. In the rightmost column of the Comparison Chart, the Committee has added comments reflecting the results of its research, as well as its views, as to whether the relevant provision of RA 1, if enacted, would change current New York law.

The Committee elected not to summarize in the Comparison Chart the provisions of RA 1 because these provisions already are summarized in the Official Comments to RA 1.

B. RA § 1-301.

In general, RA § 1-301 (2004) provided for party autonomy in choosing the governing law for "a transaction to the extent that it is governed by another article of the" UCC as long as (i) "one of the parties to a transaction is [not] a consumer"[6] or (ii) a "fundamental policy of the State or country whose law would govern" under otherwise applicable conflict of law principles is not violated.[7] In addition, even non-consumers were restricted to choosing only the law of one of the States of the United States when the transaction was a "domestic transaction."[8]

RA § 1-301 (2004) was criticized on a number of grounds.

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bill "for a party given by plaintiff at defendants premises", despite the fact that the Code might not expressly apply to the underlying transaction. *Id.* at 57. In *Cohen v. Ricci*, 466 N.Y.S.2d 121 (City Ct. of Mt. Vernon 1983), a tort case involving damages to a motor vehicle, the court held that the doctrine of accord and satisfaction, as expressed in section 1-207 of the Code, should be applied to comparable non-code situations.

Still other New York cases have recognized that Article 1 only applies to transactions governed by another article in the UCC. *See e.g.* Geelan Mech. Corp v. Dember Constr. Corp., 468 N.Y.S.2d. 680 (2d Dep't 1982) (refusing to adopt the reasoning in *Ayer*, and holding that section 1-207 did not apply because the case involved a construction subcontract for plumbing work); Channave v. Kraai, 466 N.Y.S.2d 916 (J. Ct. Monroe Cty. 1983) (recognizing that section 1-207 does not apply to the services provided by a handyman).

RA § 1-102 would not change the cases that borrow provisions from Article. This, in effect, is the incorporation of Article 1 concepts into the common law of New York.

The Committee believes that the better view is that Article 1 should be confined to transactions governed by the UCC. The drafting process involved in the UCC is only meant to cover certain specified transactions. Other types of transactions have not been considered in the drafting. If courts or legislatures find that UCC concepts can be applied usefully to other types of transactions, these concepts can be borrowed and incorporated either into the common law or statutes. But these concepts should not be incorporated by courts' treating Article 1 as precedent for non-UCC transactions—this gives deference to the UCC where it is not due.

[6] RA § 1-301(e) (2004).

[7] RA § 1-301(f) (2004).

[8] RA § 1-301(c)(1) (2004).

> Concerns were raised that the expanded party autonomy to choose applicable law was at variance with the formulation in the Restatement Second of Conflict of Laws, was overbroad, and might be unconstitutional. Moreover, some argued that the expanded consumer-protection provisions and the "fundamental policy" limitation on the designation of governing law could place excessive limits on party autonomy. This controversy continued during the first several enactments, with large commercial interests (primarily bankers' associations) lobbying against § 1-301, sometimes joined by those who were concerned that the section might validate choice-of-law clauses that would result in application of UCITA as enacted in Virginia or Maryland.[9]

The result is that no adopting jurisdiction other than the Virgin Islands has adopted RA § 1-301 (2004). All 37 States that have adopted RA 1 have retained a version of FUA § 1-105.[10]

The overwhelming rejection of RA § 1-301(2004) led NCCUSL and ALI in 2008 to withdraw RA § 1-301 (2004) and to substitute RA § 1-301 (2008), which is almost identical to FUA § 1-105 (2000). These events have led the Committee to reconsider its earlier disagreement and decide to recommend R § 1-301 (2008), which is almost identical to NYA § 1-105.[11] The Committee is particularly influenced by the goal of maintaining uniformity. To the extent that greater party autonomy is desirable in large scale commercial transactions, New York has already accommodated this to a limited extent in Title 14 of the General Obligations Law ("GOL").

Title 14, GOL.

In 1984, New York added Title 14 to the GOL which allowed parties limited autonomy in choice of law and choice of forum. Section 5-1401 allows parties to choose New York law as the governing law of "any contract, agreement or undertaking, contingent or otherwise" so long as the transaction is "in the aggregate not less than" $250,000."[12] Thus, there are two important

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[9] Lance Liebman, Proposal to Amend Official Text of § 1-301 (Territorial Applicability; Parties' Power to Choose Applicable Law) of Revised Article 1 of the UCC 11-12 (n.d.) (footnotes omitted) *available at* http://www.ali.org/doc/uccamendment.pdf.

[10] *See* Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1*, 38 UCC L.J. 195 (2006), updated version *available at* http://www.law.unlv.edu/faculty/rowley/RA1.041009.pdf (describing the conflict of law provisions in all states that have adopted RA 1) (last updated March 1,2010) (last visited March 19, 2010).

[11] There is only one difference between NYA § 1-105 (McKinney 2002) and RA § 1-301(2008). RA § 1-301 (2008) drops the parenthetical "including the conflict of laws rules" found in NYA § 1-105(2). The Committee's research has found no case or commentary directly addressing the parenthetical. On its face, the parenthetical appears to merely restate the general proposition set forth in NYA § 1-105(2): certain specific choice of law rules set forth in other articles of the UCC override the general choice of law rules in Article 1. The parenthetical, therefore, is superfluous.

[12] N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2001). In the original 1982 bill containing Section 5-1401, the transaction had to be at least $1 million. The Committee on Foreign and Comparative Law, Ass'n B. City N.Y., *Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements*, 38 REC. 537, 538, 542 (1983) [hereinafter 1983 ABCNY Report]. The $1 million restriction remained

limitations upon party autonomy: the transaction, even if between two businesses, must meet a size threshold before parties are authorized to exercise a choice of law, and the parties' autonomy is limited to a choice of New York law.[13]

The dollar and consumer limitations contained within Section 5-1401 were meant to ensure that only "large non-consumer transactions" were covered.[14] The intent was to protect against "any party agree[ing] to a governing law through fraud, mistake, overreaching or unequal power."[15] In addition, parties to large non-consumer transactions did not need as much protection because it is "probable" that such parties "will have been represented by counsel during the negotiation process. These factors guarantee, as much as possible, that the parties focused on the choice-of-law provisions and carefully considered the consequences of their choice of New York law."[16]

The restriction to choosing New York law was meant to ensure that New York would maintain its position of "one of the world's major financial and commercial Centers [*sic*]."[17] The expectation was that the legal community would benefit from increased work due to the choice of New York law and that New York, therefore, could expect increased "employment opportunities and tax revenues."[18]

If RA 1 is enacted in New York with Section RA § 1-301 (2008), Section 5-1401 would need to be revised to correctly cross-reference the relevant provisions of RA § 1-301 (2008).[19]

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in Section 5-1402(1), the companion choice of forum provision contained in the same 1984 law. N.Y. GEN. OBLIG. LAW § 5-1402(1) (McKinney 2001).

[13] In addition, Section 5-1401 does not apply to certain consumer transactions or to agreements concerning "labor or personal services." N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2001).The excluded consumer transactions are those involving "any transaction for personal, family or household services," almost exactly the same words used in RA § 1-201(b)(11), which defines a consumer as "an individual who enters into a transaction primarily for personal, family, or household purposes." The two definitions do differ in that RA § 1-201(b)(11) includes the qualifier "primarily," which allows a transaction having both business and non-business purposes to be categorized as a consumer transaction.

[14] 1983 ABCNY Report, *supra* note 12, at 543.

[15] *Id*.

[16] *Id*.

[17] Memorandum of Legislative Representative of City of New York, *reprinted in* 1984 N.Y. Sess. Laws 3288, 3288 (McKinney) [hereinafter "Legislative Memorandum"].

[18] 1983 ABCNY Report, *supra* note 84, at 549. The latter policy behind Section 5-1401 seems particularly unconvincing as there is nothing in Section 5-1401 that encourages a business to locate in New York State. In fact, the common law choice-of-laws rules were more likely to lead to a business's presence in New York State if the business wanted New York law to apply to its agreements. Barry W. Rashkover, Note, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227, 243 (1985).

[19] Clause (c) of Section 5-1401 now provides that Section 5-1401 does not apply "to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code." Subsection two of NYA § 1-105 is the list of other sections of the Uniform Commercial Code that specify choice-of law rules applicable to transactions that are the subject of other articles of the UCC. If RA 1 is enacted, this reference in clause (c) of Section 5-1401 to "subsection two of section 1-105 of the uniform commercial code" would need to be revised to refer to "subsection

C. Statute of Frauds: Repeal of NYA § 1-206.

Current Law**.**

NYA § 1-206 is a statute of frauds generally applicable to contracts for sale of personal property of any kind other than goods, securities and property the sale of which is governed by Article 9.[20] Under NYA § 1-206, a contract for sale of personal property that is subject to that section "is not enforceable by way of action or defense beyond [$5,000] in amount or value of remedy" unless there is a sufficient writing evidencing the contract signed by the party against whom enforcement is sought.

NYA § 1-206 tracks the uniform text of FUA § 1-206, with one exception: the New York enactment contains a nonuniform subsection (3) that narrows drastically the applicability of the section to "qualified financial contracts" as defined in Section 5-701 of the GOL.

GOL § 5-701 is the basic statute of frauds in New York. It declares contracts of various types to be unenforceable unless evidenced by a signed writing. In 1994, GOL § 5-701 was amended extensively so as to limit its effect on any contract of a type subject to that section that is also a "qualified financial contract." "Qualified financial contract" is defined for that purpose to include agreements covering broad classes of relatively sophisticated transactions. The definition was broadened in 2002, and as currently defined "qualified financial contract" includes (in paraphrase) over-the-counter derivative contracts, contracts for purchase or sale of foreign exchange, forward contracts, and contracts for sale of broad classes of indebtedness. Under GOL § 5-701, if a contract is of a type subject to that section, and is also a "qualified financial contract," then it is enforceable if it meets conditions that are much less stringent than the usual requirement of a signed writing. Specifically, a qualified financial contract that is subject to GOL § 5-701 is enforceable if (in paraphrase):

(i) the parties entered into a separate written contract by which they opted out of the statute of frauds as to that qualified financial contract, or

(ii) the qualified financial contract is evidenced in one of the following ways:

- an electronic communication (including a recorded phone call or a computer printout);
- a written confirmation sent by one party that was received and not timely objected to by the other party;
- an admission by the party against whom enforcement is sought; or

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(c) of section 1-301 of the uniform commercial code." Section E of this report lists other New York statutes that would require changes if RA 1 is enacted.

