

**REPORT  
ON REVISED ARTICLE 1  
OF THE  
UNIFORM COMMERCIAL CODE**

**Prepared by the  
Committee on Uniform State Laws  
of  
The Association of the Bar of the City of New York**

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# REPORT ON REVISED ARTICLE 1 OF THE UNIFORM COMMERCIAL CODE

Article 1 of the Uniform Commercial Code (the “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 and the American Law Institute, promulgated a revision of Article 1.<sup>1</sup> RA 1 has been enacted in the States of Idaho, Texas and Virginia and in the United States Virgin Islands and has been introduced in the legislatures of five other States: Alabama, Hawaii, Massachusetts, Minnesota, and West Virginia.<sup>2</sup>

This report (“this Report”) of the Committee on Uniform State Laws of the Association of the Bar of the City of New York (the “Committee”) analyzes RA 1 and compares it to existing New York law. This Report is organized in the following manner. Part A of this Report 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 dealing with choice of law. Section RA 1-301, in the words of the Official Comment, “represents a significant rethinking of choice of law issues” addressed in NYA 1-105 and FUA 1-105 and thereby merits detailed consideration here. 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section currently found at NYA 1-206 and which, because RA 1 contains no statutory analogue to NYA 1-206, would be repealed if RA 1 were enacted.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.

## **A. Section-by-Section Comparison**

RA 1, for the most part and with the exception of RA 1-301, the revision of the definition of “good faith” in RA 1-201(20), and the repeal of NYA 1-206, does not substantially change existing New York law. Accordingly, the Committee determined that the chart attached as Exhibit A to this Report (the “Comparison Chart”) would be the most user-friendly means of conveying in a concise fashion the differences between RA 1 and NYA 1.

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<sup>1</sup> 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.

<sup>2</sup> The Committee last surveyed the enactment status of RA 1 as of March 22, 2004. As of that date legislation to enact RA 1 had been introduced and was pending in five states: Alabama, Hawaii, Massachusetts, Minnesota and West Virginia. 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](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucc1.asp) (last visited March 22, 2004); ABA Sec. of Bus. Law, *Uniform State Laws Scorecard*, COMM. LAW NEWSLETTER 20 (March 2004).

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. Detailed Discussion of RA 1-301.**

In general, RA 1-301 provides for party autonomy in choosing the governing law for “a transaction to the extent that it is governed by another article of the” UCC, so long as (i) “one of the parties to a transaction is [not] a consumer,”<sup>3</sup> or (ii) a “fundamental policy of the State or country whose law would govern” under otherwise applicable conflict of law principles is not violated.<sup>4</sup> In addition, even non-consumers are restricted to choosing only the law of one of the States of the United States when the transaction is a “domestic transaction.”<sup>5</sup>

Although NYA 1-105 did not explicitly state that it covered only transactions governed by the UCC, as in contrast RA 1 does in RA 1-301(b), the drafters of RA 1 believe that this limitation was “implicit.”<sup>6</sup> The Official Comments also make it clear that RA 1-301 “does not apply to matters outside the scope of the Uniform Commercial Code, such as a services contract, a credit card agreement, or a contract for the sale of real estate.”<sup>7</sup> One possible explanation for the inclusion of this explicit statement is a concern that RA 1-301 not be the means to justify a choice of laws that would implicate the Uniform Computer Information Transaction Act (“UCITA”).<sup>8</sup> This depends, of course, on whether the courts consider “the distribution of boxes of software to be ‘transactions in goods’ thereby bringing them within the new UCC choice of

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<sup>3</sup> RA 1-301(e).

<sup>4</sup> RA 1-301(f).

<sup>5</sup> RA 1-301(c)(1). A “domestic transaction” is “a transaction other than an international transaction.” RA 1-301(a)(1). In turn, an “international transaction” is “a transaction that bears a reasonable relation to a country other than the United States.” RA 1-301(a)(2). The meaning of “reasonable relation” is discussed in the text accompanying note 27, *infra*. In effect, RA 1-301 is carrying forward, for the purpose of distinguishing international and domestic transactions, the concept of “reasonable relation” contained in NYA 1-105, which provides that parties to a transaction may only choose the law of a jurisdiction that bears a “reasonable relation” to “a transaction.” RA 1-301 does not limit party autonomy as severely as does NYA 1-105 based on this concept but some limitations do remain.

<sup>6</sup> RA 1-301 cmt. 1.

<sup>7</sup> RA 1-301 cmt. 1.

<sup>8</sup> The concern is what state A without UCITA would do when faced with a choice of law provision naming a state B where UCITA is the law. If RA 1-301 is in force in state A and the transaction is one for the sale of goods, then the choice of UCITA would be honored. If RA 1-301 does not apply, then reasonable relation would be applied and UCITA would be enforced only if there was a reasonable relation to state B.

law rule [RA 1-301].”<sup>9</sup> If the courts consider boxes of software as goods, then RA 1-301 will make application of UCITA exceptionally easy as no reasonable relationship with a jurisdiction where UCITA was enacted would have to be shown.

If the explicit limitation that RA 1-301 applies only to “a transaction to the extent that it is governed by another article of the [Uniform Commercial Code]” is given effect as absolutely as the accompanying Official Comments suggest, RA 1 may change New York law in the realm of hybrid good-sales transactions. When a transaction has involved both a sale of goods and a furnishing of services, New York courts typically have been hesitant to treat such transactions as divisible but rather have determined at the outset whether or not the transaction as a whole falls under the UCC and then applied to all aspects of the transaction either the UCC’s choice of law rule in NYA 1-105(1) or the fallback New York choice of law rules. In determining as a threshold matter what law to apply, New York courts typically determine which aspect of the transaction predominates and then consider the transaction as one.<sup>10</sup> Thus, where a transaction is deemed to be primarily a transaction for the sale of goods, New York courts will look to the UCC; however, where the sale of goods is incidental to the provision of services, the courts will look to other applicable law.<sup>11</sup>

Domestic and International Transactions. There has been some controversy concerning the restrictions on choice of law provisions in RA 1-301 with respect to domestic transactions. Several members of the American Law Institute expressed disagreement with this restriction on the grounds that it was “xenophobic” and did not represent the realities of international business transactions.<sup>12</sup> Professor Russell Weintraub has expressed the thought that subsection (c)(1), which provides that parties in a domestic transaction may select as the governing law of their agreement the law of any State without regard to the existence of a relation between the State and the transaction, should be restricted to issues of the validity of an agreement. In his view, “[t]here is no reason to restrict parties to a domestic transaction to choice of U.S. Law if the issue is one of construction—one in which parties are simply incorporating by reference terms that would have been held valid by any relevant jurisdiction if stated in detail.”<sup>13</sup>

The drafters of RA 1 have defended subsection (c)(1) on two grounds. First, they have pointed out that, once a reasonable relation is established with any foreign jurisdiction, the parties are free to choose the law of any jurisdiction, even if the chosen jurisdiction has no relation to the parties or the transaction.<sup>14</sup> Second, the drafting committee was concerned that

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<sup>9</sup> William J. Woodward, Jr., *UCITA’s Imperialism*, *THE LICENSING J.*, Mar. 2002, at 1, 6.

<sup>10</sup> See, e.g., *Perlmutter v. Beth David Hospital*, 123 N.E.2d 792 (N.Y. 1954) (finding that a transfusion of blood is not a transaction for the sale of goods); *Laing Logging v. International Paper Company*, 644 N.Y.S.2d 91, 93 (App.Div. 1996) (finding that an agreement for the provision of wood chips was a sale of goods transaction); *Sears, Roebuck & Co. v. Galloway*, 600 N.Y.S.2d 773, 775 (App.Div. 1993) (finding that the sale and installation of a boiler was predominantly a sale of goods); *Inn Between, Inc. v. Remanco Metropolitan*, 33 UCC Rep.Serv.2d 1110 (N.Y.D.C. 1997) (finding that the sale and maintenance of a restaurant computer system was a sale of goods falling under the UCC).

<sup>11</sup> See cases cited *supra* note 10.

<sup>12</sup> 2000 A.L.I. PROC. 258-59, 260 (John K. Lawrence; Houston Putnam Lowry; Thomas Woodward Houghton).

<sup>13</sup> Russell J. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS 25 Section (4<sup>th</sup> ed. Supp. 2002).

<sup>14</sup> RA 1-301 cmt. 5 (using the example of a non-consumer lease of goods involving a Mexican lessor and Louisiana lessee in which the law of Ireland governs the transaction).

there might be “overreaching” if “one of the parties with greater bargaining power chooses not a fellow state, where, of course, we have some degree of common legal heritage and some degree of Congressional power through the Commerce Clause to keep things within some moderation, but instead chooses the law of a foreign country that has fundamentally different policies.”<sup>15</sup>

Default Choice-of-Laws Rules. In the event that no choice of law is made, the default rules also are quite different between NYA 1-105 and RA 1-301. RA 1-301 provides that, in the absence of any agreement between the parties, normal conflict of laws principles would apply, with the exception that both the (i) protections of consumers contained in subsection (e) and (ii) limitations of choice of law where there is an explicit provision later in the UCC contained in subsection (g) still apply.<sup>16</sup> NYA 1-105(1) provides that, in the event that no choice of law is made, the UCC as in effect in the forum state applies “to transactions bearing an appropriate relation to” the forum state. The intent of the latter provision was to encourage the application of the UCC even if it had not been adopted by all States. The drafters of RA 1 note that, by adopting “an appropriate relation” rather than a more restrictive test, NYA 1-105(1) was “express[ing] a bias in favor of applying the forum’s law.”<sup>17</sup> This bias is no longer justifiable now domestically because the UCC “has been adopted, at least in part, in all U.S. jurisdictions” and internationally because of “comity concerns.”<sup>18</sup>

In addition, the drafters note that the courts “frequently ignored” the “appropriate relation” test; rather the courts applied their normal choice of law rules.<sup>19</sup> This observation is consistent with case law that has interpreted NYA 1-105 and the related Official Comments.<sup>20</sup>

The federal and New York State courts applying NYA 1-105 looked to Official Comment 3 and its use of the phrase “significant contacts.” “This [phrase], in and of itself, indicates legislative approval of the Restatement rule of ‘most significant relationship.’”<sup>21</sup> The New York Annotations to NYA 1-105 state that Official “Comment 3 suggests that the Code adopts the significant contacts test of *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).”<sup>22</sup> Although these cases and the New York Annotations arguably have misread Official Comment 3 by focusing solely on the phrase “significant contacts” rather than the entire comment, the fact

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<sup>15</sup> 2000 A.L.I. PROC. 258 (Neil B. Cohen).

<sup>16</sup> RA 1-301(d).

<sup>17</sup> RA 1-301 cmt. 7.

<sup>18</sup> *Id.*

<sup>19</sup> RA 1-301, cmt. entitled “Summary of changes from former law”.

<sup>20</sup> *See, e.g.*, *J & B Schoenfeld Fur Merchs., Inc. v. Kilbourne & Donohue, Inc.*, 704 F. Supp. 466, 468 (S.D.N.Y. 1989) (applying New York law in a diversity action); *Landmark Land Co. v. Sprague*, 529 F. Supp. 971, 976 (S.D.N.Y. 1981) (applying New York law as the rule of decision in a case governed by federal law); *Petrobras Comercio Internacional, S.A. v. Intershoe, Inc.*, 430 N.Y.S.2d 328, 330 (N.Y. App. Div. 1st Dep’t 1980); *Martin v. Julius Dierck Equip. Co.*, 384 N.Y.S.2d 479, 482-83 (N.Y. App. Div. 2d Dep’t 1976).

<sup>21</sup> *Martin*, 384 N.Y.S.2d at 482-83 (citations omitted).

<sup>22</sup> N.Y. U.C.C. §1-105 annotations (McKinney 2002). *Auten* represents an earlier approach to choice of laws that applied that law of the jurisdiction “which has the most significant contacts with the matter in dispute.” *Auten v. Auten*, 124 N.E.2d 99, 103 (N.Y. 1954) (quoting *Rubin v. Irving Trust Co.*, 113 N.E.2d 424, 431 (1953)). “Recent New York cases have followed the rule that a contractual provision setting forth the law applicable to the agreement in question will be followed as long as the transaction bears a reasonable relationship to the law chosen or, more precisely stated, to the jurisdiction whose law is chosen. The cases have followed this rule in spite of *Auten v. Auten*.” Michael Gruson, *Governing Law Clauses in Commercial Agreements-New York’s Approach*, 18 COLUM. J. TRANSNAT’L L. 323, 329-30 (1979).

remains that the default rule in RA 1-301 would not represent a change from how NYA 1-105 was interpreted by the New York courts and federal courts applying New York law.

Consumer Protection Provisions. Before discussing the protections granted by RA 1 to consumers, it is important to acknowledge the limited universe that is afforded these protections. A “consumer” is defined as an “individual who enters into a transaction primarily for personal, family, or household purposes.”<sup>23</sup> This definition, which is derived from UCC Section 9-102(a)(25),<sup>24</sup> excludes all entities through its use of the word “individual” and excludes all business users through the use of the phrase “personal, family, or household purposes.” No attempt is made to distinguish between large businesses involved in large transactions, which rationally are able to expend the transaction costs needed to understand and negotiate choice of law provisions, and large businesses engaged in small transactions. Nor is any distinction made with respect to small businesses, which rationally will not expend the transaction costs, and will, therefore, have no understanding of what the choice of law provision means, and may need protection from overreaching as much as individual consumers do.<sup>25</sup>

Three special protections are afforded consumers by RA 1-301. First, a choice of law agreement “is not effective unless the *transaction bears a reasonable relation* to the State or country designated.”<sup>26</sup> This is the same standard that was incorporated into NYA 1-105(1),<sup>27</sup> but that applied to all persons, nonconsumer as well as consumer.

The phrase “reasonable relation” is used twice in RA 1-301. First, to define the meaning of “international transaction” in subsection (a)(2) and then in the consumer protection provisions in subsection (e)(1). As this phrase also was used in NYA 1-105 and no indication in the Official Comments to RA 1-301 exists that any further gloss on the meaning of “reasonable relation” is intended, there should be no change in New York law on this point.