[20] Article 9 of the UCC governs transactions creating consensual security interests in most types of personal property, but it also governs outright sales of certain rights to payment. Specifically, Article 9 governs an outright sale of an "account," "chattel paper," "payment intangible" or "promissory note," as those terms are defined in Article 9. See UCC § 9-109(a)(3).

- a signed writing sufficient under the usual requirement.

The same bill that amended GOL § 5-701 to add the "qualified financial contract" provisions added the nonuniform subsection (3) to NYA § 1-206 in order to make the application of NYA § 1-206 to qualified financial contracts consistent with GOL § 5-701. Under that nonuniform subsection (3), a contract is not rendered unenforceable by NYA § 1-206 if it is a qualified financial contract and if one of the conditions to enforceability set forth in GOL § 5-701 is satisfied.

Repeal of FUA § 1-206 by RA 1. RA 1 contains no analogue to FUA § 1-206. At first blush it would seem to follow from the usual presumption in favor of uniform enactment of uniform laws that, if New York enacts RA 1, FUA § 1-206 should be repealed and not carried forward in New York law. However, such is not the case. RA 1 contains the following legislative note on this matter (located immediately after RA § 1-206):

> Former Section 1-206, a Statute of Frauds for sales of "kinds of personal property not otherwise covered," has been deleted. The other articles of the Uniform Commercial Code make individual determinations as to requirements for memorializing transactions within their scope, so that the primary effect of former Section 1-206 was to impose a writing requirement on sales transactions not otherwise governed by the UCC. Deletion of former Section 1-206 does not constitute a recommendation to legislatures as to whether such sales transactions should be covered by a Statute of Frauds; rather, it reflects a determination that there is no need for uniform commercial law to resolve that issue.

RA 1 is therefore neutral on the desirability of an enacting state retaining the rule set forth in FUA § 1-206. A California bar committee that reviewed RA 1 for enactment in that state, recommended in fact that the California legislature enact RA 1 but retain the rule set forth in FUA § 1-206, by recodifying it elsewhere in the California statutory code.[21] § 1-2-6 Statute of Frauds in it; however, the provisions in FUA § 1-206 were recodified in section 1624.5 of the California Civil Code and apply to transactions that are not governed by the U.C.C.

The Committee has therefore evaluated FUA § 1-206 on its merits and considered whether it should be retained in a New York-enacted RA 1. It is clear that, if New York were to elect to retain the rule of FUA § 1-206, the rule would no longer be appropriately situated in the New York UCC after enactment of RA 1 and so would have to be recodified elsewhere.[22]

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[21] REPORT OF THE UNIFORM COMMERCIAL CODE COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA ON THE REVISIONS OF UNIFORM COMMERCIAL CODE ARTICLE 1 – GENERAL PROVISIONS DRAFTED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE AMERICAN LAW INSTITUTE 13 (March 2003) [hereinafter the CALIFORNIA BAR REPORT].

[22] The natural home for a recodified version of NYA § 1-206 would seem to be New York's general statute of frauds, GOL § 5-701.

Recommendation: New York Should Not Carry Forward the Rule of NYA § 1-206. The Committee believes that New York should indeed repeal the rule set forth in NYA § 1-206 and should not preserve it by recodifying it elsewhere.

The California bar committee gave as its reason for recommending that California preserve the rule only that the committee "sees no reason at this time to change substantive law with respect to non-UCC transactions to which this statute of frauds might apply."[23] That is less a reason for the recommendation than a restatement of it. A state that enacts RA 1 *is* changing its law. In the view of the Committee, the case for retaining the rule of FUA § 1-206 should be based on the merits of the rule. The California report says nothing about the merits of the rule or its reception by California courts.

In the view of the Committee, there is not a sufficient case for New York to retain the rule of NYA § 1-206 following enactment of RA 1:

1) Although the opening words of NYA § 1-206 give the impression that the section is of mountainous importance (insofar as subsection (1) states that the section applies to every "contract for the sale of personal property"), the exceptions in subsection (2) turn the section into something closer to a molehill. Subsection (2) excludes from that section any contract for sale of goods, securities or rights to payment governed by Article 9. Little personal property is left when those are excluded.

2) Only a handful of reported cases have relied on NYA § 1-206 in the 50 years that it has been law in New York. The clearest cases in which NYA 1-206 has been appropriately applied involve sales of copyrights and other intellectual property.[24] Other cases have applied NYA § 1-206 to situations in which its applicability is, in the view of the Committee, doubtful.[25]

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[23] CALIFORNIA BAR REPORT, *supra* note 21, at 13.

[24] *See* Mellencamp v. Riva Music Ltd., 698 F.Supp. 1154 (S.D.N.Y 1988). *Mellencamp* held that rock music star John Mellencamp did not have an enforceable contract with a recording company to transfer copyrights to certain songs back to Mellencamp. The court held that a contract for sale of copyrights would be subject to NYA 1-206, but did not find it necessary to rule on whether an adequate writing existed. The court ruled instead that the facts showed that the parties had not intended to enter into a binding contract.

Likewise, *Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427 (2d Cir. 1995), held NYA 1-206 applicable to an alleged oral contract by an employee against his former employer on an alleged contract to buy a copyrighted training program.

It should be noted that federal law might require a signed writing in order to enforce a contract for sale of a copyright. The Copyright Act provides that "a transfer of copyright ownership" generally is not valid unless evidenced by a signed writing. 17 U.S.C. § 204(a) 2008. Although by its terms applicable only to the transfer of a copyright, this provision has been interpreted to render unenforceable a contract to transfer a copyright in the absence of a signed writing. *See, e.g., Mellencamp*, 698 F.Supp. at 1161-62. To that extent that the Copyright Act is so interpreted, it makes no practical difference whether a state statute of frauds also applies to such a contract.

[25] For instance, in *Cohn, Ivers & Co. v. Gross*, 289 N.Y.S.2d 301 (N.Y. App. Term 1968), the court awarded damages of a call option on securities granted by the defendant to the plaintiff, notwithstanding absence of a writing evidencing the contract. The court held the contract to be outside the Article 8 statute of frauds on the ground that the contract was not one for sale of a security (a dubious holding). The court held the contract to be outside NYA 1-206 as the amount involved was less than $5,000 (a holding that seems correct). Note that the outcome would have been no different had NYA § 1-206 not been in force.

In the few reported cases that have applied NYA § 1-206 properly to bar enforcement of an alleged oral contract, NYA § 1-206 almost never determined the outcome of the case, as in most such cases the court also noted other reasons for not enforcing the contract.

3) As statutes of frauds go, NYA § 1-206 is very peculiar. It does not say that a contract for sale of personal property that is subject to that section and that is not evidenced by a sufficient writing is not enforceable. Rather, it says that such a contract is not enforceable "beyond" $5,000. Courts applying New York law have interpreted this to mean exactly what it says--that a contract subject to this section and is not evidenced by a sufficient writing may nevertheless be enforced , but only up to $5,000 and no more.[26]

Consider, for instance, an otherwise valid oral contract involving sale of personal property worth $100,000 and as to which party D's breach resulted in provable damages to party P of $20,000. From a policy perspective, it can reasonably be argued that the lack of a writing should not impede P's right to get a judgment for $20,000 against D, so long as the factfinder determines that a contract was indeed made. Conversely, from a policy perspective it can reasonably be argued that P ought not expect to be able to enforce a contract of this size that has not been reduced to writing, and so the lack of a writing should preclude P from recovering any damages. But the Committee perceives no coherent justification for the outcome that NYA § 1-206 mandates, which is to award P $5,000. That result seems quite arbitrary and raises questions of why the statute was constructed in this manner.

In *Federal Deposit Insurance Corporation v. Herald Square Fabrics Corp.*, 439 N.Y.S.2d 944 (N.Y. App. Div. 1981), the court enforced a contract for sale of chattel paper, holding that the Article 9 statute of frauds did not apply as the contract was not a "pure" security transaction (which seems incorrect), further holding that the sale was subject to NYA 1-206 (incorrect, given that the transaction was subject to the Article 9 statute of frauds), and concluding that the contract was enforceable because an adequate writing existed. Again, the outcome would have been no different had NYA § 1-206 not been in force.

In *Sel-Leb Marketing, Inc. v. Dial Corp.*, No. 01 Civ. 9250, 2002 WL 1874056 (S.D.N.Y. 2002), Sel-Leb sued Dial for breach of contract on account of Dial's failure to give Sel-Leb the right to purchase, on a "right of first refusal" basis, certain discontinued inventory of Dial. This would seem to be within the Article 2 statute of frauds, but the court held it instead to be within NYA § 1-206, and declined to enforce it for want of a sufficient writing. The same result would seem to follow from the Article 2 statute of frauds. But in any event the statute of frauds did not determine the outcome as the court found the contract to be unenforceable for lack of consideration and vagueness anyway.

In *Beldengreen v. Ashinsky*, 528 N.Y.S.2d 744 (N.Y. Civ. Ct. 1987), the court held a contract for sale of a dental business subject to NYA § 1-206, on the ground that it involved sale of "a business", which the court considered to be a single thing constituting personal property. This seems dubious, in that the sale involved the seller's interest in, among other things, the equipment, supplies and lease appertaining to a dental office; and sale of most if not all of those items would appear to be subject to other statutes of frauds. *Horn & Hardart Co. v. Pillsbury Co.*, 703 F.Supp. 1062 (S.D.N.Y 1989), built on this dubious holding, holding that that an alleged oral standstill agreement in a takeover contest was subject to NYA § 1-206 and unenforceable. The court held that NYA § 1-206 applied rather than the Article 8 statute of frauds, stating only that "We hold that of the two statutes, [NYA § 1-206] is the more appropriate, the alleged contract being essentially one for the sale of a business (or a portion thereof)." *Id.* at 1064. The court did not clearly identify just what was being sold – stock or assets.

[26] *See* Beldengreen, 528 N.Y.S.2d at 747-48; Grappo v. Alitalia Linee Aeree Italiane, S.p.A, 56 F.3d 427, 431-32 (2d Cir. 1995) (applying New York law); Olympic Junior, Inc. v. David Crystal Inc., 463 F.2d 1141, 1144-45 (3d Cir. 1972) (same).

4) This oddity aside, the arguments for and against NYA § 1-206 are much the same as those for and against statutes of frauds generally. The effect of a statute of frauds is to preclude an aggrieved party to an otherwise valid oral contract from enforcing the contract. A statute of frauds can operate to prevent fraudulent claims that a contract was established when none was in truth established. But equally it can operate to encourage fraudulent denials that a contract was established when one was in truth established.

The modern trend is away from statutes of frauds. If an alleged contract is not subject to a statute of frauds, it is left to the factfinder to determine whether a contract was established, and the factfinder is not constrained in that determination by any *per se* evidentiary requirement. A claimant is free to try to establish that an oral contract was formed, but the factfinder is entitled to be skeptical that there was a genuine meeting of the minds if the situation is one in which reasonable people would have reduced their agreement to writing.

An instance of the trend away from statutes of frauds is the repeal of any statute of frauds for a contract for sale of securities. That repeal was effected by the 1994 revision to the Official Text of Article 8 of the UCC, which was enacted by New York in 1997.[27] Another instance of the trend is the special treatment given to qualified financial contracts by the 1994 amendments to GOL § 5-701 and NYA § 1-206(3), the scope of which was expanded as recently as 2002. While not quite abolishing the applicability of statutes of frauds to qualified financial contracts, these provisions narrow their applicability nearly to the vanishing point.

In the international arena, the trend away from statutes of frauds is particularly evident. For instance, the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), to which the United States is party and which came into force in 1988, contains no statute of frauds.[28] Similarly, the UNIDROIT Principles of International Commercial Contracts, finalized in 1994 (which are not intended for adoption by any country and not legally binding, but rather are a sort of international equivalent of the Restatements of the Law produced by The American Law Institute), provides that no writing is necessary in order for a contract to be enforceable. [29]

Finally, the explosive growth of electronic commerce contributes to the trend by blurring--indeed transcending--the distinction between a written and an oral contract. Electronically-formed contracts have been validated by a variety of federal and state laws, including the federal Electronic Signatures in Global and National Commerce Act,[30] New York's Electronic Signa-

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[27] *See* NYA § 8-113 (2002).

[28] United Nations Convention on Contracts for the International Sale of Goods, art. 11, Apr. 11, 1980, S. TREATY DOC No. 98-9, 1489 U.N.T.S. 3.

[29] UNIDROIT Principles of International Commercial Contracts Art. 1.2, May 1994 *available at* http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf (updated March 3, 2009).

[30] 15 U.S.C. § 7001 *et seq.* (2006).

tures and Records Act[31] and the Uniform Electronic Transactions Act, which has been enacted by 47 states, the District of Columbia and the U.S. Virgin Islands.[32]

It is true that established statutes of frauds have not invariably been scuttled when reviewed by thoughtful drafters. A prominent example is the revision of UCC Article 2, pertaining to sales of goods, promulgated in 2003 by NCCUSL and ALI. It retains a statute of frauds, although it raises the threshold for applicability from $500 to $5,000 and accepts electronic records as an equivalent of a writing.[33] This exception is the proverbial one that tends to prove the rule, however, as during the 13-year revision process the drafters changed their minds at least twice as to the desirability of continued applicability of a statute of frauds to contracts for the sale of goods. The study group of NCCUSL's Permanent Editorial Board concerned with revision of Article 2 concluded as follows:

> Despite its ancient lineage, there is no persuasive evidence either that the statute of frauds has prevented fraud in the proof of the making of a contract or that its presence has channeled behavior toward more reliable forms of record keeping…. England repealed the statue of frauds for sales in 1953. Since [then] there has been little discussion and no reports about the impact, if any. In short, the statute of frauds has apparently sunk in England without an adverse trace.[34]

5) Indiana and California appear to be the only two states that have adopted RA1 to date and that have retained section 1-206.[35]

Accordingly, the Committee recommends that New York should not retain the rule set forth in NYA § 1-206 when it enacts RA 1 by recodifying it elsewhere in the New York statutes. Rather, NYA § 1-206 should simply be repealed.

D. "Good Faith."

RA § 1-304 provides, like NYA § 1-203, that "[e]very contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforce-

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[31] N.Y. STATE TECH. LAW §§ 101-109 (McKinney 2003).

[32] *See* National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Electronic Transactions Act*, available at http://www.nccusl.org/Update/uniformact-factsheets/uniformacts-fs-ueta.asp (last visited June 18, 2009).

[33] *See* National Conference of Commissioners on Uniform State Laws, *Amendments To Uniform Commercial Code Article 2 – Sales, Section 2-201* (Annual Meeting Draft 2002) *available at* http://www.law.upenn.edu/bll/archives/ulc/ucc2/annual2002.htm.

[34] -PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, STUDY REPORT ON ARTICLE 2 50-51 (1990).

[35] Indiana has amended certain sections of its version of Article 1 with provisions from RA 1. In the process, it retained FUA § 1-206. *See* IND. CODE 26-1-1-206 (West 2010). California has enacted RA 1 without including the FUA § 1-206 Statute of Frauds in it; however, the provisions in FUA § 1-206 were recodified in section 1624.5 of the California Civil Code and apply to transactions that are not governed by the U.C.C. *See* Cal. Civ. Code § 1624.5 (West 2009).

ment." RA § 1-201(b)(20) redefines "good faith" to include not only "honesty in fact," which is the same subjective standard currently contained in NYA § 1-201(19), but also the objective test of "observance of reasonable commercial standards of fair dealing." The Committee recommends against this proposed change.

The only justification given in the official comment for the proposed change is that all revised UCC Articles other than Articles 5, 6 and 7 have already incorporated the objective standard as part of the definition of good faith applicable to those Articles, and the new broader definition by its terms "is subject to the applicability of the narrower definition [i.e., the subjective standard] in revised Article 5." According to the official comment, "Given this near unanimity [that is, in all Articles except 6 and 7], it is appropriate to move the broader definition of 'good faith' to Article 1." Thus, the official comment appears to regard the proposed change as a technical, rather than substantive, change in law that, in effect, shifts the burden for legislatures dealing with revisions to particular Articles from affirmatively incorporating the objective standard to affirmatively opting out of it, as to each Article.

That stated justification for the change does not apply to New York law. There is a well-developed body of New York case law on what good faith means under NYA 1 that is currently applicable to NYA § 1-208 (Option to Accelerate at Will), which would be re-enacted as RA § 1-309, and to Articles 3 and 4. This law would be disturbed by the adoption of the objective standard contained in RA § 1-201(b)(20). This change undoubtedly could affect the way business is conducted under these UCC provisions and on the manner in which issues of "good faith" are litigated, the frequency of such litigation and the expense of such litigation. It might also create uncertainty as to whether the parties could contractually eliminate the objective standard.[36]

The Committee believes that adoption of such a significant substantive change in several important areas of New York law in the guise of a technical amendment is inappropriate, and that the effects of such a change have neither been adequately explored nor justified on any policy grounds. In any case, under current law the parties remain free to supplement the subjective standard of good faith by contractual agreement or by the selection of the governing law of another state that has adopted RA § 1-201(b)(20).

RA 1's change in the definition of "good faith" would most directly affect New York's unique version of Articles 3 and 4 of the UCC but, except as discussed below, not the versions of Articles 3 and 4 in effect in the 49 other states.[37] Every state except New York has adopted, in its version of Articles 3 and 4, a definition of good faith that parallels RA § 1-201(b)(20). In New York, however, adoption of RA § 1-201(b)(20) would change the meaning of good faith in New York's Articles 3 and 4, both of which rely on NYA 1's definition of "good faith" because

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[36] RA § 1-302(b) (2008) does not permit the duty of good faith to be disclaimed although the parties may determine the standards by which the duty is to be measured if those standards are not manifestly unreasonable.

[37] Keith A. Rowley, Articles 3 & 4 (2002), available at http://www.law.unlv.edu/faculty/rowley/articles-3_&4_ (2002). htm (last visited June 10, 2009). Forty-nine states have adopted the 1990 revisions of Articles 3 and 4 and six states the 2002 revisions. As of March 1, 2010, Arkansas, Indiana, Kentucky, Minnesota, Nevada, New Mexico, Oklahoma, South Carolina, and Texas have enacted that 2002 Amendments. *See* National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Amendments to Articles 3 and 4 of the Uniform Commercial Code, available at* http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucca3.asp.

they lack their own definitions, from a subjective to an objective standard.[38] Many of the Article 3[39] and Article 4[40] cases decided under New York law involving the standard of good faith have relied on the subjective definition of the good faith standard in NYA 1. The Committee found no cases that applied an objective standard of good faith.

The Committee believes that any revisions to Articles 3 and 4 that New York may hereafter adopt could have significant effects on New York's highly developed banking and finance industry, as well as on customers of that industry, and that both industry representatives and consumer advocates are entitled to fully explore those potential effects. Any changes to those Articles ultimately may also represent a delicate compromise of interests and concerns between the financial industry and consumer advocates, and any change of the definition of good faith applicable to those Articles could well be part of a compromise. Piecemeal change in Articles 3 and 4, through the adoption of RA § 1-201(b)(20)'s objective definition of good faith, could be perceived as upsetting the process of compromise and thus ultimately might impede the adoption of RA 1, as well as efforts to update Articles 3 and 4, in New York.