Second, RA 1-301 prevents parties from opting out of certain consumer protection laws. Specifically, RA 1-301 preserves “the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement.”<sup>28</sup>

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<sup>23</sup> RA 1-201(b)(11).

<sup>24</sup> RA 1-201 cmt. 11. Neither Section 9-102(a) nor the Official Comments thereto provide any further gloss on the meaning of “consumer.”

<sup>25</sup> William J. Woodward, Jr., *Symposium: Consumer Protection and the Uniform Commercial Code: “Sale” of Law and Forum and the Widening Gulf Between “Consumer” and “Nonconsumer” Contracts in the UCC*, 75 WASH. U. L. Q. 243, 271-72 (1997).

<sup>26</sup> RA 1-301(e)(1).

<sup>27</sup> “Except as provided hereafter in this section [referencing subsection (2) with its list of specific choice of law provisions in other articles of the UCC], 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.” NYA 1-105(1) (emphasis added). As NYA 1-105(1) used “and,” it would be possible to read NYA 1-105(1) as requiring both a reasonable relationship to New York as well as to another jurisdiction before allowing parties to choose another jurisdiction’s laws. Gruson, *supra* note 22, at 348-49. New York courts, however, have not adhered to the literal language of NYA 1-105(1) and have allowed parties to choose the law of any jurisdiction that bears a reasonable relationship to the transaction even if the forum has no relationship. *Id.* at 350.

<sup>28</sup> RA 1-301(e)(2).

In turn, there is a rule for determining which jurisdiction's consumer protection laws are pertinent. In transactions that are not sales of goods and in certain sales of goods transactions, the pertinent jurisdiction is the "State or country in which the consumer principally resides."<sup>29</sup> In sales of goods transactions where the consumer "both makes the contract and takes delivery of those goods" in a jurisdiction other than the "State or country in which the consumer principally resides," then the consumer protection laws of that other jurisdiction are the relevant ones for RA 1-301(e)(2).<sup>30</sup> The Official Comments to RA 1 describe the latter provision as intended to cover "face-to-face transactions" so that sellers who engage in such transactions are able to determine what are the relevant consumer protection laws, "without the necessity of determining the principal residence of each buyer."<sup>31</sup> The Official Comments state that the reference to the concept of making a contract is not meant to "incorporate formalistic concepts of where the last event necessary to conclude the contract took place; rather, the intent is to identify the state in which all material steps necessary to enter into the contract were taken by the consumer."<sup>32</sup> In light of this comment, transactions other than face-to-face ones might be covered as well by RA 1-301(e)(2)(B). In particular, a transaction where the buyer resides in one jurisdiction and works in another but both places the order from the work jurisdiction and takes delivery in the work jurisdiction would seem to be covered. In other words, a transaction in which a Connecticut resident who works in New York State and places an order with a New Jersey merchant for delivery in New York would appear to be subject to New York consumer protection laws.

Third, the consumer protections granted by RA 1-301(e)(2) apply even in the situation where no choice of law has been made by the parties to the transaction and normal conflict of laws principles are being applied pursuant to RA 1-301(d).<sup>33</sup> ("Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law . . . .")

The consumer protection provisions of RA 1 have been criticized both for undermining the "certainty and predictability" that the "justified expectations" of parties to a contract will be carried out<sup>34</sup> and for leaving out a choice of forum provision, which could substantially weaken the protections contained in subsection (e).<sup>35</sup>

The American Bankers Association has argued that trying to comply with the consumer protection provisions will be a "compliance nightmare" as "[f]inancial institutions with customers residing in another state will need to become experts on the consumer protection laws of the other jurisdiction."<sup>36</sup> In addition, the American Bankers Association is concerned that the sale of goods provisions in subsection (e)(2)(B) may extend to such situations as the use of a

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<sup>29</sup> RA 1-301(e)(2)(A).

<sup>30</sup> RA 1-301(e)(2)(B).

<sup>31</sup> RA 1-301 cmt. 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Memorandum on Proposed Final Draft of Revisions to UCC Article 1 from L.H. Wilson, Associate General Counsel, American Bankers Association (dated April 5, 2001) (May 3, 2001) [hereinafter Am. Bankers Ass'n May 3, 2001 Memorandum].

<sup>35</sup> Peter Linzer, *Two Cheers for UCC 1-301 5-6*, in COMM. ON U.C.C., A.B.A. SEC. OF BUS. LAW, DEREGULATORY CHOICE OF LAW: THE UPS AND DOWNS OF CHANGING THE CONTRACTUAL CHOICE OF LAW RULE IN UCC ARTICLE 1 17, 21-22 (2000).

<sup>36</sup> Am. Bankers Ass'n May 3, 2001 Memorandum, *supra* note 34.

credit card to purchase goods.<sup>37</sup> Finally, the American Bankers Association is concerned that the consumer protection provisions are inconsistent with federal law.<sup>38</sup> In light of these concerns, the American Bankers Association would like subsection (e) deleted, as well as subsection (f) on “fundamental policy,” which is discussed below.

Current New York Non-UCC Consumer Protection Provisions that Might Be Preserved by RA 1-301. RA 1-301 would work to preserve many of the state consumer protection laws consumers enjoy in New York. Exhibit B to this Report contains an indicative list of New York’s consumer protection laws that are both protective of consumers and may not be varied by agreement.<sup>39</sup> The courts will face two preliminary issues with respect to each of these laws. First, although all of these laws cover consumers, the definitions of “consumer” in these existing laws and in RA 1-301 are not always the same. Thus, if RA 1 is enacted, the courts will have to decide on a statute-by-statute basis whether these laws fall within RA 1-301’s definition of “any rule of law . . . which both is protective of consumers and may not be varied by agreement.”<sup>40</sup> Second, the courts will need to determine the “extent” to which a particular transaction that is subject to such a provision is “a transaction . . . governed by another article of the [Uniform Commercial Code.]”<sup>41</sup> Insofar as the transaction is not so governed, RA 1-301 will not apply.

Current New York UCC Consumer Provisions that Would Be Preserved by RA 1-301. The UCC itself contains a number of provisions that have been interpreted to be both “protective of consumers” and invariable “by agreement.”<sup>42</sup> For example, RA 9 and its rules for recovering the amount of a deficiency in an action arising from a “consumer transaction” preserve existing New York case law<sup>43</sup> that approaches in three different ways the failure of a secured party to comply with the provisions of Part 6 of Article 9 relating to collection, enforcement, disposition, or acceptance of collateral.<sup>44</sup> To date, no cases have been decided

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<sup>37</sup> *Id.*

<sup>38</sup> As the American Bankers Association itself notes, many of the provisions of federal banking law “have been litigated and found to preempt state consumer protection laws.” Am. Bankers Ass’n May 3, 2001 Memorandum, *supra* note 34. Why the American Bankers Association should be concerned about the conflict between RA 1 and federal banking law is, therefore, opaque. If RA 1-301 mandates the application of a state consumer protection law, that law will be preempted to the same extent as it is currently.

<sup>39</sup> Please note the list contained in Exhibit B is indicative and not exhaustive.

<sup>40</sup> RA 1-301(e)(2).

<sup>41</sup> RA 1-301(b).

<sup>42</sup> RA 1-301(e)(2).

<sup>43</sup> The New York courts have applied three different rules in cases arising under NYA 9 prior to its amendment in 2001. These cases arose under FUA 9-504 and its requirements that a secured party comply with certain procedures in disposing of collateral after default and the effect of such a disposition on the debtor’s obligations to the secured party. The first approach bars a secured party’s collection of a deficiency from a debtor when the secured party has failed to comply with its obligations under FUA 9-504. This is often called the absolute bar rule. The second approach creates “a presumption that the fair market value of the collateral equals the balance of the outstanding indebtedness, thereby extinguishing the indebtedness unless the secured party proves the contrary.” The third approach does not affect a secured party’s right to a deficiency and restricts the debtor to its remedy under FUA 9-507(1) to recover “from the secured party any loss caused by a failure to comply with the provisions of this Part,” which leaves the debtor to pursue a set-off. Memorandum to the Law Review Commission Relating to the Right of a Secured Party to Recover a Deficiency Judgment under Part 5 of Article 9 of the New York U.C.C., *reprinted in* 1983 N.Y. Laws 2317, 2321.

<sup>44</sup> NYA 9-626(a) cmt. 2.

under NYA 9-626, so these older cases should continue to be good law. As to commercial transactions, RA 9 has adopted “the rebuttable presumption rule;” for consumer transactions, NYA 9-626(a) explicitly exempts them and subsection (b) states that “[t]he court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.”

The following table lists and describes other provisions of the UCC that are invariable “by agreement” and appear to be “protective of consumers”.<sup>45</sup>

| <b>Section</b> | <b>Description of provision</b>   |
|----------------|---|
| 2-719(3)       | Limitation of consequential damages for personal injury related to consumer goods is prima facie unconscionable.  |
| 2A-106         | For consumer leases, choice of law or forum clauses are invalid, unless the law chosen is that of the state of the consumer lessee’s residence or where the goods will be kept, or the chosen forum is one that otherwise would have jurisdiction over the lessee.  |
| 2A-108(4)      | For consumer leases, if a court finds a lease (or its provisions) unconscionable, the court shall award the lessee reasonable attorney’s fees. The amount of recovery does not control in determining the amount of attorney’s fees to award.   |
| 2A-109(2)      | For consumer leases, the burden of establishing good faith (to accelerate payment or performance or require collateral or additional collateral at will or when the party deems itself “insecure”) is on the party who seeks to accelerate.   |
| 2A-503(3)      | Limitation, alteration, or exclusion of consequential damages for personal injury related to consumer goods is prima facie unconscionable.  |
| 9-207(b)(4)    | Secured parties with possession of collateral in the form of consumer goods may not use or operate the collateral, except, under 9-207(d), where the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or consignor. <i>(Nonwaivable pursuant to Section 9-602)</i>   |
| 9-614          | Requirements regarding the contents of a notification of disposition for consumer goods. <i>(Nonwaivable pursuant to Section 9-602)</i>   |
| 9-616          | In a consumer goods transaction where the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under Section 9-615 after a disposition, the secured party must send an explanation and pay the surplus or make written demand for the deficiency to the debtor or consumer obligor. The writing must conform with detailed requirements set forth in this section. <i>(Nonwaivable pursuant to Section 9-602)</i> |
| 9-620          | (e) For consumer goods, a secured party that has taken possession of collateral must dispose of the collateral pursuant to 9-610 and within the time specified in 9-620(f) if 60% of the cash price has been paid for a purchase-money security interest in consumer goods or 60% of the principal amount has been paid in a non-purchase money security  |

<sup>45</sup> RA 1-301(e)(2).

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|             | <p>interest in consumer goods.<br/> For consumer transactions, a secured party cannot accept collateral in partial satisfaction of the obligation.<br/> <i>(Nonwaivable pursuant to Section 9-602)</i></p>  |
| 9-624       | <p>Debtor may waive disposition notification under 9-611 or mandatory disposition under 9-620 only by an agreement entered into and authenticated after default.<br/> Except in a consumer-goods transaction, debtor may waive redemption right under 9-623 only by an agreement entered into and authenticated after default.<br/> <i>(Nonwaivable pursuant to Section 9-602)</i></p>  |
| 9-625(c)(2) | <p>Statutory remedies for secured party's failure to comply with Article 9 in consumer-goods transactions:<br/> If collateral is consumer goods, the debtor or secondary obligor at the time the secured party failed to comply with this part may recover an amount not less than the credit service charge plus 10% of the principal amount of the obligation or the time-price differential plus 10% of the cash price. Subject to the limitations of 9-628 (regarding secured party's knowledge that person is a debtor/obligor, the identity of debtor/obligor, and how to communicate with the debtor).<br/> <i>(Nonwaivable pursuant to Section 9-602)</i></p> |

Choice of Forum. Choice of forum is important because forcing a “consumer or small businesswoman with a valid claim” to “assert it in a distant forum or not at all” is to “effectively deprive[] [her] of that claim.”<sup>46</sup> The first draft of RA 1-301 had contained a choice of forum provision that provided substantial protection both to businesses and consumers by making the choice of forum provision ineffective if: “(ii) utilization of that forum would effectively deprive a party of the ability to bring, or defend against, an action regarding such a dispute[, or would be otherwise fundamentally unfair]; or (iii) if the transaction is a consumer transaction and the action is brought against the consumer, the judicial forum would not otherwise have jurisdiction over the consumer.”<sup>47</sup> The language in the brackets in draft subsection (d) was modified in the February 1997 draft to read “or would otherwise unfairly disadvantage that party” and subsection (d) was deleted in its entirety in the April 1997 draft.<sup>48</sup>

The Reporter for RA 1, Professor Neil Cohen, gave an explanation for the deletion of the choice of forum provisions at the American Law Institute's 2000 meeting. He first noted that choice of forum is “not a uniquely commercial issue” and then, more importantly, that the drafting committee did not feel that choice of forum could be applied separately to the non-UCC and UCC aspects of a dispute; in contrast, choice of law could be applied separately.<sup>49</sup> In other words, a lawsuit can be brought in only one jurisdiction although different bodies of law may govern different aspects of the lawsuit.<sup>50</sup>

Fundamental Policy. The meaning of “fundamental policy” in RA 1-301(f) has been the source of much discussion. Subsection (f) provides that, in both consumer and nonconsumer transactions, a choice of law provision “is not effective to the extent that

<sup>46</sup> Linzer, *supra* note 30, at 22.

<sup>47</sup> Revised Article 1 §1-301(d)(1)(ii), (iii) (Tentative Draft October 1996).

<sup>48</sup> Revised Article 1 §1-301(d)(1)(ii), (iii) (Tentative Draft February 1997).

<sup>49</sup> 2000 A.L.I. PROC. 265 (Neil Cohen).