Similarly, and unnoted by the official comment to RA § 1-201(b)(20), the standard of good faith in the enforcement of an "at will" provision in a contract governed by the UCC would be changed. NYA § 1-208 provides that the party that accelerates "payment or performance" under a contractual term providing for such acceleration may only do so when that party "in *good faith* believes that the prospect of payment or performance is impaired" (emphasis added). With minor language changes, RA § 1-309 continues the same concept. But a change in the definition of "good faith" would change the standard to which the accelerating party is held.

It is also likely the proposed change would affect Article 7. The official comment's statement that Article 7 has no definition of good faith is not quite correct; section 7-102(4) incorporates the general definition in Article 1.[41] The duty of good faith is expressly referred to in nine separate provisions of Article 7; sections 7-206, 404, 504(2)(c) and 601(2) define the rights of a bailee by reference to its good faith and sections 7-210(5), 301(1), 308(4), 501(4) and 508 define the rights of purchasers, document holders and collecting banks by reference to good faith. Only one of these provisions, section 7-404, also requires "observance of reasonable commercial standards" and, therefore, would not be affected by RA § 1-201(b)(20), but the

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[38] NYA § 3-302, definitional cross references; NYA § 4-103, cmt. 4.

[39] *See* Hartford Accident & Indem. Co. v. Am. Express Co., 542 N.E.2d 1090 (N.Y. 1989); First Int. Bank of Isr. v. Blankstein & Son, 452 N.E.2d 1216 (N.Y. 1983*)*; Chem. Bank of Rochester v. Haskell, 411 N.E.2d 1339, 1341 (N.Y. 1980); DH Cattle Holdings Co. v. Smith, 607 N.Y.S.2d 227, 232-33 (1st Dep't 1994); Bank of Babylon v. Zaffuto Constr. Co., 549 N.Y.S.2d 737, 737 (2d Dep't 1990); Adamar of New Jersey, Inc. v. Chase Lincoln First Bank, N. A., 537 N.Y.S.2d 1009, 1014 (Sup. Ct. 1989); Chase Manhattan Bank, N. A. v. Finger Lakes Motors, Inc., 423 N.Y.S.2d 128, 131 (Sup. Ct. 1979).

[40] *See* Davis Auction House, Inc., v. Ontario Nat'l Bank, 609 N.Y.S.2d 707 (4th Dep't 1994); Broadway Nat'l Bank v. Barton-Russell Corp., 585 N.Y.S.2d 993, 945 (Sup. Ct. 1992).

[41] *Cf.* Shimamoto v. S&F Warehouse, Inc.,783 N.E.2d 484, 491 (N.Y. 2002) (Kaye, J., dissenting). Judge Kaye noted in passing that Article 1 "presumes a general obligation of good faith" when she discussed another issue under Article 7.

meaning of the other provisions would be changed. Thus, it appears that RA §1-201(b)(20) would effectively amend Article 7.

Beyond Articles 3, 4 and 7 and NYA § 1-208 , some commentators have made the argument that the changed definition of good faith in RA 1 affects other articles of the UCC, perhaps unintentionally, more significantly than is commonly believed. According to one group of authors,

> [w]hile the recent revisions to Articles 3, 4, 4A, 8 and 9 already enhanced the definition of "good faith" in those articles in this manner [by adding an objective standard], only the change to Article 8 expressly made that enhancement applicable to the general duty of good faith imposed by Article 1 (in connection with Article 8 transactions). The revisions to Article 9 attempted to do this by comment, but technically the definition there as well as in Article[s] 3, 4, and 4A applies only to the phrase "good faith" when used in the text of that article. Thus, a strict reading of the Code as currently enacted would indicate that the standard of mere honesty in fact applies to most contractual and legal duties arising in transactions governed by Articles 3, 4, 4A and 9. Not until [Revised] Article 1 is enacted will the higher standard of commercial reasonableness generally apply.[42]

In other words, the adoption of RA 1's objective standard of good faith might be held to cause all aspects of transactions under all articles of the UCC (except Article 5) to be governed by that standard, rather than only when a specific provision in those articles explicitly invokes good faith. Again, the consequences of such an unintended change have not been explored or justified.

Indeed, Professor Margaret Moses believes that this argument could equally well be made with respect to Article 5. She points out that the definition section of Article 5 starts with the phrase, "In this article" and that the phrase "good faith" is used only once in Article 5 (in Section 5-109(a)).[43] Thus, in her view, a valid argument could be made that RA 1's definition of "good faith" would apply in all aspects of Article 5 transactions other than as expressly provided in Section 5-109(a).[44]

Furthermore, the Committee is concerned that the objective standard of good faith in RA § 1-201(b)(20) might apply in an unintended, and possibly undesirable, way to non-merchants in transactions governed by Articles 2 or 2A. Professor Keith Rowley illustrates this concern with the following hypothetical:

> Suppose I sign a contract to purchase a home spa from Sears and that I further agree to make monthly payments for a fixed term, to maintain the spa for the du-

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[42] Stephen L. Sepinuck, Robyn L. Meadows, and Russell A. Hakes, *The Uniform Commercial Code Survey: Introduction*, 57 BUS. LAW. 1667, 1667-68 (2002).

[43] Margaret L. Moses, *The New Definition of Good Faith in Revised Article 1*, 35 UCC L.J. 47, 54 (2002).

[44] *Id.* at 54-55. In the Committee's view, this possibility is not negated by RA § 1-304's use of the phrase "except as otherwise provided in Article 5."

> ration of the payment period, and to promptly notify Sears of any non-routine maintenance needs that arise for the duration of the express warranty that is part of the sales agreement. Under Revised Article 1, not only must Sears (the merchant seller) observe reasonable commercial standards of fair dealing, so must I (the non-merchant buyer) – even though I may have no reason to know what constitutes "reasonable commercial standards of fair dealing" in the sale and servicing of home spas. If reasonable commercial standards of fair dealing in the performance of a contract for the sale and servicing of a home spa require that I inspect the home spa every few days, and I fail to inspect the spa for two weeks because I am on vacation, when I return home and find the spa not working as warranted, am I breaching my duty of good faith by insisting that Sears make good on its warranty? Revised Article 1's reasonable-person-with-knowledge-of-the-trade standard suggests I am in breach.[45]

The Committee believes that, for the reasons stated herein, New York should not adopt the objective standard of good faith contained in RA § 1-201(b)(20).[46]

E. Conforming Changes to Other New York State Statutes.

Various existing New York State statutes refer to definitions or other provisions in NYA 1. If RA 1 is enacted in New York, these references require updating to refer to the corresponding provisions of RA 1 as enacted. A list of these existing statutory provisions (with proposed revisions) is included at Exhibit B to this Report.

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[45] Rowley, *supra* note 10, at 45. The Official Comments to RA § 1-304 make clear that the "obligation of good faith in [a contract's] performance and enforcement" does not create a "separate duty of fairness and reasonableness which can be independently breached." There must be a pre-existing contractual obligation to which § 1-304 can be applied. But Professor Rowley's hypothetical does pre-suppose such a pre-existing contractual obligation.

[46] Eleven of the states that have enacted RA 1 did not adopt the objective standard contained in RA § 1-201(b)(20). *Id*. at 14-15.

F. Committee Recommendation.

In the Committee's view, RA 1 is in most respects an improvement on existing NYA 1. RA 1 integrates Article 1 with the recent revisions to other articles of the UCC. RA 1 makes explicit that Article 1 applies only to the extent that another article of the UCC also applies and that Article 1 is not a general statement of law to be applied unthinkingly to all transactions. It is now clear that courts will need to consider how to apply Article 1's provisions where transactions have mixed UCC and non-UCC related components. In another beneficial change, "course of performance" has now been added to "course of dealing" and "usage of trade" in RA 1-303 as one of the tools to be used in the interpretation of UCC transactions generally. Previously, "course of performance" applied only to transactions governed by Articles 2 (sales) or 2A (leasing). The Committee wishes to commend NCCUSL and ALI, the sponsors of the UCC, and the drafting committee that prepared RA 1 under the auspices of those organizations, for their work product, which continues the tradition of UCC craftsmanship.

Based on the foregoing, the Committee recommends enactment of RA 1 with one major change. In the Committee's view, the existing definition of "good faith" contained in NYA § 1-201(19) should be retained without alteration to include the objective component of RA § 1-201(b)(20). In addition, RA § 1-308 needs to be modified in order to preserve existing NY law on accord and satisfaction. The necessary modifications are described in Appendix A where it discusses RA § 1-308 and NYA § 1-207.

The Committee also recommends that RA 1 be enacted with the few additional minor nonuniform revisions recommended in the section-by-section analysis of this Report contained in Appendix A.

EXHIBIT A

COMPARISON OF REVISED ARTICLE 1 TO CURRENT NEW YORK ARTICLE 1

Revised Uniform Article 1 ("RA")	**Corresponding Provision of Current New York Article 1 ("NYA")**	**Commentary**
ARTICLE 1 - GENERAL PROVISIONS	ARTICLE 1 - GENERAL PROVISIONS	
PART 1 GENERAL PROVISIONS	PART 1 SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT	
SECTION 1-101. SHORT TITLES. (a) This [Act] may be cited as the Uniform Commercial Code. (b) This article may be cited as Uniform Commercial Code – General Provisions.	Section 1-101. Short Title. This Act shall be known and may be cited as Uniform Commercial Code.	*Changes from former New York law:* Now allows for short title for Article 1 as well.

Revised Uniform Article 1 ("RA")	Corresponding Provision of Current New York Article 1 ("NYA")	Commentary
SECTION 1-102. SCOPE OF ARTICLE. This article applies to a transaction to the extent that it is governed by another article of [the Uniform Commercial Code].		*Changes from former New York law:* New section clearly provides that Article 1 applies to a transaction only where another UCC article applies.
SECTION 1-103. CONSTRUCTION OF [UNIFORM COMMERCIAL CODE] TO PROMOTE ITS PURPOSES AND POLICIES; APPLICABILITY OF SUPPLEMENTAL PRINCIPLES OF LAW. (a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.	Section 1-102. Purposes; Rules of Construction; Variation by Agreement. Subsections 1-2. (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies. (2) Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions.	*Changes from former New York law:* NYA 1-102(1)-(2) with very minor wording changes. NYA 1-102(3)-(4) are now part of RA 1-302, and NYA 1-102(5) is now RA 1-106.
(b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of	Section 1-103. Supplementary General Principles of Law	*Changes from former New York law:* NYA 1-103 with

Revised Uniform Article 1 ("RA")	Corresponding Provision of Current New York Article 1 ("NYA")	Commentary
law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.	Applicable. Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.	very minor wording changes.
SECTION 1-104. CONSTRUCTION AGAINST IMPLIED REPEAL. [The Uniform Commercial Code] being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.	Section 1-104. Construction Against Implicit Repeal. This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.	*Changes from former New York law:* None.

Revised Uniform Article 1 ("RA")	Corresponding Provision of Current New York Article 1 ("NYA")	Commentary
SECTION 1-105. SEVERABILITY. If any provision or clause of [the Uniform Commercial Code] or its application to any person or circumstance is held invalid, the 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 severable.	Section 1-108. Severability. If any provision or clause of this Act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.	*Changes from former New York law:* NYA 1-108. NYA 1-105 has been replaced by RA 1-301.

Revised Uniform Article 1 ("RA")	Corresponding Provision of Current New York Article 1 ("NYA")	Commentary
SECTION 1-106. USE OF SINGULAR AND PLURAL; GENDER. In [the Uniform Commercial Code], unless the statutory 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.	Section 1-102. Purposes; Rules of Construction; Variation by Agreement. Subsection 5. (5) In this Act unless the context otherwise requires (a) words in the singular number include the plural, and in the plural include the singular; (b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.	*Changes from former New York law:* NYA 1-102(5) with minor wording changes. NYA 1-106 is now RA 1-305.
SECTION 1-107. SECTION CAPTIONS. Section captions are part of [the Uniform Commercial Code].	Section 1-109. Section Captions and Subsection Headings. Section captions are parts of this Act. The subsection headings in the article on secured transactions are not parts of this Act for purposes of construction.	*Changes from former New York law:* NYA 1-109. NYA 1-107 is now RA 1-306 and has been modified as described below in the discussion of RA 1-306.
SECTION 1-108. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, and supersedes the federal		*Changes from former New York law:* This new section states that the UCC modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act ("E-Sign") with certain exceptions. The language of this section enables the UCC to fit within a statutory exception to E-Sign that permits the UCC to specify procedures or requirements for the use or accep-

Revised Uniform Article 1 ("RA")	Corresponding Provision of Current New York Article 1 ("NYA")	Commentary
Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001, et. seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 103(b)).		tance of electronic records that supplant provisions of E-Sign.
PART 2 GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION	PART 2 GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION	
SECTION 1-201. GENERAL DEFINITIONS. (a) Unless the 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:	Section 1-201. General Definitions. Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:	*Changes from former New York law:* One of the most significant changes to Article 1 is the difference between the chapeaux to NYA 1-201 and its replacement, RA 1-201(a). As the opening sentence of the Comment to RA 1-201 says, "In order to make it clear that all definitions in the Uniform Commercial Code (not just those appearing in Article 1, as stated in NYA 1-201, but also those appearing in other Articles) do not apply if the context otherwise requires, a new subsection (a) to that effect has been added, . . ." This insistence that the drafters of other Articles of the UCC might be subject to human fallibility may be heresy, but nonetheless, the examples given in the comment to support its necessity are compelling.
(1) "Action", in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity,	(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any	*Changes from former New York law:* "Action". RA 1 carries forward the language of NYA 1.

Revised Uniform Article 1 ("RA")	Corresponding Provision of Current New York Article 1 ("NYA")	Commentary
and any other proceeding in which rights are determined.	other proceedings in which rights are determined.	
(2) "Aggrieved party" means a party entitled to pursue a remedy.	(2) "Aggrieved party" means a party entitled to resort to a remedy.	*Changes from former New York law:* "Aggrieved party". NYA 1 speaks of "a party entitled to resort to a remedy". RA 1 changes "resort to" to "pursue". The Official Comment to RA 1-201 states there is no change to this definition. There is obviously a change in language, but there does not appear to be a change in meaning.
(3) "Agreement", as distinguished from "contract", 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 1-303.	(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). (Compare "Contract".)	*Changes from former New York law:* "Agreement". RA 1 substantially modifies the form of this definition but not the substance. NYA 1 differs from FUA 1 by failing to include a cross-reference to UCC Section 2A-207. RA 1 eliminates all the cross references except the final reference to Section 1-303. It also rewords the two sentences and the statement "Compare Contract" found in NYA 1, and it combines them into one sentence. NYA 1 includes as sources from which to determine the agreement of the parties in fact "implication from other circumstances including course of dealing". RA 1 states this same idea by saying "inferred from other circumstances, including course of performance" with "course of dealing" demoted to third place in the list of circumstances. No substantive change in meaning appears to have been made.
(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.	(4) "Bank" means any person engaged in the business of banking.	*Changes from former New York law:* "Bank". RA 1 adds "and includes a savings bank, savings and loan association, credit union , and trust company" to "a person engaged in the business of banking" which is the language carried forward from NYA 1. This change makes this definition parallel to that found in Article 4A-105 (Not Article 4A-104 as the Official Comment states). No substantive change in meaning appears to have been made.

Revised Uniform Article 1 ("RA")	Corresponding Provision of Current New York Article 1 ("NYA")	Commentary
(5) "Bearer" means a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank.	(5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.	*Changes from former New York law:* "Bearer". RA 1 carries forward the language of NYA 1.
(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods.	(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.	*Changes from former New York law:* "Bill of lading". RA 1 carries forward the language found in the first sentence of NYA 1, but strikes the reference to "Airbill" and the next sentence, which defines "Airbill".
(7) "Branch" includes a separately incorporated foreign branch of a bank.	(7) "Branch" includes a separately incorporated foreign branch of a bank.	*Changes from former New York law:* "Branch". RA 1 carries forward the exact language of NYA 1.
(8) "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 nonexistence.	(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.	*Changes from former New York law:* "Burden of Establishing". RA 1 changes the NYA 1's phrase "triers of fact" to "trier of fact". The singular has always included the plural and vice versa if the context requires, so this change in expression cannot have a change in meaning.

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(9) "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 oil, gas, or other minerals 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 preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business. "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.	(9) "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 oil, gas, or other minerals 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 under article 2 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.	*Changes from former New York law:* "Buyer in ordinary course of business". RA 1 makes "stylistic" changes in NYA 1's definition. The change is to invert the phrase ordering in the last sentence, which cannot have a substantive change in meaning.
(10) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following: (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of	(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.	*Changes from former New York law:* "Conspicuous". Substantially reworded in RA 1. The order of the ideas is changed, all references to telegrams have been dropped, and further examples of conspicuous terms have been added. These include "font" and "set off from surrounding text of the same size by symbols or other marks that call attention to the language". The most striking change is in the Official Comment which states that "The statutory language should not be construed to permit a result that is inconsistent with that test [whether attention can reasonably be expected to be called to it]". This comment creates some doubt as to whether the statutory examples of conspicuousness are in fact safe harbors, or at best there is a presumption that terms conforming to the ex-

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the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.		amples listed in the statute are conspicuous.
(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes		*Changes from former New York law:* "Consumer". NYA 1 had no definition of consumer. RA 1 draws its definition from UCC Section 9-102(25) and is substantively equivalent to that definition.
(12) "Contract", as distinguished from "agreement", means the total legal obligation that results from the parties' agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.	(11) "Contract" means the total legal obligation which results from the parties` agreement as affected by this Act and any other applicable rules of law. (Compare "Agreement".)	*Changes from former New York law:* "Contract". RA 1 rewords this definition with no intent to change its substance. The closest to a substantive change is the substitution in RA 1 of "any other applicable laws" for NYA 1's "any other applicable rules of law" and the change to the thought which introduces this language from "agreement affected by this Act and . . ." to "as supplemented by".
(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.	(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.	*Changes from former New York law:* "Creditor". RA 1 carries forward the exact language of NYA 1.
(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.	(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.	*Changes from former New York law:* "Defendant". RA 1 changes NYA 1's "cross-action" to "cross-claim" and adds a "third-party claim" to the types of actions in which a person could be in the position of a defendant.
(15) "Delivery", with respect to an instrument, document of title, or chattel paper, means voluntary transfer of pos-	(14) "Delivery" with respect to instruments, documents of title, chattel paper or certificated securities means vol-	*Changes from former New York law:* "Delivery". RA 1 changes the listed types of things from plural to singular,

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session.	untary transfer of possession.	which cannot be a change in substance.
(16) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which 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 document and the goods it covers. To be a document of title, a document must purport 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.	(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which 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 document and the goods it covers. To be a document of title a document must purport 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.	*Changes from former New York law:* "Document of title". RA 1 carries forward the exact language of NYA 1.
(17) "Fault" means a default, breach, or wrongful act or omission.	(16) "Fault" means wrongful act, omission or breach.	*Changes from former New York law:* "Fault". RA 1's definition parallels NYA 1's definition, but adds "default" to the list of events constituting fault.
(18) "Fungible goods" means: (A) goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or (B) goods that by agreement are treated as equivalent.	(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.	*Changes from former New York law:* "Fungible Goods". NYA 1 included "securities" within its definition of "Fungible". RA 1 limits the application of the definition to goods. RA 1 makes stylistic changes, but otherwise leaves the definition with the same meaning when applied to goods. As official comment 18 to RA § 1-201 notes, "[r]eferences to securities have been deleted because Article 8 no longer uses the term 'fungible' to describe securities."
(19) "Genuine" means free of forgery or counterfeiting.	(18) "Genuine" means free of forgery or counterfeiting.	*Changes from former New York law:* "Genuine". RA 1 carries forward the exact language of NYA 1.
(20) "Good faith," except as otherwise provided in Arti-	(19) "Good faith" means honesty in fact in the conduct or	*Changes from former New York law:* "Good Faith". RA 1

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cle 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.	transaction concerned.	changes this definition from the subjective definition in NYA 1 to an objective definition by adding to the existing "honesty in fact" the words "the observance of reasonable commercial standards of fair dealing". See more detailed discussion at Part D in body of text.
(21) "Holder" means: (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or (B) the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.	(20) "Holder" means a person who is in possession of a document of title or an instrument or an investment certificated security drawn, issued or indorsed to him or to his order or to bearer or in blank.	*Changes from former New York law:* "Holder". RA 1 reorganizes this definition for clarity, but there is no substantive change.
(22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.	(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.	*Changes from former New York law:* "Insolvency proceeding". Other than changing the defined term from "Insolvency proceedings" to "Insolvency proceeding", this definition itself carries forward the exact language of NYA 1.
(23) "Insolvent" means: (A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute; (B) being unable to pay debts as they become due;	(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.	*Changes from former New York law:* "Insolvent". RA 1 rewrites this definition with only one substantive change. It includes an element of insolvency from NYA 1,"having generally ceased to pay debts in the ordinary course of business" but qualifies that element with the phrase "other than as a result of bona fide dispute".