<sup>50</sup> *Id.* But see text accompanying notes 10 and 11, *supra*, as to whether courts, as a practical matter, apply different bodies of law to different aspects of the lawsuit.

application of the law of the State or country designated would be contrary to a *fundamental policy* of the State or country whose law would govern in the absence of agreement under subsection (d).<sup>51</sup> The Official Comments attempt to narrowly define the phrase “fundamental policy.” A fundamental policy is one that is “a fundamental principle of justice” or “‘mandatory’ in that it *must* be applied in the courts of that State or country without regard to otherwise-applicable choice of law rules of that State or country and without regard to whether the designated law is otherwise offensive.”<sup>52</sup>

It is important to note that the second, mandatory type of fundamental policy does not contemplate an evaluation by the forum state of the desirability of the designated law. It seems, therefore, that provisions such as the legislation against UCITA currently being considered in New York State would not be fundamental policy under RA 1-301(f). The Official Comments provide a gloss on the meaning of “mandatory” by stating that “rules that cannot be changed by agreement under” the forum state’s law are not “for that reason alone” mandatory.<sup>53</sup> In fact, the Official Comments attempt to restrict fundamental policy to those situations in which “a mandatory choice of law rule is established by statute” by noting that it is “rare” for courts to otherwise “decline[] to follow the designated law.”<sup>54</sup>

Despite the attempt to create a narrow definition of fundamental policy, RA 1-301(f) has provoked criticism for restricting freedom of contract. The American Bankers Association, for example, criticized Revised Article 1 Draft 1-301(e), a forerunner of RA 1-301(f) that did not differ in any way except numbering, for being “an open invitation to litigation. It is an ambiguous standard. Its scope is not clear: is it limited to business-to-business transactions or does it also apply in the consumer context?”<sup>55</sup> The American Bankers Association requested that this section be deleted.<sup>56</sup>

Professor Woodward shares the concern of the American Bankers Association that the concept of fundamental policy may be ambiguous, although he locates the ambiguity in the very concept of allowing parties to choose unrelated law. Professor Woodward argues that, historically, courts, in analyzing fundamental policy, have relied “substantially on a comparison of the connection that the chosen and unchosen state have to the controversy, independently of the parties’ choice.”<sup>57</sup> If we move to a regime where parties are able to choose unrelated law, “[t]he current relatedness requirement and judicial analysis built on it will make it hard to predict what a forum court will do with a case where the chosen state has no contact with the

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<sup>51</sup> RA 1-301(f) (emphasis added).

<sup>52</sup> RA 1-301 cmt. 6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Am. Bankers Ass’n May 3, 2001 Memorandum, *supra* note 34.

<sup>56</sup> Putting aside the American Bankers Association’s objection that RA 1-301(f) is “an open invitation to litigation,” the American Bankers Association’s further complaint that the scope is not clear does not seem justified. RA 1-301(f) refers to an agreement made under subsection (c). In turn, subsection (c) refers to “an agreement by parties” and makes no distinction between business-to-business agreements and agreements in which a consumer is one of the parties. This conclusion is strengthened by subsection (e), the section dealing with consumers, which explicitly contemplates that an agreement governed by subsection (c) may have a consumer as one of its parties.

<sup>57</sup> William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU LAW REV. 697, 736 (2001).

controversy (other than the fact that it was chosen), and an unchosen state has obvious contacts with the controversy.”<sup>58</sup>

Professor Weintraub points to another conceptual confusion contained within subsection (f) that arises from conflating, in the Official Comments to RA 1, the two different meanings of “public policy” and “fundamental policy” in the Restatement (Second) of Conflict of Laws.<sup>59</sup> In the Restatement, “public policy” is used to determine whether a cause of action based on foreign law should be entertained in the forum state’s courts. “No action will be entertained on a foreign cause of action the enforcement of which is contrary to the *strong public policy* of the forum.”<sup>60</sup> As the comments state, this section of the Restatement “does not apply to situations where the forum does decide the controversy between the parties and, on the stated ground of public policy, applies its own local law ... in determining one or more of the issues involved.”<sup>61</sup>

In those cases, one turns to Section 187 of the Restatement to determine when a forum state will apply its own law or that chosen by the parties to the contract. In Section 187, the test is whether “the law of the chosen state would be contrary to the *fundamental policy* of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which ... would be the state of the applicable law in the absence of an effective choice of law by the parties.”<sup>62</sup> The Official Comments note, as Professor Woodward has pointed out, that “an important consideration” in determining whether a fundamental policy exists is the extent and type of contacts with the forum and chosen jurisdictions.<sup>63</sup> “The more closely the state of the chosen law is related to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice-of-law provision.”<sup>64</sup> The Official Comments also note that “[t]o be ‘fundamental’ within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit on a foreign cause of action under the rule of §90.”<sup>65</sup>

The differing usages of the two phrases —“public policy” and “fundamental policy”—within the Restatement and their conflation within the Official Comments to RA 1 led Professor Weintraub to be concerned that courts may become confused in applying subsection (f).<sup>66</sup> In Professor Weintraub’s view, the potential confusion is increased by the use in Official Comment 6 to RA 1-301 of the *Loucks v. Standard Oil Co. of New York*<sup>67</sup> case, which was a case brought in the New York courts to enforce rights under a Massachusetts law and therefore was a “public policy” case.<sup>68</sup>

Professor Woodward raises another issue about the citation to *Loucks*. As he points out, Massachusetts had “a strong interest in the dispute” as the accident in question had occurred in

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<sup>58</sup> *Id.*

<sup>59</sup> Weintraub, *supra* note 13, at 25.

<sup>60</sup> Restatement (Second) of Conflict of Laws § 90 (1971) (emphasis added).

<sup>61</sup> Restatement (Second) of Conflict of Laws § 90 cmt. a (1971).

<sup>62</sup> Restatement (Second) of Conflict of Laws § 187 (1971) (emphasis added).

<sup>63</sup> Restatement (Second) of Conflict of Laws § 187 cmt. g (1971).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Weintraub, *supra* note 13, at 25.

<sup>67</sup> 128 N.E.198 (N.Y. 1918).

<sup>68</sup> Weintraub, *supra* note 13, at 25.

Massachusetts.<sup>69</sup> *Loucks*, thus, did not involve deference to a jurisdiction that had no interest in the dispute, as could occur under RA 1-301.<sup>70</sup>

New York Fundamental Public Policy. Although there are many New York cases in which the fundamental public policy issue is discussed in general terms, there are not many cases in which these principles are applied to particular bodies of law. In addition, the New York cases do not explicitly make the distinction found in the Restatement (Second) of Conflicts of Law between “public policy” and “fundamental policy.” The inquiry about the nature of a particular public policy has moved from an examination of legislative intent<sup>71</sup> to a broader examination that covers New York’s “State Constitution, statutes and judicial decisions.”<sup>72</sup> Even “prevailing social and moral attitudes of the [New York State] community” must be examined to determine what constitutes New York’s public policy, even if these attitudes are different from explicit New York legislation.<sup>73</sup>

Where public policy has been used to overrule the choice of another jurisdiction’s law, it often has been in cases involving the twin grounds that a New York “fundamental public policy” has been violated and that New York has the “most ‘substantial relationship’” with the transaction.<sup>74</sup> This type of analysis is consistent with either subsection (a) or (b) of Section 187(2) of the Restatement (Second) Conflict of Laws. Subsection (a) requires that the forum state not enforce the chosen state’s law when “the chosen state has no substantial relationship to the parties or the transaction”, while subsection (b) requires that a forum state enforce “the law of the chosen state” except when such enforcement would be “contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which ...would be the state of the applicable law in the absence of an effective choice of law by the parties.”<sup>75</sup> Use of two alternative rationales for their holdings muddies the significance of these cases for understanding New York public policy.<sup>76</sup>

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<sup>69</sup> Woodward, *supra* note 57, at 736 n.178.

<sup>70</sup> *Id.*

<sup>71</sup> F.A. Straus and Co. v. Canadian Pac. R.R., Co., 173 N.E. 564, 567 (N.Y. 1930) (“The power to determine what the policy of the law shall be rests with the Legislature within constitutional limitations....”).

<sup>72</sup> Cooney v. Osgood Mach., Inc., 595 N.Y.S.2d 919, 926 (N.Y. 1993).

<sup>73</sup> Intercontinental Hotels Corp. (Puerto Rico) v. Golden, 203 N.E.2d 209 (N.Y. 1964).

<sup>74</sup> No. Am. Bank, Ltd. v. Schulman, 474 N.Y.S.2d 383, 387 (N.Y. Co. Ct. 1984); *accord* Joy v. Heidrick & Struggles, Inc., 403 N.Y.S.2d 613, 615 (City of N.Y. Civ. Ct. 1977) (defendant used its Chicago office address rather than New York office address where employment contract to be carried out; held that choice of Illinois law had “no ‘substantial relation to or reasonable basis for’ the parties”). Both of these cases relied on Section 187 of the Restatement (Second) of Conflict of Laws.

<sup>75</sup> Restatement (Second) Conflict of Laws § 187(2) (1971).

<sup>76</sup> See generally Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 56 COLUM. L. REV. 969, 1016 (1956). The most troublesome use of public policy comes when it is employed as a cloak for the selection of local law to govern a transaction having important local contacts. Resort to the concept [of public policy] is beguilingly easy and does not demand the hard thinking which the careful formulation of narrower, more realistic, choice of law rules would require.”)

Public policy has been invoked by the New York courts in an extremely limited range of situations to either invalidate contractual provisions valid under the chosen law or to enforce New York law when it leads to a different result than the chosen law.<sup>77</sup>

In situations where one party seeks to enforce its rights under another jurisdiction's laws in the New York courts, the New York courts have been similarly hesitant in applying New York public policy to invalidate the other jurisdiction's laws. One means of avoiding the issue has been to hold that there are "not sufficient contacts between New York, the parties and the transactions involved to implicate our public policy and call for its enforcement."<sup>78</sup> Another means has been to look beyond the normal sources of New York law to the "prevailing social and moral attitudes of the community."<sup>79</sup> If such attitudes are different than the applicable New York statutes, such attitudes may trump application of the statutes.<sup>80</sup> These holdings are consistent with the Restatement (Second) of Conflict of Laws, which, in comment (c) to Section 90, states that "[a]ctions should rarely be dismissed because of the rule of this Section."

One area in which the New York courts have refused to enforce another state's law is in the area of "insurance indemnification for punitive damage awards," where New York has an "unswerving policy against permitting" such indemnification.<sup>81</sup>

On the one hand, RA 1-301 does not work a change in New York law through its narrow definition of "fundamental policy" as the New York courts have not articulated the distinctions that the Restatement (Second) of Conflict of Laws makes between "public policy" and "fundamental policy" and have applied a public policy rationale in only limited circumstances to enforce New York law. On the other hand, insofar as the reluctance of New York courts to apply public policy arguments has been based on the common factual thread in most cases that another jurisdiction has a greater interest in the transaction than New York, RA 1-301 will work a change in New York law. This change will arise from shifting the legal focus from the relationship to the policy itself. Under RA 1-301, a narrow definition of public policy that was ordinarily applied only when another state had a greater interest in a transaction will be applied even when the other state has no interest in the transaction.<sup>82</sup> In other words, one has to ask whether the New

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<sup>77</sup> See, e.g., *F.A. Straus and Co.*, 173 N.E. at 567 (refusing to enforce provision in bill of lading that would have limited carrier's liability and that would have been valid under chosen British law); *No. Am.*, 474 N.Y.S.2d at 386-387 (refusing to enforce interest rate above that allowed by New York's usury statute in loan agreement governed by Israeli law).

<sup>78</sup> *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 688 (N.Y. 1985) (in tort action against two charities, holding that New Jersey charitable immunity statute would apply even though "New York discarded the doctrine of charitable immunity long ago").

<sup>79</sup> *Intercontinental Hotels Corp.*, 203 N.E.2d at 212-13.

<sup>80</sup> *Id.* at 210-12 (allowing "access" to the New York courts for a plaintiff "seeking to enforce [gambling] obligations validly entered into in the Commonwealth of Puerto Rico and enforceable [sic] under Puerto Rican law").

<sup>81</sup> *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065, 1070 (N.Y. 1994) (refusing to determine whether New York or another state's law applied because, even if the other state's law applied, indemnification would not be permitted under New York public policy).

<sup>82</sup> See *Woodward*, *supra* note 57, at 736 n.178 (New York caselaw "stand[s] for judicial deference to the sovereign interests and public policy of a state with a strong interest in the dispute").

York courts would have created such a narrow definition of public policy if any state's laws could have applied.<sup>83</sup>

Title 14, New York General Obligations Law. In 1984, New York added Title 14 to the General Obligations Law, which allowed parties a limited amount of 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 two hundred fifty thousand dollars.”<sup>84</sup> There are two important qualifications to party autonomy contained within this initial language. First, the transaction, even if between two businesses, has to be of a certain size before parties can choose New York law. Second, the parties do not have complete autonomy to choose any jurisdiction's law. They may only choose New York law.

In addition, Section 5-1401 does not apply to certain consumer transactions or to agreements concerning “labor or personal services.” The excluded consumer transactions are those involving “any transaction for personal, family or household services,” almost exactly the same words used within 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 that is engaged in for both business and non-business purposes still to be categorized as a consumer transaction.

The dollar and consumer limitations contained within Section 5-1401 were meant to ensure that only “large non-consumer transactions” were covered.<sup>85</sup> The intent was to protect against “any party agree[ing] to a governing law through fraud, mistake, overreaching or unequal power.”<sup>86</sup> 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.”<sup>87</sup>

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<sup>83</sup> A separate issue is presented by Section 5-1401 of the New York General Obligations Law, which is discussed in the text immediately below. Section 187(2)(b) of the Restatement (Second) of Conflict of Laws and its public policy exception to a choice of law provision have no bearing on a choice of law provision that is valid under Section 5-1401. *See, e.g.,* Supply & Bldg Co. v. Estee Lauder Int'l, Inc., No. 95 Civ. 8136, 2000 WL 223838, at \*3 (S.D.N.Y. Feb. 25, 2000) (“[T]he clear provisions of section 5-1401 make no exception for a foreign state's public policy...”); *accord* Lehman Bros. Commercial Corp. v. Minmetals Int'l Nonferrous Metals Trading Co., No. 94 Civ. 8301, 2000 WL 1702039 at \*12-13 (S.D.N.Y. Nov. 13, 2000) (“This Court agrees that §5-1401 is not limited by Restatement §187(2)(b). Section 5-1401 is clear on its face, and thus there is no need to look beyond its own provisions to resolve any ambiguity in its meaning.”).