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or (C) being insolvent within the meaning of federal bankruptcy law.		
(24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.	(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency except that it does not include rare or unusual coins used for numismatic purposes. Such rare or unusual coins shall be considered goods; provided, however, that nothing in this subsection shall be deemed to impair or alter the obligation of an insurer to an insured under a contract of insurance heretofore of hereafter issued or delivered in this state covering loss of or damage to property.	*Changes from former New York law:* "Money". NYA 1's definition of money is substantially non-uniform. FUA 1's definition uses the same opening phrase as NYA's definition uses, but after the word "government," there appears a second phrase "and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations". That second phrase appears in RA 1. What is obscure in the New York definition is why the second phrase was dropped from New York's definition. Nor is it clear what problem the proviso solves. The purpose of New York's "except" language becomes clear when one considers granting a security interest in a coin collection. So long as the contents of the collection consist of "money" a secured party to be perfected must take possession of the collection. Once the coin collection no longer consists of "money", then a secured party can perfect its security interest in the collection by filing. Note, however, that the New York language exempts only coins from the meaning of money. Paper money, no matter how rare or valuable to "coin" collectors, does not appear to be included in this definition. RA 1's definition picks up some of the elements of New York's definition, but still varies substantially from that definition. In RA 1, the word "currently" separates money from specie that has only numismatic value. In

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		drawing the line in this fashion RA 1 provides an all-but bright line test. On December 31, 2001, lira notes were money. On January 1, 2002, with the introduction the euro, those lira notes may have ceased to be money as their use after that date as currency was simply by an act of grace. At the end of the 90 day transition period, those lira notes surely ceased to be money, as they could no longer be used as a medium of exchange. These notes today have solely numismatic value. Under NYA 1, the same result would occur, provided that a court gives a generous read to the word "coins". Where the results differ is the case of a rare coin that still can be used as a medium of exchange. For example, a steel penny from 1943 can be used as a penny, but these days it is worth more than a penny to a coin collector. Under NYA 1's definition, a collection of steel pennies would be simply goods, and a security interest in the collection could be perfected by filing. Under RA 1's definition, that same collection would still be money, and a security interest in it could be perfected only by taking possession. Under NYA 1's definition, the classification of the steel penny collection would depend on whether or not it had a market value above its face value. This vagueness at the edges is more apparent than real, as the only time the differences in the definitions matter is when a creditor takes the specie as security for a loan. A creditor willing to consider the specie as security has already made the judgment that the specie has value beyond its face value. Although New York's non-uniform provision may be sensible, continuing New York's non-uniformity could cause some confusion. A creditor who lends to a New York person, taking as security a collection of numismatically valuable American specie could perfect by filing. Once that person moves to a state that has adopted RA 1, whether or not the collection stays in New York, the only means of perfecting it will be for the secured party to take possession. Thus any lender who relies on the New York law could be injured by continuing the

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		non-uniform provision.
(25) "Organization" means a person other than an individual.	(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.	*Changes from former New York law:* "Organization". RA 1's definition adopts what is now the standard National Conference of Commissioners on Uniform State Laws (NCCUSL) definition of this term. Instead of a long list of examples of types of association that are organizations, RA 1 says every person is an organization except an individual.
(26) "Party", as distinguished from "third party", means a person that has engaged in a transaction or made an agreement subject to [the Uniform Commercial Code].	(29) "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this Act.	*Changes from former New York law:* "Party". RA 1 restates NYA 1's version of this definition with the intent to clarify the expression of the same substantive idea.
(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.	(30) "Person" includes an individual or an organization (See Section 1-102).	*Changes from former New York law:* "Person". RA 1's definition adopts what is now the standard NCCUSL definition of this term.
(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.	Section 1-201 (37)(c)(iii) "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.	*Changes from former New York law:* "Present value". A reworded version of the definition that NYA 1 contained as subsection (c)(iii) to 1-201(37) "Security interest". There is no change in substance.

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(29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.	(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift or any other voluntary transaction creating an interest in property.	*Changes from former New York law:* "Purchase". RA 1 uses the identical language to NYA 1, with one exception. Where NYA 1 says the defined term "includes" the listed transactions, RA 1 says the defined term "means" the listed transaction. As both definitions end with the statement "or any other voluntary transaction creating an interest in property", the change should have no substantive effect.
(30) "Purchaser" means a person that takes by purchase.	(33) "Purchaser" means a person who takes by purchase.	*Changes from former New York law:* "Purchaser". RA 1 carries forward the language of NYA 1.
(31) "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.		*Changes from former New York law:* "Record". A new term for Article 1. This definition is derived from and closely follows the definition of record that appears in UCC Section 9-102(a)(69).
(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.	(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.	"Remedy". RA 1 carries forward the exact language of NYA 1.
(33) "Representative" means a 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.	(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.	*Changes from former New York law:* "Representative". RA 1 differs from NYA 1 in two ways. As with "Purchase", "includes" is changed to "means", but again there is a general statement describing a representative as "a person empowered to act for another". This general description precedes the list of examples, while in NYA 1, it followed that list.

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(34) "Right" includes remedy.	(36) "Rights" includes remedies.	*Changes from former New York law:* "Right". RA 1 carries forward the language of NYA 1, although the defined term is now in the singular.
(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2- 401, but a buyer may also acquire a "security interest" by complying with Article 9. Except as otherwise provided in Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor 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 under Section 2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to Section 1-203.	(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note 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 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Except as otherwise provided in Section 2-505, the right of a seller or lessor of goods under Article 2 or 2-A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor 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 2-401) is limited in effect to a reservation of a "security interest". (a) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, 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 not subject to termination by the lessee, and: (i) the original term of the lease is equal to or greater than the remaining economic life of the goods, (ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is	*Changes from former New York law:* "Security interest". RA 1 follows the first paragraph of NYA 1's definition quite closely with only minor stylistic changes. The rest of NYA 1's definition has been moved to its own section, RA 1-203.

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	bound to become the owner of the goods, (iii) 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 (iv) 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: (i) 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, (ii) 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, (iii) the lessee has an option to renew the lease or to become the owner of the goods, (iv) 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 (v) the lessee has an option to become the owner	

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	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) For purposes of this subsection (37): (i) Additional consideration is not nominal if (A) 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 (B) 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. 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; (ii) "Reasonably predictable" and "remaining economic life of the goods "are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and (iii) "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	

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	entered into.	
(36) "Send" in connection with a writing, record, or notice means: (A) to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or (B) in any other way to cause to be received any record or notice within the time it would have arrived if properly sent.	(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.	*Changes from former New York law:* "Send", RA 1 follows the substance of NYA 1, making only stylistic changes.
(37) "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing.	(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing. Without limiting the generality of the preceding sentence, any financing or other statement or security agreement filed pursuant to Part 5 of Article 9 which contains a copy, however made, of the signature of a secured party or his representative, or of a debtor or his representative, is "signed" by the secured party or the debtor, as the case may be.	*Changes from former New York law:* "Signed". RA 1 carries forward the exact language of FUA 1. NYA 1 has a non-uniform addition to this sentence concerning the signing of a financing statement. As financing statements are no longer signed, this language can safely be deleted.
(38) "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.		*Changes from former New York law:* "State". This a defined term new to Article 1. It is the standard definition for that term used by NCCUSL.

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(39) "Surety" includes a guarantor or other secondary obligor.	(40) "Surety" includes guarantor.	*Changes from former New York law:* "Surety". RA 1 adds the phrase "or other secondary obligor" to the original definition, "includes a guarantor". In other definitions RA 1 used the term "means" where NYA 1 used the term "includes". The retention here of "includes" raises the question of whether the drafters intended to narrow those definitions in which NYA 1 used "includes" and RA 1 changed the word to "means".
(40) "Term" means a portion of an agreement that relates to a particular matter.	(42) "Term" means that portion of an agreement which relates to a particular matter.	*Changes from former New York law:* "Term". RA 1 carries forward with only slight stylistic changes the definition in NYA 1.
(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.	(43) "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes a forgery.	*Changes from former New York law:* "Unauthorized signature". RA 1 carries forward NYA 1's definition of "Unauthorized", which by its terms was limited to signatures. The stylistic changes create no changes in meaning.
(42) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.	(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.	*Changes from former New York law:* "Warehouse receipt". RA 1 carries forward the exact language of NYA 1.
(43) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.	(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.	*Changes from former New York law:* "Writing". Slightly reworded with no change in meaning. As with "Surety", "Writing" retains NYA 1's use of the word "includes". The definition of "Writing" also contains a general statement, ". . . or any other intentional reduction to tangible form". In the other cases where NYA 1 had "includes" and RA 1 changed the term to "means" there were general statements that performed the work of "includes". In "Writing", there is both "includes" and a general statement. That fact raises the question of whether or

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		not the drafters intended to narrow those definitions in which "includes" was changed to "means", but which also contain general statements. The same question was asked with respect to the definition of "Surety", but in the context of "Writing", the question takes on more force.
SECTION 1-202. NOTICE; KNOWLEDGE. (a) Subject to subsection (f), a person has "notice" of a fact if the person: (1) has actual knowledge of it; (2) 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, has reason to know that it exists. (b) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning. (c) "Discover", "learn", or words of similar import refer to knowledge rather than to reason to know. (d) A person "notifies" or "gives" a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the oth-	Section 1-201 General Definitions. Subsections 25-27. (25) A person has "notice" of a fact when (a) he has actual knowledge of it; or (b) he has received a notice or notification of it; or (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists. A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Act. (26) 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 such other actually comes to know of it. A person "receives" a notice or notifi-	*Changes from former New York law:* NYA 1-201(25)-(27) with very minor wording changes, except that the reference to "forgotten" notice in RA 1-201(25) which read, "The time and circumstances under which a notice or notification may cease to be effective are not determined by this Act," has been deleted. NYA 1-202 is now RA 1-307.

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er person actually comes to know of it. (e) Subject to subsection (f), 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 held out by that person as the place for receipt of such communications. (f) 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 the 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.	cation when (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications. (27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his 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 his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.	

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SECTION 1-203. LEASE DISTINGUISHED FROM SECURITY INTEREST. (a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case. (b) A transaction in the form of a lease creates a security interest if the consideration that 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 for 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 for nominal additional consideration upon compliance with the lease agreement. (c) A transaction in the form of a lease does not cre-	Section 1-201 General Definitions Subsection 37. (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note 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 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Except as otherwise provided in Section 2-505, the right of a seller or lessor of goods under Article 2 or 2-A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor 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 2-401) is limited in effect to a reservation of a "security interest". (a) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, 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 not subject to termination by the lessee, and: (i) the original term of the lease is equal to or greater than the remaining economic life of the goods, (ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is	*Changes from former New York law:* Includes all substantive provisions of NYA 1-201(37) without the definitions of "security interest" and "present value," both of which remain part of RA 1-201. This new section spells out more clearly that the phrase "reasonably predictable," which must be construed according to the facts and circumstances at the time the transaction was entered into, relates to fair market rent, fair market value and cost of performing under the lease agreement. NYA 1-203 is now RA 1-304.

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ate a security interest merely because: (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; (3) the lessee agrees to pay, with respect to the goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs; (4) the lessee has an option to renew the lease or to become the owner of the goods; (5) 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 (6) 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. (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:	bound to become the owner of the goods, (iii) 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 (iv) 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: (i) 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, (ii) 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, (iii) the lessee has an option to renew the lease or to become the owner of the goods, (iv) 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 (v) the lessee has an option to become the owner	

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(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.	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) For purposes of this subsection (37): (i) Additional consideration is not nominal if (A) 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 (B) 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. 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; (ii) "Reasonably predictable" and "remaining economic life of the goods "are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and (iii) "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	

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	entered into.	
SECTION 1-204. VALUE. Except as otherwise provided in Articles 3, 4, [and] 5, [and 6], 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 under a preexisting contract for purchase; or (4) in return for any consideration sufficient to support a simple contract.	Section 1-201 General Definitions Subsection 44 (44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3-303, 4-208 and 4-209) a person gives "value" for rights if he acquires them (a) 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; or (b) as security for or in total or partial satisfaction of a pre-existing claim; or (c) by accepting delivery pursuant to a pre-existing contract for purchase; or (d) generally, in return for any consideration sufficient to support a simple contract.	*Changes from former New York law:* NYA 1-201(44) with additional Article 5 exceptions and the replacement of specific references to negotiable instruments and bank collections with references to Articles 3 and 4.
SECTION 1-205. REASONABLE TIME; SEASONABLENESS. (a) Whether a time for taking an action required by [the Uniform Commercial Code] is reasonable depends on the nature, purpose, and circum-	Section 1-204. Time; Reasonable Time; "Seasonably". Subsections 2-3. (2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of	*Changes from former New York law:* NYA 1-204(2)-(3) with minor wording changes. NYA 1-204(1) is now part of RA 1-302(b). NYA 1-205 is now part of RA 1-303.

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stances 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.	such action. (3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.	
SECTION 1-206. PRESUMPTIONS. Whenever [the Uniform Commercial Code] creates a "presumption" with respect to a fact, or provides that a fact is "presumed," the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.	Section 1-201 General Definitions Subsection 31 (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 non-existence.	*Changes from former New York law:* NYA 1-201(31) with minor wording changes. Note: NYA 1-206, the Statute of Frauds, has been deleted. This does away with the need for NYA 1-206(c), a non-uniform addition to FUA 1-206 that excepted qualified financial contracts covered by Section 5-701 of the New York General Obligations Law from the operation of NYA 1-206. No changes to Section 5-701 of the New York General Obligations Law will be required as a result of this change. *Note*: NYA 1-207, NYA 1-208 and NYA 1-209 are now RA 1-308, RA 1-309 and RA 1-310 respectively.

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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 otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. (b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state. (c) If one of the following provisions of [the Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified: (1) Section 2 – 402;	Section 1-105. Territorial Application of the Act; Parties` Power to Choose Applicable Law. (1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state. (2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified: Rights of creditors against sold goods -- Section 2-402. Applicability of the Article on Leases. Sections -- 2-A-105 and 2-A-106. Applicability of the Article on Bank Deposits and Collections -- Section 4-102. Governing Law in the Article on Fund Transfers -- Section 4-A-507.	*Changes from former New York law*: NYA 1-105. RA 1-301(c) is NYA 1-105(c) with minor wording changes in the lead-in language. RA 1-301(c) provides that RA 1-301's general choice-of-law rules do not apply where there is a specific choice-of-laws provision in a later UCC article.

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(2) Sections 2A-105 and 2A-106; (3) Section 4-102; (4) Section 4A-507; (5) Section 5-116; (6) [Section 6-103;] (7) Section 8-110; (8) Sections 9-301 through 9-307.	Letters of Credit -- Section 5-116. Applicability of the Article on Investment Securities -- Section 8-110. Law governing perfection, the effect of perfection or non-perfection, and the priority of security interests and agricultural liens -- Sections 9-301 through 9-307.	
SECTION 1-302. VARIATION BY AGREEMENT. (a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.	Section 1-102. Purposes; Rules of Construction; Variation by Agreement. Subsections 3-4. (3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this	*Changes from former New York law:* New section combines substantive provisions of NYA 1-102(3)-(4) and NYA 1-204(1). No substantive change.

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(b) The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever [the Uniform Commercial Code] requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement. (c) The presence in certain provisions of [the Uniform Commercial Code] of the phrase "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.	Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but 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. (4) 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 (3). Section 1-204. Time; Reasonable Time; "Seasonably". Subsection 1. (1)Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.	
SECTION 1-303. 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; and (2) the other party, with knowledge of the nature of the performance and opportunity for ob-	Section 1-205. Course of Dealing and Usage of Trade. (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. (2) 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	*Changes from former New York law:* The new section adds concept of "course of performance" from UCC Sections 2-208 and 2A-207 into framework of NYA 1-205, using the term "particular transaction" instead of listing "contracts of sale" and "lease contracts" separately. Because of this addition, RA 1 repeals both UCC sections 2-208 and 2A-207. While the waiver and modification provisions of UCC Section 2-209 (applied to "contracts of sale" in UCC Section 2-208) are incorporated by reference in sub-section (f), this cross-reference does not include the analogous provisions mentioned in UCC Section 2A-207 as applied to "lease contracts" (i.e., UCC Section 2A-208). The Committee believes that this was an inadvertent oversight by the drafting committee for RA 1 and recommends that RA § 1-303(f) be amended to add UCC Section 2A-208 so that the introductory phrase

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jection to it, accepts the performance or acquiesces in it without objection. (b) A "course of dealing" is a sequence of conduct concerning previous transactions 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 must 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 in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.	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 written trade code or similar writing the interpretation of the writing is for the court. (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement. (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade. (5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance. (6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.	reads "Subject to Sections 2-209 and 2A-208."

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(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 must be construed whenever 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 Section 2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the 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 notice that the court finds sufficient to prevent unfair surprise to the other party.		
SECTION 1-304. OBLIGATION OF GOOD FAITH. Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its perform-	Section 1-203. Obligation of Good Faith. Every contract or duty within this Act imposes an obliga-	*Changes from former New York law:* See the discussion of RA 1-304 and NYA 1-203 in the body of the report.

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ance and enforcement.	tion of good faith in its performance or enforcement.	
SECTION 1-305. REMEDIES TO BE LIBERALLY ADMINISTERED. (a) The remedies provided by [the Uniform Commercial Code] must 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 damages nor penal damages may be had except as specifically provided in [the Uniform Commercial Code] or by other rule of law. (b) Any right or obligation declared by [the Uniform Commercial Code] is enforceable by action unless the provision declaring it specifies a different and limited effect.	Section 1-106. Remedies to Be Liberally Administered. (1) 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 had except as specifically provided in this Act or by other rule of law. (2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.	*Changes from former New York law:* NYA 1-106 with very minor wording changes.
SECTION 1-306. 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.	Section 1-107. Waiver or Renunciation of Claim or Right After Breach. Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.	*Changes from former New York law:* NYA 1-107, but changing the requirement of a "written waiver or renunciation signed and delivered by the aggrieved party" to that of an "agreement of the aggrieved party in an authenticated record," emphasizing both the need for agreement and the possibility of newer technologies.
SECTION 1-307. PRIMA FACIE EVIDENCE BY	Section 1-202. Prima Facie Evidence by Third Party	*Changes from former New York law:* NYA 1-202 with