<sup>84</sup> 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 in Section 5-1402(1), the companion choice of forum provision that was part of the same 1984 law. N.Y. Gen. Oblig. Law §5-1402(1) (McKinney 2001).

<sup>85</sup> 1983 ABCNY Report, *supra* note 84, at 543.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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].”<sup>88</sup> 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.”<sup>89</sup>

The complete party autonomy allowed under RA 1-301 in nonconsumer transactions is, thus, inconsistent with the policies underlying Section 5-1401. Only the law of New York State may be chosen under Section 5-1401, not the law of any State (in a domestic transaction) or any jurisdiction (in an international transaction) under RA 1-301. In addition, RA 1-301 makes no distinction between large commercial transactions and smaller ones, as does Section 5-1401, which provides protection for small businesses and even large businesses when they are engaged in small transactions.

In contrast, Section 5-1401 and RA 1-301 share a common goal of protecting consumers. Both restrict the free choice of governing law in a transaction involving a consumer. RA 1-301 is more restrictive, however, than the current state of New York conflict-of-laws jurisprudence. Under RA 1-301, the residence of the consumer dictates the applicable law except in sales of goods in which the consumer “makes the contract and takes delivery of those goods” in a jurisdiction other than the one of her residence. Under New York common law principles, another jurisdiction’s law can be applied either when the jurisdiction has a “reasonable relationship” to the transaction or when the jurisdiction has “the most significant contacts” with the transaction.<sup>90</sup>

As soon as Title 14 was enacted in New York State, concerns were raised about its constitutionality under the federal constitution.<sup>91</sup> Federal district courts have echoed these concerns, although no court has ever held that Section 5-1401 is unconstitutional.<sup>92</sup> Similar concerns have been raised about RA 1-301.<sup>93</sup>

Constitutionality of Governing Law Clauses in General. Complete party autonomy in choice of law clauses raises two constitutional issues in domestic transactions.<sup>94</sup>

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<sup>88</sup> Memorandum of Legislative Representative of City of New York, (McKinney), *reprinted in 2 McKinney’s 1984 Session Laws of New York* 3288, 3288 [hereinafter “Legislative Memorandum”].

<sup>89</sup> 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).

<sup>90</sup> Rashkover, *supra* note 89, at 236-238.

<sup>91</sup> *See id.*

<sup>92</sup> *See generally* Thomas P. Hanley, Jr., *Enforcing New York Governing Law Clauses in Commercial Contracts*, N.Y. L. J., Jan. 18, 2001, at 1.

<sup>93</sup> Richard K. Greenstein, *Is the Proposed UCC Choice of Law Provision Unconstitutional?*, 73 TEMPLE L. REV. 1159 (2000).

<sup>94</sup> In international transactions, the only constitutional issue is due process. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 410-11 (1930) (noting that Fourteenth Amendment, not Full Faith and Credit Clause, addresses whether a State must recognize rights derived from laws of foreign countries).

These issues are based on the constitutional limitations in the Due Process Clause<sup>95</sup> and the Full Faith and Credit Clause.<sup>96</sup> In 1981, the United States Supreme Court gave its modern formulation of the constitutional issues, summarizing them as follows: “[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>97</sup> The plurality opinion in *Hague* treated the two issues as “functionally coextensive.”<sup>98</sup> Justice Stevens in his concurring opinion treated the two issues as separate ones.<sup>99</sup> Professor Greenstein also treats the two issues as conceptually separate, although he notes that they are often linked in particular factual situations.<sup>100</sup>

The due process issue involves individual rights and whether the application of a governing law clause is “arbitrary” or “fundamentally unfair;” in other words, whether the parties could anticipate that the governing law that was applied would be applied.<sup>101</sup> Insofar as parties consent to a governing law clause, it is hard to see what the due process argument could be.<sup>102</sup> How can a party raise a due process claim based on the theory that she could not have anticipated the governing law when she has consented to that very law? Once the issue is framed as one of consent, the further issue of whether a person can consent to an adhesion contract is raised.

Although the United States Supreme Court has never ruled explicitly on whether adhesion contracts raise a Due Process issue, it seems unlikely that it would find the Due Process Clause implicated in such contracts.<sup>103</sup> In *Carnival Cruise Lines*, the Court upheld a forum selection clause in a form contract as reasonable, although it did note that the “fundamental fairness” of such clauses remained subject to “judicial scrutiny.”<sup>104</sup> In light of the fact that the burden of showing “fundamental fairness” was easily met, it seems unlikely that this remains a viable alternative for challenging forum selection clauses and, by extension, choice of law provisions.

In *Carnival Cruise Lines*, the forum selection clause could have been challenged on “fundamental fairness” grounds only if there was an “indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims.”<sup>105</sup> In determining that there was no such indication, the Court looked to three facts: the cruise line had its “principal place of business” in Florida and conducted much of its business there; the cruise line did not engage in “fraud or overreaching” in “obtain[ing] [the customers’] accession to the forum clause”; and the customers “were given

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<sup>95</sup> “[N]or shall any State deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV, §1.

<sup>96</sup> “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.” U.S. CONST. art. IV, §1.

<sup>97</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

<sup>98</sup> Greenstein, *supra* note 93, at 1172.

<sup>99</sup> *Allstate Ins. Co.*, 449 U.S. at 320-32 (Stevens, J., concurring).

<sup>100</sup> Greenstein, *supra* note 93, at 1170-73.

<sup>101</sup> *Id.* at 1166-67, 1171.

<sup>102</sup> *Id.* at 1173.

<sup>103</sup> *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>104</sup> *Id.* at 586.

<sup>105</sup> *Id.*

notice of the forum provision.”<sup>106</sup> Insofar as the Court relied in part on the cruise line’s principal place of business and the location of much of its business, traditional factors in a choice of laws analysis, there remains room to challenge a choice of law provision upon “fundamental fairness” grounds if there is no connection between the chosen law and the parties or the transaction but it seems a weak argument in light of the result-oriented reasoning of *Carnival Cruise Lines*.<sup>107</sup>

In New York, adhesion arguments would not have much power as “[un]equal bargaining power ... alone does not invalidate [a] contract [for the purchase of goods] as one of adhesion” when the weaker party has “the ability to make the purchase elsewhere and the express option to return the goods.”<sup>108</sup> A contract for the purchase of goods may be set aside, however, for unconscionability if the cost of pursuing a mandatory arbitration remedy provided in the contract is “excessive.” The plaintiffs in *Brower* had argued that the arbitration provision was substantively unconscionable<sup>109</sup> both because Chicago was the forum for the arbitration and because the arbitration had to be conducted in accordance with the rules of the International Chamber of Commerce, which would lead to fees in excess of the cost of most of the products that would be the subject of the arbitration.<sup>110</sup> The First Department held that, although the choice of forum was not unconscionable, “the excessive cost factor that is necessarily entailed in arbitrating before the [International Chamber of Commerce] is unreasonable and surely serves to deter the individual consumer from invoking the process.”<sup>111</sup>

The full faith and credit issue is whether the selected governing law is that of a State that has “state interests” arising from “a significant contact or significant aggregation of contacts.”<sup>112</sup> The full faith and credit issue will be framed differently depending on whether RA 1 is uniformly enacted. If it is uniformly enacted, then an argument can be made that each State has waived its right to have its own law applied to any transaction.<sup>113</sup> (RA 1-301 would preserve a State’s right to have its fundamental law applied.) If it is not uniformly enacted, then, with respect to the non-enacting States, the Full Faith and Credit Clause will remain in full effect. In the latter situation, all of the practical concerns that have arisen in connection with the choice of laws provisions of UCITA and that have been explored in great depth in that context also will become relevant. These concerns have centered around the possibility that a State that adopts UCITA may dictate,

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<sup>106</sup> *Id.*

<sup>107</sup> Cf. Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 510 (1992) (*Carnival Cruise Lines* “reflects the Court’s inchoate desire to strengthen the nation’s economic institutions by allowing American business to operate freely and ‘efficiently’ and its relative unwillingness to provide meaningful remedies for those individuals who fail, for whatever reason, to protect their own interests.”).

<sup>108</sup> *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (App. Div. 1st Dep’t 1998).

<sup>109</sup> After holding that the arbitration provision was not procedurally unconscionable, the *Brower* court noted that New York normally required both procedural and substantive unconscionability before finding a contract unconscionable but that “the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable.” *Id.* at 574.

<sup>110</sup> *Id.* at 574. The ICC rules required, for a claim of less than \$50,000, “advance fees of \$4,000 (more than the cost of most Gateway products), of which the \$2000 registration fee was nonrefundable even if the consumer prevailed at the arbitration.” *Id.* at 571.

<sup>111</sup> *Id.* at 574.

<sup>112</sup> *Allstate Ins. Co.*, 449 U.S. at 313.

<sup>113</sup> Greenstein, *supra* note 93, at 1177.

through the choice by a licensor of an enacting State's law, the law that applies to residents of the forum State when those residents are involved in litigation in any enacting State.<sup>114</sup>

In the event of uniform enactment of RA 1, the argument can be made that each State intended to cede almost unlimited power to private parties to regulate their affairs free of that State's law, other than its fundamental policy. Whether this intention can be gleaned from uniform enactment is unclear if States also continue to pass legislation that is protective of their residents. As Professor Greenstein phrases the problem, "suppose [that a State] enacts ... safety regulations *and* the proposed UCC amendments [to NYA 1-105]. What exactly are the policy objectives of a state that, on the one hand, adopts safety regulations and, on the other hand, enacts a choice of law provision that allows individuals to choose another state's law and thereby avoid compliance with those regulations?"<sup>115</sup>

Another constitutional issue may be raised by the fundamental policy exception to party autonomy contained in RA 1-301(f) and discussed above. Determination of fundamental policy has a constitutional dimension under RA 1-301 if one accepts the argument that a State can waive its rights under the Full Faith and Credit Clause. The extent of that waiver will be determined by what a State's fundamental policy is.<sup>116</sup> As Professor Greenstein notes, no guidance is given by RA 1-301 on how a forum court is to interpret an interested jurisdiction's fundamental policy. Is a court to use a subjective test, trying to gauge what the interested jurisdiction itself believes its fundamental policies to be? Or is a court to use an objective standard, using its own legal principles?<sup>117</sup> If a subjective test is adopted and "[i]f there is serious reason to doubt whether a forum can accurately discern the fundamental policy of another state, then the constitutional significance of that determination might argue for not allowing a disinterested forum to make such a determination. That is, full faith and credit may require that a disinterested forum always defer to the prescriptive law of an interested state, thereby once again calling into question the constitutionality of the proposed amendment."<sup>118</sup>

Constitutionality of Title 14. After passage of Section 5-1401, there has been a split in cases involving the contractual selection of a New York choice-of-law provision between those decisions that have not required a contacts analysis before applying the provision,<sup>119</sup> and those that have continued to require contacts between New York State, the parties and the transaction.<sup>120</sup>

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<sup>114</sup> See generally Woodward, *supra* note 57, at 779-80.

<sup>115</sup> Greenstein, *supra* note 93, at 1182.

<sup>116</sup> *Id.* at 1179.

<sup>117</sup> *Id.* at 1178 n.119, 1180, 1180 n.130.

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., *BNP-Dresdner Bank Zao v. Haque*, No. 98 Civ. 1109, 1998 WL 599713, at \*2 (S.D.N.Y. Sept. 9, 1998).

<sup>120</sup> See, e.g., *Von Hundertmark v. Boston Prof'l Hockey Ass'n*, No. CV-93-1369, 1996 WL 118538, \*4 (E.D.N.Y. Mar. 7, 1996). See generally Hanley, *supra* note 92, at 8; Joseph A. Kilbourn & Jeffrey M. Winn, *The Rules of Construction in Choice-of-Law Cases in New York*, 62 ST. JOHN'S L. REV. 243, 244 (1988).

The First Department appears to have implicitly adopted the position that a contacts analysis is no longer necessary when Section 5-1401 applies.<sup>121</sup> In contrast, many federal cases in applying New York law have taken the approach that contacts are still required.

The Eastern District, in a case dealing with a contractual selection of New York choice-of-law provision and Section 5-1401, has held that such a provision was enforceable only “so long as there is a reasonable basis for the choice or the state whose law is selected has sufficient contacts with the transaction.”<sup>122</sup> Even federal cases that have stated that Section 5-1401 does not require significant contacts with New York have often examined such contacts and, therefore, may be viewed as having implicitly embraced such a test.<sup>123</sup>

A recent Southern District case has clarified the reasoning behind these earlier cases, explaining that the application of Section 5-1401 to any particular agreement is subject to both the Due Process Clause and the Full Faith and Credit Clause.<sup>124</sup>

The drafters of Title 14 argued that the very act of parties’ choosing New York law as governing provides New York with “significant contract [sic] with the parties and the underlying transaction.”<sup>125</sup> Presumably this was the drafters’ attempt to answer full faith and credit objections to Section 5-1401.<sup>126</sup> No court has ever decided this issue. The closest is *Lehman Brothers*, although Judge Kennan did not have to decide this issue because there were other contacts between New York State and the transaction and parties.<sup>127</sup> Judge Kennan left for another day resolution of the issue of “whether a state with *no* connection to either the parties or the transaction could apply its own law, consonant with the Full Faith and Credit Clause, when doing so would violate the important public policy of a more-interested state.”<sup>128</sup>

In light of these cases, we can expect New York State courts and federal courts applying New York law to examine carefully the constitutional issues raised by RA 1-301 in the event that it is enacted in New York. Unless the courts accept the waiver argument, they are likely to continue to look for a relationship between the chosen jurisdiction and the parties and transaction.

Harmonization of 5-1401 with Section 1-301. The enactment of RA 1 (including RA 1-301) in New York, would affect Section 5-1401 in several ways.

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<sup>121</sup> See, e.g., *In re Propulsora Ixtapa Sur, S.A., pe C.V. (Omni Haties Franchising Corp.)*, 621 N.Y.S.2d 569, 572 (App. Div. 1st Dep’t 1995); *Babcock & Wilcox Co. v. Control Components, Inc.*, 614 N.Y.S.2d 678, 680-81 (N.Y. County Sup. Ct. 1993) (case involving choice-of-forum under Section 5-1402).

<sup>122</sup> *Von Hundertmark*, 1996 WL 118538 at \*4. *But see Supply & Bldg. Co.*, 2000 WL 223838 at \*[2] n.4 (noting that cases that apply a “reasonable relationship” analysis are not relevant for interpreting Section 5-1401).

<sup>123</sup> See, e.g., *Phillips Credit Corp. v. Regent Health Group*, 953 F. Supp. 482, 503 (S.D.N.Y. 1997).

<sup>124</sup> *Lehman Bros.*, 2000 WL 1702039, at \*13.

<sup>125</sup> Legislative Memorandum, *supra* note 88, at 3289.

<sup>126</sup> See Hanley, *supra* note 92, at 8.

<sup>127</sup> *Lehman Bros.*, 2000 WL 1702039 at \*13 (“This is not a case involving parties or transactions without any connection to New York. Lehman is headquartered in New York and the transactions and payments occurred, at least in part, in New York.”).

<sup>128</sup> *Id.*

First, enactment of Section RA 1-301, effectively would remove for UCC transactions the \$250,000 threshold in Section 5-1401. In other words, parties selecting New York law as the governing law in non-UCC transactions are assured of obtaining New York law only where the transaction covers in the aggregate \$250,000 or more. If the legislature enacts RA 1, UCC transactions, as a result of Section 1-301, would not be subject to this limitation. The legislature will need to consider whether retention of the \$250,000 threshold in Section 5-1401, and the distinction between large and small commercial transactions that it embodies, continues to make sense.

Second, if RA 1 is enacted in New York with Section RA 1-301 in its current form, Section 5-1401 would need to be revised to correctly cross-reference the relevant provisions of 1-301.<sup>129</sup> 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 (g) of section 1-301 of the uniform commercial code”.

If RA 1 is enacted in New York with Section RA 1-301 in its current form, other changes to Section 5-1401 may be desirable to harmonize the policies behind 5-1401 and RA 1-301. The extent of those revisions will depend on the legislature’s view as to whether the policy embodied in Section 5-1401 of applying New York law wherever possible is paramount to other policies. Subsection (e) of RA 1-301 would allow a New York court to apply New York law in a consumer transaction only if the transaction has a reasonable relation to New York and application of New York law would not deprive the consumer of the protection of non-waivable consumer laws of the State or country of the consumer’s principal residence or the State or country in which the consumer made the relevant contract and took delivery of the goods. Thus, application of subsection (e) of RA 1-301 may result in the application of the law of a state or country other than New York which seems contrary to the stated policy behind Section 5-1401. However, if RA 1 is enacted in New York with Section RA 1-301 in its current form, RA 1’s enactment could be read as the New York legislature’s endorsement of the approach to consumer laws taken in subsection (e) of RA 1-301 despite the general policy favoring New York law embodied in Section 5-1401. Accordingly, the reference in clause (c) of Section 5-1401 to “subsection two of section 1-105 of the uniform commercial code” then would need to be revised to also refer to subsection (e).

A similar approach is applicable to subsection (f) of Section 1-301. Subsection (f) specifies that the parties’ agreement as to choice of law will not be effective to the extent application of the law chosen would be contrary to the fundamental policy of the State or country whose laws would otherwise apply to the transaction if the parties had made no choice of law. There is no such limitation on application of New York law under Section 5-1401 although, as discussed above, some courts have implied such a limitation<sup>130</sup>. Theoretically, and this seems contrary to the stated policy behind Section 5-1401, subsection (f) could result in the application of the law

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<sup>129</sup> Section E of this report lists other New York statutes that would require changes if RA 1 is enacted.

<sup>130</sup> See discussion of constitutionality of Section 5-1401 above.

of a state other than New York in a transaction where the parties had chosen New York law. However, if RA 1 is enacted in New York with Section RA 1-301 in its current form, one can argue that its enactment should be read as the New York legislature's endorsement of the approach to fundamental policy taken in subsection (f) of RA 1-301 despite the general policy favoring New York law embodied in Section 5-1401. If so, the reference in clause (c) of Section 5-1401 to "subsection two of section 1-105 of the uniform commercial code" should be revised to refer to also refer to subsection (f).

### **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.<sup>131</sup> 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 [\$5000] 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 N.Y. General Obligations Law section 5-701 ("GOL § 5-701").

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);

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<sup>131</sup> Article 9 of the UCC governs transactions creating a consensual lien 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 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
- a signed writing sufficient under the usual requirement.

The same bill that amended GOL § 5-701 to add these 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 above-paraphrased 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 Revised 1-206):

Legislative Note: 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 agnostic 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 has, in fact, recommended 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.<sup>132</sup>

The Committee has therefore evaluated FUA 1-206 on its merits and considered whether it should be retained if New York enacts 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 in the New York statutory code.<sup>133</sup>

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<sup>132</sup> 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]. As of March 22, 2004, no legislation has been introduced in California to enact Revised Article 1.

<sup>133</sup> 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 Set Forth in NYA 1-206. On the merits, 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.”<sup>134</sup> 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. Not much 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.<sup>135</sup> Other cases have applied NYA 1-206 to situations in which its applicability is, in the view of the Committee, doubtful.<sup>136</sup> In the

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<sup>134</sup> CALIFORNIA BAR REPORT, *supra* note 132, at 13.

<sup>135</sup> See *Mellencamp v. Riva Music Ltd.*, 698 F.Supp. 1154 (S.D.N.Y. 1988), which 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.A. § 204(a) (1996). 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. 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.

<sup>136</sup> 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 \$5000 (a holding that seems correct). Note that the outcome would have been no different had NYA 1-206 not been in force.

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 a very peculiar one. 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 [\$5000].” Courts applying New York law have interpreted this to mean exactly what it says: that a contract that is subject to this section and that is not evidenced by a sufficient writing may nevertheless be enforced -- but only up to \$5000, and no more.<sup>137</sup>

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 \$5000. That result seems quite arbitrary and raises questions of why the statute was constructed in this manner.

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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.

<sup>137</sup> See *Beldengreen v. Ashinsky*, 528 N.Y.S.2d 744 (N.Y. Civ. Ct. 1987); *Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427, 431-32 (2<sup>nd</sup> Cir. 1995)(applying New York law); *Olympic Junior, Inc. v. David Crystal, Inc.*, 463 F.2d 1141, 1144-45 (3<sup>rd</sup> Cir. 1972) (applying New York law); *California National, Inc. v. Nestle Holdings, Inc.*, 631 F. Supp. 465, 471 (D.N.J. 1986) (applying New York law).

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.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup>

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 laws at the federal and state level, including the federal Electronic Signatures in Global and National Commerce Act,<sup>141</sup> New York’s Electronic Signatures and Records Act,<sup>142</sup> and the Uniform Electronic Transactions Act, which has been enacted by at least 42 states.<sup>143</sup>

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<sup>138</sup> See NYA 8-113.

<sup>139</sup> See United Nations Convention on Contracts for the International Sale of Goods, August 31, 1981, Article 11.

<sup>140</sup> See UNIDROIT Principles 1.2.

<sup>141</sup> 15 U.S.C. § 7001 *et seq.*

<sup>142</sup> N.Y. STATE TECHNOLOGY LAW §§ 101-109 (McKinney 2003).

<sup>143</sup> See National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Electronic Transactions Act*, available at [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-ueta.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp) (last visited September 15, 2003).

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 the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It retains a statute of frauds, although it raises the threshold for applicability from \$500 to \$5000 and accepts electronic records as an equivalent of a writing.<sup>144</sup> 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 UCC's Permanent Editorial Board on the 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 statute 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.<sup>145</sup>

5. As noted earlier, three states, Idaho, Texas and Virginia, have enacted RA 1 as of the date of this Report. It appears from examination of the bills enacting RA 1 in these three states that no state chose to carry forward the rule set forth in FUA 1-206.<sup>146</sup>

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

#### **D. “Good Faith”.**

RA 1-304 provides, as NYA 1-203 does, that “[e]very contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.” RA 1-201(b)(20) defines “good faith,” however, to require not only “honesty in fact,” which is the same subjective standard currently in NYA 1-201(19), but also “observance of reasonable commercial standards of fair dealing.” Accordingly, the definition of “good faith” under RA 1 would represent a change in New York law by adding an objective test for determining the existence of good faith.

This change in the definition of “good faith” in RA 1 would affect New York’s version of Article 3 of the UCC but, except as discussed below, will have no effect on the versions of

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<sup>144</sup> See National Conference of Commissioners on Uniform State Laws, *Amendments To Uniform Commercial Code Article 2 – Sales*, Section 2-201 (Annual Meeting Draft 2003).

<sup>145</sup> PEB Study Report on Article 2, at 50-51 (1990).

<sup>146</sup> In Idaho, the enacting bill was SB 1228, introduced on January 26, 2004 and signed by the Governor on March 10, 2004, available at <http://www3.state.id.us/oasis/S1228.html>. In Texas, the enacting bill was HB 1394, introduced on February 27, 2003 and signed by the Governor on June 20, 2003, available at <http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=78&SESS=R&CHAMBER=H&BILLTYPE=B&BILLSUFFIX=01394&VERSION=5&TYPE=B>. In Virginia, the enacting bill was H1778, introduced on January 8, 2003 and approved by the Governor on March 8, 2003, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+CHAP0353>.

Article 3 in effect in 48 other states and the District of Columbia, as each of these jurisdictions has adopted a definition of good faith that parallels that of RA 1. In New York, however, application of the RA 1 definition of good faith would have the effect of changing the meaning of good faith in New York's version of Article 3 from a subjective to an objective standard. Many of the Article 3 cases decided under New York law that have involved the standard of good faith have referenced the subjective definition of good faith standard in NYA 1. The Committee found no cases that applied an objective standard of good faith.

Some commentators have made the technical point that the change to the definition of good faith in RA 1 is more significant than is commonly believed. According to one commentator, “[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, 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 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 Article 1 is enacted will the higher standard of commercial reasonableness generally apply.”<sup>147</sup> In other words, RA 1's objective standard of good faith would imbue generally all transactions under the UCC except those governed by Article 5 (rather than applying only when a specific UCC provision explicitly renders good faith applicable) only once RA 1 is adopted.

#### **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 will need to be updated to refer to the corresponding provisions in RA 1. A list of these existing statutory provisions is included at Exhibit C to this Report together with proposed revisions to these existing statutory provisions.

#### **F. Committee Recommendation.**

In the Committee's view, RA 1 is in many 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) and 2A (leasing). The Committee wishes to commend the National Conference of Commissioners on Uniform State Laws and The American Law Institute, who are the sponsors

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<sup>147</sup> Stephen L. Sepinuck, Robyn L. Meadows, and Russell A. Hakes, *The Uniform Commercial Code Survey: Introduction*, 57 BUS. LAW. 1667, 1667-68 (2002).

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.

Despite these worthwhile changes in RA 1, the Committee was divided over the proper course of action with respect to RA 1, principally as a result of the changes in RA 1 in the rules governing choice of law. As a result of this division, no more than a plurality of the members of the Committee was able to agree as to any one of the possible recommendations for the course of action that the New York Legislature could take with respect to RA 1. Nearly every member, however, preferred making no recommendation regarding enactment of RA1 at this time to the New York Legislature as his or her second preference. Accordingly, the Committee is issuing this Report without a recommendation as to the enactment of RA1 at this time in New York.

The change in the rules governing choice of law under the UCC, set forth currently in NYA 1-105 and in the revision in RA 1-301, along with the expanded definition of “good faith,” are the most significant changes that RA 1 would make to NYA 1. As discussed in the section-by-section analysis earlier in this Report, RA 1-301 generally increases party autonomy in choice of law. Except in consumer transactions, RA 1 eliminates the restriction in current law that permits the parties to a transaction governed by the UCC to choose only the law of a jurisdiction that has a reasonable relation to the transaction. For the most part (and again with the exception of consumers), under RA 1-301, parties who choose a particular jurisdiction’s law can expect to have that choice honored whether or not the jurisdiction has a reasonable relationship to the transaction. For business transactions (including international business transactions), the rule of RA 1-301 would bring New York into conformity with international norms that enable parties to choose the law of any jurisdiction, regardless of that jurisdiction’s contacts (if any) to the transaction. No one on the Committee had problems with RA 1-301 in the context of transactions between businesses. However, some Committee members have expressed concerns about RA 1-301 as applied to consumer transactions, with regard to the impact of the section on businesses such as banking and manufacturing. One trade group in particular focused on compliance considerations. Others on the Committee accepted the drafters’ policy decision to strengthen the reach of consumer protection in this area.

The Committee has considered various possible choices, grouped here in the following three categories: (1) recommending adoption of RA 1; (2) recommending adoption of a non-uniform RA 1; and (3) recommending not adopting RA 1. As previously noted, the Committee was not able to reach agreement as to which of these three courses of action to take. The Committee’s lack of agreement as to a course of action stemmed in part from the division among the Committee members over the importance of uniform enactment of RA 1-301 by all other states.

One group of Committee members believed that the content of the UCC choice of law rule was arguably less important than having that rule – whatever its content may be – enacted uniformly by all the states. While it is always presumptively a good result for a uniform law to be enacted uniformly, in the opinion of this group, uniform enactment would be uniquely important with respect to a choice of law rule. For example, if Montana were to retain the existing choice of law rule of FUA 1-105, and a suit arising out of a contract that the parties had agreed would be governed by New York law is brought to a Montana court, the Montana court

would apply FUA 1-105 and enforce the contractual choice of New York law only if it finds that the transaction bears a reasonable relationship to New York. If, on the other hand, the same suit is brought in Illinois, which (it is assumed here) had adopted the new rule of RA 1-301, the Illinois court would enforce New York choice of law regardless of any “reasonable relationship” between the transaction and New York. Thus, this group argued, if different choice of law rules were in force in different states, then the law that a court would apply to a given transaction – and, accordingly, the outcome of a dispute involving that transaction – might vary depending upon the happenstance of where suit is brought. This diversity of choice of law rules among the states would inject uncertainty into transactional planning, and also could give rise to potential issues under the Full Faith and Credit Clause.