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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 is prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the 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.	very minor wording changes.
SECTION 1-308. PERFORMANCE OR ACCEPTANCE UNDER RESERVATION OF RIGHTS. (a) 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.	Section 1-207. Performance or Acceptance Under Reservation of Rights. A party who 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.	*Changes from NYA*: According to the Official Comments, NYA 1-207 as presently in effect in New York "provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment" with an express reservation of rights. Among other things, NYA 1-207 permits a party to make or accept a payment in a Code-covered transaction or by a Code-covered means without such payment or acceptance constituting an involuntary "accord and satisfaction" waiving its rights in connection with a dispute (*see*, *e.g.*, Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 66 N.Y.2d 321 (1985) (acceptance of payment); Beeland Interests, Inc. v. Armstrong, 1999 U.S. Dist. LEXIS 15744 (S.D.N.Y. 1999) (making of payment)). It allows a party to perform or accept performance (i.e., to make or accept payment) and the transaction thus to proceed without that party incurring the cost in so doing of waiving its rights in a dispute (which may have been concocted by the other party precisely to cause the party to incur that cost in order to avoid the consequences of withholding or rejecting payment) as a result of an accord and satisfaction. Subsection (a) of RA 1-308 is substantially identical to

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		present NYA 1-207. However, new subsection (b) of RA 1-308 states that "Subsection (a) does not apply to an accord and satisfaction." Thus, adoption of RA 1-308 would end NYA 1-207's authorization of express reservations of rights as a means of avoiding an accord and satisfaction that would otherwise be effected by a payment or acceptance of a payment. It does so because it contemplates that the jurisdiction adopting RA 1-308 will have also adopted Revised UCC Article 3, which provides in Revised Section 3-311 an alternative (albeit only partial) mechanism for the preservation of rights. However, New York has not yet adopted Revised UCC Article 3, and there is no assurance that it will ever do so. In light of the foregoing, the Committee believes there are two courses of action. The first would be that New York adopt RA 1-308 only after it has adopted Revised Section 3-311 or another satisfactory rights-preservation mechanism. If this approach is taken, existing NYA 1-207 should be retained. The second approach, which has the added benefit of doing less violence to the principle of uniformity, is to adopt RA 1-308(a) now. RA 1-308(b) would be adopted only when and if RA 3-311 becomes law. The Committee recommends the latter option, in which case RA 1-308(a) would be renumbered as 1-308 in the NY adoption of RA 1. Note: Nothing in this Report should be construed as an endorsement of revised Section 3-311 as a satisfactory alternative to existing NYA 1-207. .
SECTION 1-309. OPTION TO ACCELERATE AT WILL.	Section 1-208. Option to Accelerate at Will.	*Changes from former New York law:* NYA 1-208 with minor wording changes.

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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 words of similar import, means 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.	A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he 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 whom the power has been exercised.	
SECTION 1-310. SUBORDINATED OBLIGATIONS. An obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor.	Section 1-209. Subordinated obligations. An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate his 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. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it.	*Changes from former New York law:* NYA 1-209 with the two references to "payment" of an obligation changed to "performance" and the following provision removed: "This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it."

Provisions from New York Article 1 without Equivalents in Proposed Article 1		
	Section 1-206. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered (1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent. (2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 2-201) nor of securities (Section 8-113) nor to security agreements (Section 9-203). (3) Subsection one of this section does not apply to a qualified financial contract as that term is defined in paragraph two of subdivision b of section 5-701 of the general obligations law if either (a) there is, as provided in paragraph three of subdivision b of section 5-701 of such law, sufficient evidence to indicate that a contract has been made or (b) the parties thereto, by means of a prior or subsequent written contract, have agreed to be bound by the terms of such qualified financial contract from the time they reach agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.	*Changes from former New York law:* NYA 1-206, the Statute of Frauds, does not appear in RA 1. This does away with the need for NYA 1-206(c), a non-uniform addition to NYA 1-206 that excepted qualified financial contracts covered by Section 5-701 of the New York General Obligations Law from the operation of NYA 1-206. No changes to Section 5-701 of the New York General Obligations Law will be required as a result of this change. See detailed discussion at Part C in the text. *Note*: NYA 1-207, NYA 1-208 and NYA 1-209 are now RA 1-308, RA 1-309 and RA 1-310 respectively.

	Section 1-201. General Definitions. Subsection 21. (21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.	*Changes from former New York law:* "Honor". NYA 1 contains this non-uniform definition applicable only to letters of credit. It is surplusage as Article 5 now defines "honor" in Section 5-102(a)(8).
	Section 1-201. General Definitions. Subsection 41. (41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.	*Changes from former New York law:* "Telegram". NYA 1 contains this definition, which is not in RA 1. The term "telegram" is used in the definition of "conspicuous" in NYA 1-201(10) but is dropped from the definition of "conspicuous" in RA 1-201(b)(10). In addition, "telegram" had been used in section 5-104 in the pre-1995 version of Article 5. NY adopted the 1995 revision of Article 5 in 2000, which dropped the word "telegram." The only other place of which the Committee is aware in which "telegram" is used in the UCC is in official comment 2 to NYA 2-205. In light of the above, the Committee does not view the deletion of "telegram" as a substantive change.

EXHIBIT B

POTENTIAL CONFORMING CHANGES TO OTHER NEW YORK STATUTES

Provision	Current Text	Minimum Necessary Revision	Better Revision
Arts & Cultural Affairs Law § 11.01, subdivision 4.	"Creditors" means "creditor" as defined in subdivision ***twelve*** of section 1-201 of the uniform commercial code.	Replace the reference to subdivision twelve with a reference to subdivision thirteen.	Eliminate the reference to subdivision.
Banking Law § 138, subdivision 1.	Notwithstanding section ***1-105*** of the uniform commercial code, any bank or trust company or national bank located in this state which in accordance with the provisions of this chapter or otherwise applicable law shall have opened and occupied a branch office or branch offices in any foreign country shall be liable for contracts to be performed at such branch office or offices and for deposits to be repaid at such branch office or offices to no greater extent than a bank, banking corporation or other organization or association for banking purposes organized and existing under the laws of such foreign country would be liable under its laws. . . .	Replace the reference to section 1-105 with a reference to section 1-301.	None
Banking Law § 138, subdivision 2.	Notwithstanding section ***1-105*** of the uniform commercial code, if by action of any such dominant authority which is not recognized by the United States as the de jure government of the foreign territory concerned, any property situated in or any amount to be received in such foreign territory and carried as an asset of any branch office of such bank or trust company or national bank in such foreign territory is seized, destroyed or cancelled, then the liability of such bank or trust company or national bank for any deposit theretofore received and thereafter to be repaid by it, and for any contract theretofore made and thereafter to be performed by it, at any branch office in such foreign territory shall be reduced pro tanto by the proportion that the value (as shown by the books or other records of such bank or trust company	Replace the reference to section 1-105 with a reference to section 1-301.	None

Provision	Current Text	Minimum Necessary Revision	Better Revision
	or national bank at the time of such seizure, destruction or cancellation) of such assets bears to the aggregate of all the deposit and contract liabilities of the branch office or offices of such bank or trust company or national bank in such foreign territory, as shown at such time by the books or other records of such bank or trust company or national bank.		
Banking Law § 204-a, subdivision 3(a).	Notwithstanding section ***1-105*** of the uniform commercial code, any foreign banking corporation doing business in this state under a license issued by the superintendent in accordance with the provisions of this chapter shall be liable in this state for contracts to be performed at its office or offices in any foreign country, and for deposits to be repaid at such office or offices, to no greater extent than a bank, banking corporation or other organization or association for banking purposes organized and existing under the laws of such foreign country would be liable under its laws. . . .	Replace the reference to section 1-105 with a reference to section 1-301.	None
Banking Law § 204-a, subdivision 3(b).	Notwithstanding section ***1-105*** of the uniform commercial code, if by action of any such dominant authority which is not recognized by the United States as the de jure government of the foreign territory concerned, any property situated in or any amount to be received in such foreign territory and carried as an asset of any office of such foreign banking corporation in such foreign territory is seized, destroyed or cancelled, then the liability, if any, in this state of such foreign banking corporation for any deposit theretofore received and thereafter to be repaid by it, and for any contract theretofore made and thereafter to be performed by it, at any office in such foreign territory shall be reduced pro tanto by the proportion that the value (as shown by the books or other records of such foreign banking corporation, at the time of such seizure, destruction or cancellation) of such assets bears to the aggregate of all	Replace the reference to section 1-105 with a reference to section 1-301.	None

Provision	Current Text	Minimum Necessary Revision	Better Revision
	the deposit and contract liabilities of the office or offices of such foreign banking corporation in such foreign territory, as shown at such time by the books or other records of such foreign banking corporations. . . .		
Banking Law § 676	. . . The term "unauthorized signature" shall have the meaning ascribed to it by section 1-201 of the uniform commercial code. . . .	None	
General Business Law § 399-w, subdivision 7(e).	. . . An agreement that substantially complies with this article does not create a security interest in the goods as the term "security interest" is defined in subdivision ***thirty-seven*** of section 1-201 of the uniform commercial code.	Replace the reference to subdivision thirty-seven with a reference to subdivision thirty-five.	Eliminate the reference to a subdivision.
General Obligations Law § 5-1401.	See discussion in body of report.	See discussion in body of report.	
General Obligations Law § 7-101, subdivision 1-c.	This section shall apply to money deposited or advanced on contracts for the use or rental of personal property as security for performance of the contract or to be applied to payments upon such contract when due, only if (a) such contract is governed by the laws of this state as the result of a choice of law provision in such contract, in accordance with section ***1-105*** of the uniform commercial code. . . .	Replace the reference to section 1-105 with a reference to section 1-301.	None
Personal Property Law § 331, subdivision 5.	. . . An agreement that substantially complies with this article does not create a security interest in a motor vehicle as the term "security interest" is defined in subdivision ***thirty-seven*** of section 1-201 of the uniform commercial code.	Replace the reference to subdivision thirty-seven with a reference to subdivision thirty-five.	Eliminate the reference to a subdivision.
Personal Property Law § 500, subdivision 6.	. . . An agreement that complies with this article is not a retail installment sales contract, agreement or obligation as defined in this chapter or a security interest as defined in subdivision ***thirty-seven*** of section 1-201 of the uniform commercial code.	Replace the reference to subdivision thirty-seven with a reference to subdivision thirty-five.	Eliminate the reference to a subdivision.

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