In this respect, this group of Committee members drew attention to the prospect that there would be non-uniformity among the choice of law rules in effect in various states in the event that some states enact the revision and others do not, or in the event that states alter the applicable choice of law rule. Widespread long-term non-enactment of RA 1 was, in view of many Committee members, another possibility, as Article 1 of the UCC was revised as part of the revision of the entire UCC, and its revision was not responsive to an affirmative substantive need in and of itself (by contrast with, for instance, the 1999 revision of UCC Article 9 and the 1994 revision of UCC Article 8). Hence, some Committee members were concerned that inertia alone could defer enactment in some jurisdictions for a period of time even if there were no substantive concern regarding RA 1-301. It was also pointed out that some business groups have expressed opposition to RA 1-301, making the likelihood of reasonably prompt uniform enactment of RA 1-301 more problematic. To date, only three states, Idaho, Texas and Virginia, have enacted RA 1, and they have all enacted RA 1 *without* RA 1-301, replacing it with the existing rule set forth in FUA 1-105.<sup>148</sup>

Another group of Committee members, however, believed that while uniform enactment of the UCC provisions by all of the states is generally important, it is perhaps less so with respect to the choice of law rule of RA 1-301, as the non-uniformity arguably would have practical importance only in the context of consumer transactions. This group argued that as long as a business takes the simple step of choosing as the law to govern its agreements the law of a state with which the transaction has a reasonable relationship, the only type of transaction that would be affected by non-uniformity in choice of law provisions would be one in which a suit arises between a business and a consumer located in a state that has adopted RA 1-301. In the view of these members, predictability can still be achieved in transactions between businesses even where some states have adopted the choice of law rule of RA 1 and some that of FUA 1. In the event that RA 1-301 were to be adopted in some states and FUA 1-105 remained in effect in other states and to the extent that businesses choose the law of a jurisdiction with a reasonable relationship to a transaction in order to achieve certainty in choice of law in transactions between businesses, it would be possible to view businesses that make this choice as having lost the benefit of freely choosing the law of any domestic jurisdiction. This benefit is one on which RA 1 is implicitly based. But in the factual circumstances posited, this loss of the benefit with respect to business-to-business transactions would be due to the fact that certain industries such as financial institutions and large manufacturers are unwilling to support RA 1 because of concerns

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<sup>148</sup> See *supra* note 2.

about the nonuniformity that could be fostered by the consumer protections that it contains in RA 1-301.

Although the revised choice of law rule in RA 1-301 is the principal reason for the Committee's decision to make no recommendation, the Committee also notes disagreement and uncertainty among its members as to the proper "good faith" standard to be applied in RA 1 in light of the fact that New York has yet to adopt Revised Articles 3 and 4 of the Uniform Commercial Code.<sup>149</sup>

Based on the foregoing, the Committee is issuing this Report on RA 1 with no recommendation as to whether RA 1 should be enacted. In the event that RA 1 were at some time in the future to be considered by the New York Legislature for enactment, the Committee recommends, whatever the outcome on the choice of law and good faith rules to be enacted, that if RA 1 is enacted it be enacted with the few minor nonuniform revisions recommended in the section-by-section analysis of this Report.

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<sup>149</sup> In addition, the Committee notes that of the three states that have enacted RA 1, Idaho and Virginia enacted it nonuniformly, with the definition of "good faith" as present in existing law. (FA 1-201(19)). The bill introduced in Alabama also continues the definition of "good faith" in existing law. Texas, by contrast, adopted the broadened definition of "good faith" that is contained in RA 1. (RA 1-201(20)). The bills introduced in Hawaii, Massachusetts and West Virginia likewise at present use the broadened definition contained in RA 1. The bill introduced in Minnesota leaves the definition of "good faith" open by "reserv[ing]" it.

**EXHIBIT A**

**COMPARISON OF REVISED ARTICLE 1 TO CURRENT NEW YORK ARTICLE 1**

| <b>Revised Uniform Article 1 (“RA”)</b>   | <b>Corresponding Provision of Current New York Article 1 (“NYA”)</b>                                    | <b>Commentary</b>   |
|---|---|---|
| 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.<br><br>(a) This [Act] may be cited as the Uniform Commercial Code.<br><br>(b) This article may be cited as Uniform Commercial Code – General Provisions. | Section 1-101. Short Title.<br><br>This Act shall be known and may be cited as Uniform Commercial Code. | <i>Changes from former New York law:</i> Now allows for short title for Article 1 as well.  |
| SECTION 1-102. SCOPE OF ARTICLE.<br><br>This article applies to a transaction to the extent that it is governed by another article of [the Uniform Commercial Code].                  |   | <i>Changes from former New York law:</i> New section clearly provides that Article 1 applies to a transaction only where another UCC article applies. |

| Revised Uniform Article 1 (“RA”)   | Corresponding Provision of Current New York Article 1 (“NYA”)  | Commentary   |
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| <p>SECTION 1-103. CONSTRUCTION OF [UNIFORM COMMERCIAL CODE] TO PROMOTE ITS PURPOSES AND POLICIES; APPLICABILITY OF SUPPLEMENTAL PRINCIPLES OF LAW.</p> <p>(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are:</p> <ol style="list-style-type: none"> <li>(1) to simplify, clarify, and modernize the law governing commercial transactions;</li> <li>(2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and</li> <li>(3) to make uniform the law among the various jurisdictions.</li> </ol> | <p>Section 1-102. Purposes; Rules of Construction; Variation by Agreement.<br/>Subsections 1-2.</p> <ol style="list-style-type: none"> <li>(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.</li> <li>(2) Underlying purposes and policies of this Act are <ol style="list-style-type: none"> <li>(a) to simplify, clarify and modernize the law governing commercial transactions;</li> <li>(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;</li> <li>(c) to make uniform the law among the various jurisdictions.</li> </ol> </li> </ol> | <p><i>Changes from former New York law:</i> 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.</p> |
| <p>(b) Unless displaced by the particular provisions of [the Uniform Commercial Code], 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, and other validating or invalidating cause supplement its provisions.</p>  | <p>Section 1-103. Supplementary General Principles of Law Applicable.</p> <p>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.</p>  | <p><i>Changes from former New York law:</i> NYA 1-103 with very minor wording changes.</p>   |

| Revised Uniform Article 1 (“RA”)   | Corresponding Provision of Current New York Article 1 (“NYA”)  | Commentary  |
|--|--|---|
| <p>SECTION 1-104. CONSTRUCTION AGAINST IMPLIED REPEAL.</p> <p>[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.</p>   | <p>Section 1-104. Construction Against Implicit Repeal.</p> <p>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.</p>   | <p><i>Changes from former New York law: None.</i></p>   |
| <p>SECTION 1-105. SEVERABILITY.</p> <p>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.</p> | <p>Section 1-108. Severability.</p> <p>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.</p> | <p><i>Changes from former New York law: NYA 1-108. NYA 1-105 has been replaced by RA 1-301.</i></p> |

| Revised Uniform Article 1 (“RA”)  | Corresponding Provision of Current New York Article 1 (“NYA”)  | Commentary   |
|---|--|--|
| <p>SECTION 1-106. USE OF SINGULAR AND PLURAL; GENDER.</p> <p>In [the Uniform Commercial Code], unless the statutory context otherwise requires:</p> <ol style="list-style-type: none"> <li>(1) words in the singular number include the plural, and those in the plural include the singular; and</li> <li>(2) words of any gender also refer to any other gender.</li> </ol> | <p>Section 1-102. Purposes; Rules of Construction; Variation by Agreement. Subsection 5.</p> <p>(5) In this Act unless the context otherwise requires</p> <ol style="list-style-type: none"> <li>(a) words in the singular number include the plural, and in the plural include the singular;</li> <li>(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.</li> </ol> | <p><i>Changes from former New York law:</i> NYA 1-102(5) with minor wording changes. NYA 1-106 is now RA 1-305.</p>            |
| <p>SECTION 1-107. SECTION CAPTIONS.</p> <p>Section captions are part of [the Uniform Commercial Code].</p>  | <p>Section 1-109. Section Captions and Subsection Headings.</p> <p>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.</p>  | <p><i>Changes from former New York law:</i> NYA 1-109. NYA 1-107 is now RA 1-306 and has been modified as described below.</p> |

| Revised Uniform Article 1 (“RA”)  | Corresponding Provision of Current New York Article 1 (“NYA”)  | Commentary  |
|---|--|---|
| <p>SECTION 1-108. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.</p> <p>This [Act] modifies, limits, and supersedes the federal 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)).</p> |  | <p><i>Changes from former New York law:</i> 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 acceptance of electronic records that supplant provisions of E-Sign.</p>  |
| <p>PART 2<br/>GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION</p>  | <p>PART 2<br/>GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION</p>   |   |
| <p>SECTION 1-201. GENERAL DEFINITIONS.</p> <p>(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.</p> <p>(b) Subject to definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof:</p>               | <p>Section 1-201. General Definitions.</p> <p>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:</p> | <p><i>Changes from former New York law:</i> 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.</p> |
| <p>(1) “Action”, in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.</p>  | <p>(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.</p>   | <p><i>Changes from former New York law:</i> “Action”. RA 1 carries forward the language of NYA 1.</p>   |

| Revised Uniform Article 1 (“RA”)  | Corresponding Provision of Current New York Article 1 (“NYA”)  | Commentary   |
|---|--|--|
| (2) “Aggrieved party” means a party entitled to pursue a remedy.  | (2) "Aggrieved party" means a party entitled to resort to a remedy.  | <i>Changes from former New York law:</i> “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".) | <i>Changes from former New York law:</i> “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.  | <i>Changes from former New York law:</i> “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.   |
| (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.  | <i>Changes from former New York law:</i> “Bearer”. RA 1 carries forward the language of NYA 1.   |

| Revised Uniform Article 1 (“RA”)   | Corresponding Provision of Current New York Article 1 (“NYA”)  | Commentary  |
|--|--|---|
| (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. | <i>Changes from former New York law:</i> “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.  | <i>Changes from former New York law:</i> “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.  | <i>Changes from former New York law:</i> “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. |

| Revised Uniform Article 1 (“RA”)   | Corresponding Provision of Current New York Article 1 (“NYA”)   | Commentary   |
|--|---|--|
| <p>(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.</p> | <p>(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.</p> | <p><i>Changes from former New York law:</i> “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.</p>   |
| <p>(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:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(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 the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.</li> </ul>   | <p>(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.</p>   | <p><i>Changes from former New York law:</i> “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 examples listed in the statute are conspicuous.</p> |

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| (11) “Consumer” means an individual who enters into a transaction primarily for personal, family, or household purposes  |  | <i>Changes from former New York law:</i> “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".)   | <i>Changes from former New York law:</i> “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.  | <i>Changes from former New York law:</i> “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.   | <i>Changes from former New York law:</i> “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 possession.   | (14) "Delivery" with respect to instruments, documents of title, chattel paper or certificated securities means voluntary transfer of possession.  | <i>Changes from former New York law:</i> “Delivery”. RA 1 changes the listed types of things from plural to singular, 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 | (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 | <i>Changes from former New York law:</i> “Document of title”. RA 1 carries forward the exact language of NYA 1.  |

| Revised Uniform Article 1 (“RA”)   | Corresponding Provision of Current New York Article 1 (“NYA”)   | Commentary   |
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| possession which are either identified or are fungible portions of an identified mass.   | possession which are either identified or are fungible portions of an identified mass.  |  |
| (17) “Fault” means a default, breach, or wrongful act or omission.   | (16) "Fault" means wrongful act, omission or breach.  | <i>Changes from former New York law:</i> “Fault”. RA 1's definition parallels NYA 1's definition, but adds “default” to the list of events constituting fault.   |
| (18) “Fungible goods” means:<br>(A) goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or<br>(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. | <i>Changes from former New York law:</i> “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.   |
| (19) “Genuine” means free of forgery or counterfeiting.  | (18) "Genuine" means free of forgery or counterfeiting.   | <i>Changes from former New York law:</i> “Genuine”. RA 1 carries forward the exact language of NYA 1.  |
| (20) “Good faith,” except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.   | (19) "Good faith" means honesty in fact in the conduct or transaction concerned.  | <i>Changes from former New York law:</i> “Good Faith”. RA 1 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”.<br><br>See more detailed discussion at Part D in body of text. |
| (21) “Holder” means:<br>(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<br>(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.   | <i>Changes from former New York law:</i> “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.  | <i>Changes from former New York law:</i> “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.   |

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| <p>(23) “Insolvent” means:</p> <p>(A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;</p> <p>(B) being unable to pay debts as they become due; or</p> <p>(C) being insolvent within the meaning of federal bankruptcy law.</p> | <p>(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.</p>  | <p><i>Changes from former New York law:</i> “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”.</p>  |
| <p>(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.</p>                                    | <p>(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.</p> | <p><i>Changes from former New York law:</i> “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.</p> <p>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.</p> <p>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 drawing the line in this fashion RA 1 provides an all-but</p> |

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|                                  |   | <p>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.</p> <p>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 non-uniform provision.</p> |

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| (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.  | <i>Changes from former New York law:</i> “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.   | <i>Changes from former New York law:</i> “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).  | <i>Changes from former New York law:</i> “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. | <i>Changes from former New York law:</i> “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.  |
| (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.   | <i>Changes from former New York law:</i> “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.  | <i>Changes from former New York law:</i> “Purchaser”. RA 1 carries forward the language of NYA 1.  |

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| (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.  |   | <i>Changes from former New York law:</i> “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.   | <i>Changes from former New York law:</i> “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. |
| (34) “Right” includes remedy.  | (36) "Rights" includes remedies.  | <i>Changes from former New York law:</i> “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 | (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". | <i>Changes from former New York law:</i> “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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| <p>lease creates a “security interest” is determined pursuant to Section 1-203.</p> | <p>(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:</p> <ul style="list-style-type: none"> <li>(i) the original term of the lease is equal to or greater than the remaining economic life of the goods,</li> <li>(ii) 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,</li> <li>(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</li> <li>(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.</li> </ul> <p>(b) A transaction does not create a security interest merely because it provides that:</p> <ul style="list-style-type: none"> <li>(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,</li> <li>(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,</li> <li>(iii) the lessee has an option to renew the lease or to become the owner of the goods,</li> <li>(iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the</li> </ul> |            |

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|                                  | <p>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</p> <p>(v) 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.</p> <p>(c) For purposes of this subsection (37):</p> <p>(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;</p> <p>(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</p> <p>(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.</p> |            |

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| <p>(36) “Send” in connection with a writing, record, or notice means:</p> <p>(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</p> <p>(B) in any other way to cause to be received any record or notice within the time it would have arrived if properly sent.</p> | <p>(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.</p> | <p><i>Changes from former New York law:</i> “Send”, RA 1 follows the substance of NYA 1, making only stylistic changes.</p>  |
| <p>(37) “Signed” includes using any symbol executed or adopted with present intention to adopt or accept a writing.</p>   | <p>(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.</p>   | <p><i>Changes from former New York law:</i> “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.</p>  |
| <p>(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.</p>   |   | <p><i>Changes from former New York law:</i> “State”. This a defined term new to Article 1. It is the standard definition for that term used by NCCUSL.</p>   |
| <p>(39) “Surety” includes a guarantor or other secondary obligor.</p>   | <p>(40) "Surety" includes guarantor.</p>  | <p><i>Changes from former New York law:</i> “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”.</p> |
| <p>(40) “Term” means a portion of an agreement that relates to a particular matter.</p>   | <p>(42) "Term" means that portion of an agreement which relates to a particular matter.</p>   | <p><i>Changes from former New York law:</i> “Term”. RA 1 carries forward with only slight stylistic changes the</p>  |

| Revised Uniform Article 1 (“RA”)  | Corresponding Provision of Current New York Article 1 (“NYA”)  | Commentary   |
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|   |  | 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.  | <i>Changes from former New York law:</i> “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.   | <i>Changes from former New York law:</i> “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.  | <i>Changes from former New York law:</i> “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 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.<br><br>(a) Subject to subsection (f), a person has “notice” of a fact if the person:<br>(1) has actual knowledge of it;<br>(2) has received a notice or notification of it; or<br>(3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.<br><br>(b) “Knowledge” means actual knowledge. “Knows” | Section 1-201 General Definitions.<br>Subsections 25-27.<br><br>(25) A person has "notice" of a fact when<br>(a) he has actual knowledge of it; or<br>(b) he has received a notice or notification of it; or<br>(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.<br><br>A person "knows" or has "knowledge" of a fact when he | <i>Changes from former New York law:</i> 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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| <p>has a corresponding meaning.</p> <p>(c) “Discover”, “learn”, or words of similar import refer to knowledge rather than to reason to know.</p> <p>(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 other person actually comes to know of it.</p> <p>(e) Subject to subsection (f), a person “receives” a notice or notification when:</p> <ol style="list-style-type: none"> <li>(1) it comes to that person’s attention; or</li> <li>(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.</li> </ol> <p>(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.</p> | <p>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.</p> <p>(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 notification when</p> <ol style="list-style-type: none"> <li>(a) it comes to his attention; or</li> <li>(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.</li> </ol> <p>(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.</p> |            |

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| <p>SECTION 1-203. LEASE DISTINGUISHED FROM SECURITY INTEREST.</p> <p>(a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.</p> <p>(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:</p> <ol style="list-style-type: none"> <li>(1) the original term of the lease is equal to or greater than the remaining economic life of the goods;</li> <li>(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;</li> <li>(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</li> <li>(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.</li> </ol> <p>(c) A transaction in the form of a lease does not create a security interest merely because:</p> <ol style="list-style-type: none"> <li>(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;</li> <li>(2) the lessee assumes risk of loss of the goods;</li> <li>(3) the lessee agrees to pay, with respect to the</li> </ol> | <p>Section 1-201 General Definitions Subsection 37.</p> <p>(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".</p> <p>(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:</p> <ol style="list-style-type: none"> <li>(i) the original term of the lease is equal to or greater than the remaining economic life of the goods,</li> <li>(ii) 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,</li> <li>(iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal</li> </ol> | <p><i>Changes from former New York law:</i> 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.</p> |

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| <p>goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs;</p> <p>(4) the lessee has an option to renew the lease or to become the owner of the goods;</p> <p>(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</p> <p>(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.</p> <p>(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:</p> <p>(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</p> <p>(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.</p> <p>(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.</p> | <p>additional consideration upon compliance with the lease agreement, or</p> <p>(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.</p> <p>(b) A transaction does not create a security interest merely because it provides that:</p> <p>(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,</p> <p>(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,</p> <p>(iii) the lessee has an option to renew the lease or to become the owner of the goods,</p> <p>(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</p> <p>(v) 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.</p> <p>(c) For purposes of this subsection (37):</p> <p>(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</p> |            |

| Revised Uniform Article 1 (“RA”)   | Corresponding Provision of Current New York Article 1 (“NYA”)   | Commentary  |
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|  | <p>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;</p> <p>(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</p> <p>(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.</p> |   |
| <p>SECTION 1-204. VALUE.</p> <p>Except as otherwise provided in Articles 3, 4, [and] 5, [and 6], a person gives value for rights if the person acquires them:</p> <ol style="list-style-type: none"> <li>(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;</li> <li>(2) as security for, or in total or partial satisfaction of, a preexisting claim;</li> <li>(3) by accepting delivery under a preexisting contract for purchase; or</li> <li>(4) in return for any consideration sufficient to support a simple contract.</li> </ol> | <p>Section 1-201 General Definitions<br/>Subsection 44</p> <p>(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</p> <ol style="list-style-type: none"> <li>(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</li> <li>(b) as security for or in total or partial satisfaction of a pre-existing claim; or</li> <li>(c) by accepting delivery pursuant to a pre-existing contract for purchase; or</li> <li>(d) generally, in return for any consideration sufficient</li> </ol>   | <p><i>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.</i></p> |

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|   | to support a simple contract.  |  |
| <p>SECTION 1-205. REASONABLE TIME; SEASONABLENESS.</p> <p>(a) Whether a time for taking an action required by [the Uniform Commercial Code] is reasonable depends on the nature, purpose, and circumstances of the action.</p> <p>(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.</p> | <p>Section 1-204. Time; Reasonable Time; "Seasonably". Subsections 2-3.</p> <p>(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.</p> <p>(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.</p> | <p><i>Changes from former New York law:</i> 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.</p>   |
| <p>SECTION 1-206. PRESUMPTIONS.</p> <p>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.</p>   | <p>Section 1-201 General Definitions Subsection 31</p> <p>(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.</p>   | <p><i>Changes from former New York law:</i> 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.</p> <p><i>Note:</i> NYA 1-207, NYA 1-208 and NYA 1-209 are now RA 1-308, RA 1-309 and RA 1-310 respectively.</p> |
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| PART 3 TERRITORIAL APPLICABILITY AND GENERAL RULES  |  |   |
| <p>SECTION 1-301. TERRITORIAL APPLICABILITY; PARTIES’ POWER TO CHOOSE APPLICABLE LAW.</p> <p>(a) In this section:</p> <p>(1) “Domestic transaction” means a transaction other than an international transaction.</p> <p>(2) “International transaction” means a transaction that bears a reasonable relation to a country other than the United States.</p> <p>(b) This section applies to a transaction to the extent that it is governed by another article of the [Uniform Commercial Code].</p> <p>(c) Except as otherwise provided in this section:</p> <p>(1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated; and</p> <p>(2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.</p> <p>(d) In the absence of an agreement effective under subsection (c), and except as provided in subsections (e) and (g), the rights and obligations of the parties are determined by the law that would be selected by application of this State’s conflict of laws principles.</p> <p>(e) If one of the parties to a transaction is a consumer,</p> | <p>Section 1-105. Territorial Application of the Act; Parties’ Power to Choose Applicable Law.</p> <p>(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.</p> <p>(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:<br/> Rights of creditors against sold goods -- Section 2-402.<br/> Applicability of the Article on Leases. Sections -- 2-A-105 and 2-A-106.<br/> Applicability of the Article on Bank Deposits and Collections -- Section 4-102.<br/> Governing Law in the Article on Fund Transfers -- Section 4-A-507.<br/> Letters of Credit -- Section 5-116.<br/> Applicability of the Article on Investment Securities -- Section 8-110.<br/> 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.</p> | <p><i>Changes from former New York law:</i><br/> NYA 1-105. RA 1-301(g) is NYA 1-105(c) with minor wording changes in the lead-in language. RA 1-301(g) 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.</p> <p>Major changes are incorporated in RA 1-301(a)-(f), which have generated considerable controversy and commentary. Radically different views have been expressed on the merits of these changes by the banking community and certain academics.</p> <p>Please see detailed discussion regarding RA 1-301 in Part B of the body of the report.</p> <p>The Committee notes that RA 1-301(b) arguably is unnecessary as it effectively duplicates RA 1-102. Because of RA 1-102, RA 1-301 would apply only to the extent that transactions are governed by another Article of the Uniform Commercial Code. Restating this in RA 1-301(b) is therefore not necessary. Accordingly, if RA 1-301 is enacted, the Committee proposes that a New York comment be included in any enactment of 1-301(b) stating as follows: “Section 1-301(b) is intended to emphasize in the context of choice of law the point that is made in Section 1-102 on the applicability of Article 1 generally. Section 1-301 only governs conflicts of law issues arising in a transaction to the extent such transaction would be governed by the UCC of this State, were the law of this State applicable.”</p> |

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| <p>the following rules apply:</p> <p>(1) An agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the State or country designated.</p> <p>(2) Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement:</p> <p>(A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or</p> <p>(B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides.</p> <p>(f) An agreement otherwise effective under subsection (c) is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy of the State or country whose law would govern in the absence of agreement under subsection (d).</p> <p>(g) To the extent that [the Uniform Commercial Code] governs a transaction, 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:</p> <p>(1) Section 2-402;</p> <p>(2) Sections 2A-105 and 2A-106;</p> |   |            |

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| <p>(3) Section 4-102;<br/> (4) Section 4A-507;<br/> (5) Section 5-116;<br/> [(6) Section 6-103;]<br/> (7) Section 8-110;<br/> (8) Sections 9-301 through 9-307.</p>   |   |   |
| <p>SECTION 1-302. VARIATION BY AGREEMENT.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> | <p>Section 1-102. Purposes; Rules of Construction; Variation by Agreement.<br/> Subsections 3-4.</p> <p>(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement 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.</p> <p>(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).</p> <p>Section 1-204. Time; Reasonable Time; “Seasonably”.<br/> Subsection 1.</p> <p>(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.</p> | <p><i>Changes from former New York law:</i> New section combines substantive provisions of NYA 1-102(3)-(4) and NYA 1-204(1). No substantive change.</p>  |
| <p>SECTION 1-303. COURSE OF PERFORMANCE, COURSE OF DEALING, AND USAGE OF TRADE.</p> <p>(a) A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if:</p>   | <p>Section 1-205. Course of Dealing and Usage of Trade.</p> <p>(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</p>   | <p><i>Changes from former New York law:</i> 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. [Note: While the waiver and modification provisions of</p> |

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| <p>(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and</p> <p>(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(e) Except as otherwise provided in subsection (f), the express terms of an agreement and any</p> | <p>interpreting their expressions and other conduct.</p> <p>(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 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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> | <p>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).]</p> |

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| <p>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:</p> <p>(1) express terms prevail over course of performance, course of dealing, and usage of trade;</p> <p>(2) course of performance prevails over course of dealing and usage of trade; and</p> <p>(3) course of dealing prevails over usage of trade.</p> <p>(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.</p> <p>(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.</p> |  |  |
| <p><b>SECTION 1-304. OBLIGATION OF GOOD FAITH.</b></p> <p>Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.</p>   | <p>Section 1-203. Obligation of Good Faith.</p> <p>Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.</p>   | <p><i>Changes from former New York law: NYA 1-203.</i></p>                                 |
| <p><b>SECTION 1-305. REMEDIES TO BE LIBERALLY ADMINISTERED.</b></p> <p>(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.</p>   | <p>Section 1-106. Remedies to Be Liberally Administered.</p> <p>(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.</p> <p>(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.</p> | <p><i>Changes from former New York law: NYA 1-106 with very minor wording changes.</i></p> |

| Revised Uniform Article 1 (“RA”)   | Corresponding Provision of Current New York Article 1 (“NYA”)   | Commentary  |
|--|---|---|
| <p>(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.</p>  |   |   |
| <p><b>SECTION 1-306. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER BREACH.</b></p> <p>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.</p>   | <p>Section 1-107. Waiver or Renunciation of Claim or Right After Breach.</p> <p>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.</p>  | <p><i>Changes from former New York law:</i> 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.</p>   |
| <p><b>SECTION 1-307. PRIMA FACIE EVIDENCE BY THIRD-PARTY DOCUMENTS.</b></p> <p>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.</p> | <p>Section 1-202. Prima Facie Evidence by Third Party Documents.</p> <p>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.</p> | <p><i>Changes from former New York law:</i> NYA 1-202 with very minor wording changes.</p>  |
| <p><b>SECTION 1-308. PERFORMANCE OR ACCEPTANCE UNDER RESERVATION OF RIGHTS.</b></p> <p>(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.</p> <p>(b) Subsection (a) does not apply to an accord and satisfaction.</p>    | <p>Section 1-207. Performance or Acceptance Under Reservation of Rights.</p> <p>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.</p>  | <p><i>Changes from NYA:</i> 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 (<i>see, e.g.,</i> Horn Waterproofing Corp. v. Bushwick Iron &amp; 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.</p> |

| Revised Uniform Article 1 (“RA”) | Corresponding Provision of Current New York Article 1 (“NYA”) | Commentary  |
|----------------------------------|---|---|
|                                  |   | <p>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.</p> <p>Subsection (a) of RA 1-308 is substantially identical to 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.</p> <p>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 Section 3-311 becomes law.</p> <p>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.</p> |

| Revised Uniform Article 1 (“RA”)  | Corresponding Provision of Current New York Article 1 (“NYA”)   | Commentary   |
|---|---|--|
| <p>SECTION 1-309. OPTION TO ACCELERATE AT WILL.</p> <p>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.</p> | <p>Section 1-208. Option to Accelerate at Will.</p> <p>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.</p>                               | <p><i>Changes from former New York law: NYA 1-208 with minor wording changes.</i></p>  |
| <p>SECTION 1-310. SUBORDINATED OBLIGATIONS.</p> <p>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.</p>   | <p>Section 1-209. Subordinated obligations.</p> <p>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.</p> | <p><i>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.”</i></p> |

**Provisions from New York Article 1 without Equivalents in Proposed Article 1**

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|  | <p>Section 1-206. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered</p> <p>(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.</p> <p>(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).</p> <p>(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.</p> | <p><i>Changes from former New York law:</i> 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.</p> <p>See detailed discussion at Part C in the text.</p> <p><i>Note:</i> NYA 1-207, NYA 1-208 and NYA 1-209 are now RA 1-308, RA 1-309 and RA 1-310 respectively.</p> |
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|  | <p>Section 1-201. General Definitions.<br/>Subsection 21.</p> <p>(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.</p> | <p><i>Changes from former New York law:</i> "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).</p> |
|  | <p>Section 1-201. General Definitions.<br/>Subsection 41.</p> <p>(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.</p>                        | <p><i>Changes from former New York law:</i> "Telegram". NYA 1 contains this non-uniform definition which is not in RA 1.</p>  |

## **EXHIBIT B**

### **CONSUMER PROTECTION LAWS**

#### **A. GENERAL PROVISIONS**

1. For the following two provisions, a consumer is defined as a person engaged in a transaction primarily for personal, family, or household purposes. N.Y. GEN. OBLIG. § 5-702.
2. Plain language is required when a consumer is a party. N.Y. GEN. OBLIG. § 5-702.
3. Small print is inadmissible when the transaction is primarily for personal, family, or household purposes. N.Y.C.P.L.R. Rule 4544.

#### **B. DECEPTIVE TRADE PRACTICES**

1. The deceptive trade practices statute applies to every business operating in New York, and applies to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of the state, so long as the persons harmed are consumers. N.Y. GEN. BUS. § 349(e) & (g).
2. A person engages in a deceptive trade practice when he:
  - (a) Passes off goods or services as those of another.
  - (b) Causes confusion or misunderstanding as to the source of the goods or services.
  - (c) Uses deceptive representations or designations of geographic origin in connection with goods or services.
  - (d) Misrepresents that goods are original.
  - (e) Disparages the goods or services of another by false or misleading representations.
  - (f) Advertising goods or services with the intent not to sell them as advertised.
  - (g) Makes false or misleading statements of fact concerning the reasons for, or amounts of, price reductions.
  - (h) Engages in any other conduct that similarly creates likelihood of confusion or of misunderstanding. N.Y. GEN. BUS. § 349.
3. Reasonable attorneys' fees may be awarded to a prevailing plaintiff in an action to enforce the deceptive trade practices statute. N.Y. GEN. OBLIG. § 5-327.

#### **C. NEW YORK CONSUMER CREDIT PROTECTION LAWS**

1. Here, a consumer is defined as a natural person. N.Y. GEN. BUS. § 710(1).

2. Consumers may not waive the provisions of this section. *See* N.Y. GEN. BUS. §§ 710 et seq.
3. Statement, notice, and refund requirements:
  - (a) Creditors must provide every holder of a consumer credit account with a statement setting forth any credit balance greater than \$1. N.Y. GEN. BUS. § 712.
  - (b) Creditors must give notice to consumers of the consumer's right to request and receive a refund of the full credit balance. N.Y. GEN. BUS. § 713(1)
  - (c) Automatic refund is required if no transactions are made for six consecutive billing cycles. N.Y. GEN. BUS. § 714.
4. Creditors must issue annual credit interest statements. N.Y. GEN. BUS. § 718 (1) & (2).
5. Upon receipt of notice of error, creditors must acknowledge receipt to the consumer and make appropriate corrections in the account. N.Y. GEN. BUS. § 705.

#### D. RETAIL INSTALLMENT SALES ACT

1. Under the Act, "retail buyer" is defined as a person who buys goods or obtains services from a retail seller. N.Y. PERS. PROP. § 401(4).
2. Any waiver by the buyer of the provisions of the Retail Installment Sales Act is unenforceable and void. N.Y. PERS. PROP. § 416.
3. The contract must contain the entire agreement. N.Y. PERS. PROP. § 402(2)
4. Maturity may not be accelerated in the absence of default, arbitrarily and without reasonable care. N.Y. PERS. PROP. § 403(2)(b).
5. May not include a provision relieving seller of liability for legal remedies the buyer may have against the seller. N.Y. PERS. PROP. § 403(2)(g).
6. Buyer may not waive his right to trial by jury. N.Y. PERS. PROP. § 403(2)(h).
7. The contract may not grant a security interest in any real or personal property, other than the goods that are the subject of the sale. N.Y. PERS. PROP. § 421.
8. May not include a provision authorizing the seller to enter the buyer's premises or unlawfully to commit a breach of the peace in the repossession of goods. N.Y. PERS. PROP. § 403(2)(d).

## E. RENTAL–PURCHASE AGREEMENT

1. Covers use of merchandise for personal, family, or household purposes. N.Y. PERS. PROP. §§ 500 et seq.
2. Provisions in this section may not be waived by the consumer. N.Y. PERS. PROP. §§ 500 et seq.
3. Consumer has right to review completed agreement for up to 24 hours prior to signing. N.Y. PERS. PROP. § 502.
4. In case of loss, maximum amount to which consumer liable is no greater than if consumer had exercised the early purchase option. N.Y. PERS. PROP. § 501(7)(f).
5. In case of damage, consumer pays the lesser of the early purchase price and cost of repair. N.Y. PERS. PROP. § 501(7)(f).
6. At any time after the initial payment is made, the consumer may tender an amount equal to the cash price of the merchandise minus a percentage of all previous rental-purchase payments already made. N.Y. PERS. PROP. § 504.
7. Prohibited provisions:
  - (a) Requiring a confession of judgment. N.Y. PERS. PROP. § 501(3)(a).
  - (b) Authorizing a merchant or his agent to commit a breach of the peace in the repossession of merchandise. N.Y. PERS. PROP. § 501(3)(b).
  - (c) Waiving a defense, counterclaim, or right the consumer may have against the merchant. N.Y. PERS. PROP. § 501(3)(c).
8. Damages: Consumer may recover actual damages, attorneys' fees and court costs. N.Y. PERS. PROP. § 507(1).

## F. MOTOR VEHICLE SALES, FINANCE & LEASING

1. For purposes of this section, a “retail buyer” is a person who buys a motor vehicle from a retail seller and executes a retail installment contract in connection therewith. N.Y. PERS. PROP. § 301(2).
2. Any waiver by the buyer of the provisions of the Motor Vehicle Retail Installment Sales Act is unenforceable and void. N.Y. PERS. PROP. § 308.
3. Form, Content & Execution:
  - (a) In writing and must contain all agreements of the parties. N.Y. PERS. PROP. § 302(1).
  - (b) Must disclose rate increases and insurance coverage. N.Y. PERS. PROP. § 302(4).

(c) Prohibited provisions include:

- (i) Accelerating maturity in the absence of default. N.Y. PERS. PROP. § 302(13)(a).
- (ii) Relieving seller from liability for any legal remedies buyer might have. N.Y. PERS. PROP. § 302(13)(f).
- (iii) Buyer's waiver of right to trial by jury. N.Y. PERS. PROP. § 302(13)(h).

4. Enforcement: No motor vehicle installment contract may provide for the creation of a security interest in any personal or real property, other than the motor vehicle which is the subject of the sale. N.Y. PERS. PROP. § 338(a).

5. Prohibited Grants of Authority:

- (a) Authorizing seller to enter upon buyer's premises unlawfully or to commit any breach of the peace in the repossession of the motor vehicle. N.Y. PERS. PROP. § 302(13)(c).
- (b) Waiving any right of action of the part of the buyer for seller's illegal acts in collection of payment or repossession. N.Y. PERS. PROP. § 302(13)(d)

G. DOOR-TO-DOOR SALES PROTECTION ACT:

- 1. This Act covers sales where the seller or his representative personally solicits the sale and the buyer's offer to purchase is made at a place other than the main or permanent branch office of the seller. N.Y. PERS. PROP. § 426(1).
- 2. A door-to-door sales contract may not include any waiver of the buyer's right to cancel the sale. N.Y. PERS. PROP. § 428(3).
- 3. Consumers have a "cooling-off" period when they may cancel contracts entered into as a result of high-pressure door-to-door sales tactics. This period lasts from the time the offer of purchase is made by the consumer until midnight of the third business day. N.Y. PERS. PROP. § 425-431.

H. CONSUMER PRODUCT SAFETY

- 1. Automatic Garage-Door Opening Systems: No person may manufacture, sell, or install in the State of New York an automatic garage-door opening system for a residential building which does not have an automatic-reverse safety device. N.Y. GEN. BUS. § 391-k(2)(a).
- 2. Hazardous Toys: No person, firm, corporation, association or agent or employee thereof may import, manufacture, sell, hold for sale or distribute a toy or other article intended for use by a child which presents an electrical, mechanical or thermal hazard. N.Y. GEN. BUS. §396-k(1).

## I. MISCELLANEOUS CONSUMER TRANSACTIONS AND CONTRACTS

1. Sale of Unfit Animals: Consumer retains the right to return for refund or exchange an animal certified by a veterinarian to be unfit due to illness, a congenital malformation that adversely affects the health of the animal, or the presence of symptoms of a contagious or infectious disease. N.Y. GEN. BUS. § 753.
  - (a) Consumer is defined in this section as any individual purchasing an animal from a pet dealer, but does not include a pet dealer. N.Y. GEN. BUS. § 752(2).
  - (b) No pet dealer may restrict or diminish, by contract or otherwise, the rights provided by this section. N.Y. GEN. BUS. § 754.
  
2. Video Consumer Privacy Act: A video tape service provider may not disclose to any person, personally identifiable information concerning any consumer. N.Y. GEN. BUS. § 670-695.
  - (a) Consumer is defined in this section as any renter, purchaser, or subscriber of goods or services from a video tape service provider. N.Y. GEN. BUS. § 672(1).
  
3. Health-Club Service Contracts: Buyer retains a right to cancel a health-club service contract within 3 business days after the date of receipt of the written contract. N.Y. GEN. BUS. § 624(2).
  - (a) The contract may not contain any waivers of this section. N.Y. GEN. BUS. § 627(2).

## J. HOME IMPROVEMENT CONTRACTS

1. For purposes of this section, owner is defined as any homeowner, cooperative shareholder owner, residential tenant, or any person who purchases a custom home. N.Y. GEN. BUS. § 770(2).
  
2. The provisions of this section may not be waived. N.Y. GEN. BUS. §§ 775 et seq.
  
3. Owner retains the right to cancel the contract until midnight of the third business day following the agreement. N.Y. GEN. BUS. § 771(1)(h).
  
4. Every home-improvement contract must be evidenced by a writing that is legible and in plain English. N.Y. GEN. BUS. § 771(2).
  
5. Before any work is done, the owner must be furnished a copy of the written agreement, signed by the contractor. N.Y. GEN. BUS. § 771(2).

## K. FURNITURE & MAJOR HOUSEHOLD-APPLIANCE DELIVERY

1. In this section, a consumer is defined as a person who enters into a contract with a dealer for the purchase or lease of furniture or a major household appliance. N.Y. GEN. BUS. § 396-u(1)(e).
2. The provisions in this section may not be waived by the consumer. N.Y. GEN. BUS. §396-u(5).
3. Major household-appliance dealers must not fail to disclose the estimated delivery date conspicuously and in writing on the consumer's copy of the contract. N.Y. GEN. BUS. § 396-u(2).
4. Dealers must not fail to deliver appliance or furniture by the delivery date unless the affected customer is notified of the delay. N.Y. GEN. BUS. § 396-u(2).
5. Dealer must not fail to make a timely refund if a customer elects to cancel the contract. N.Y. GEN. BUS. § 396-u(2).

**EXHIBIT C**

**POTENTIAL CONFORMING CHANGES TO  
OTHER NEW YORK STATUTES**

| <b>Provision</b>                                    | <b>Current Text</b>  | <b>Minimum Necessary Revision</b>   | <b>Better Revision</b>                  |
|---|--|---|---|
| Arts & Cultural Affairs Law § 11.01, subdivision 4. | “Creditors” means “creditor” as defined in subdivision <i>twelve</i> 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 <i>1-105</i> 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 <i>1-105</i> 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 | Replace the reference to section 1-105 with a reference to section 1-301.             | None                                    |

| Provision                                     | Current Text   | Minimum Necessary Revision   | Better Revision |
|---|--|--|-----------------|
|   | <p>or trust company 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.</p>   |  |                 |
| <p>Banking Law § 204-a, subdivision 3(a).</p> | <p>Notwithstanding section <i>1-105</i> 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. . . .</p>  | <p>Replace the reference to section 1-105 with a reference to section 1-301.</p> | <p>None</p>     |
| <p>Banking Law § 204-a, subdivision 3(b).</p> | <p>Notwithstanding section <i>1-105</i> 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</p> | <p>Replace the reference to section 1-105 with a reference to section 1-301.</p> | <p>None</p>     |

| Provision   | Current Text   | Minimum Necessary Revision   | Better Revision                           |
|---|--|--|---|
|   | assets bears to the aggregate of all 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 <i>thirty-seven</i> 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 <i>1-105</i> of the uniform commercial code. . . . | Replace the reference to section 1-105 with a reference to section 1-301.                      | None                                      |

| Provision                                   | Current Text  | Minimum Necessary Revision   | Better Revision                           |
|---|---|--|---|
| 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 <i>thirty-seven</i> 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 <i>thirty-seven</i> 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. |