

# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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Legislative Document

No. 1403

S.P. 506

In Senate, April 2, 2009

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**An Act To Implement the Uniform Law Conference Suggested  
Updates to Article 1 of the Uniform Commercial Code**

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Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by Senator HOBBS of York.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **PART A**

3 **Sec. A-1. 11 MRSA Art. 1, as amended, is repealed.**

4 **Sec. A-2. 11 MRSA Art. 1-A is enacted to read:**

5 **ARTICLE 1-A**

6 **GENERAL PROVISIONS**

7 **PART 1**

8 **GENERAL PROVISIONS**

9 **§1-1101. Short titles**

10 **(1). This Title may be cited as the Uniform Commercial Code.**

11 **(2). This Article may be cited as the Uniform Commercial Code - General**  
12 **Provisions.**

13 **Official Comments**

14 (This section is §1-101 of Revision of Uniform Commercial Code, Article 1 –  
15 General Provisions (2001).)

16 **Source:** Former Section 1-101.

17 **Changes from former law:** Subsection (b) is new. It is added in order to make the  
18 structure of Article 1 parallel with that of the other articles of the Uniform Commercial  
19 Code.

20 1. Each other article of the Uniform Commercial Code (except Articles 10 and 11)  
21 may also be cited by its own short title. See Sections 2-101, 2A-101, 3-101, 4-101, 4A-  
22 101, 5-101, 6-101, 7-101, 8-101, and 9-101.

23 **§1-1102. Scope of article**

24 **This Article applies to a transaction to the extent that it is governed by another Article**  
25 **of the Uniform Commercial Code.**

26 **Preliminary Comments**

27 (This section is §1-102 of Revision of Uniform Commercial Code, Article 1 –  
28 General Provisions (2001).)

29 **Source:** New.



1 Even prior to the enactment of the Uniform Commercial Code, courts were careful to  
2 keep broad acts from being hampered in their effects by later acts of limited scope. See  
3 *Pacific Wool Growers v. Draper & Co.*, 158 Or. 1, 73 P.2d 1391 (1937), and compare  
4 Section 1-104. The courts have often recognized that the policies embodied in an act are  
5 applicable in reason to subject-matter that was not expressly included in the language of  
6 the act, *Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*,  
7 239 U.S. 520, 36 S.Ct. 194, 60 L.Ed. 417 (1916) (bona fide purchase policy of Uniform  
8 Warehouse Receipts Act extended to case not covered but of equivalent nature), and did  
9 the same where reason and policy so required, even where the subject-matter had been  
10 intentionally excluded from the act in general. *Agar v. Orda*, 264 N.Y. 248, 190 N.E. 479  
11 (1934) (Uniform Sales Act change in seller's remedies applied to contract for sale of  
12 choses in action even though the general coverage of that Act was intentionally limited to  
13 goods "other than things in action.") They implemented a statutory policy with liberal  
14 and useful remedies not provided in the statutory text. They disregarded a statutory  
15 limitation of remedy where the reason of the limitation did not apply. *Fiterman v. J. N.*  
16 *Johnson & Co.*, 156 Minn. 201, 194 N.W. 399 (1923) (requirement of return of the goods  
17 as a condition to rescission for breach of warranty; also, partial rescission allowed).  
18 Nothing in the Uniform Commercial Code stands in the way of the continuance of such  
19 action by the courts.

20 The Uniform Commercial Code should be construed in accordance with its  
21 underlying purposes and policies. The text of each section should be read in the light of  
22 the purpose and policy of the rule or principle in question, as also of the Uniform  
23 Commercial Code as a whole, and the application of the language should be construed  
24 narrowly or broadly, as the case may be, in conformity with the purposes and policies  
25 involved.

26 **2. Applicability of supplemental principles of law.** Subsection (b) states the basic  
27 relationship of the Uniform Commercial Code to supplemental bodies of law. The  
28 Uniform Commercial Code was drafted against the backdrop of existing bodies of law,  
29 including the common law and equity, and relies on those bodies of law to supplement its  
30 provisions in many important ways. At the same time, the Uniform Commercial Code is  
31 the primary source of commercial law rules in areas that it governs, and its rules represent  
32 choices made by its drafters and the enacting legislatures about the appropriate policies to  
33 be furthered in the transactions it covers. Therefore, while principles of common law and  
34 equity may *supplement* provisions of the Uniform Commercial Code, they may not be  
35 used to *supplant* its provisions, or the purposes and policies those provisions reflect,  
36 unless a specific provision of the Uniform Commercial Code provides otherwise. In the  
37 absence of such a provision, the Uniform Commercial Code preempts principles of  
38 common law and equity that are inconsistent with either its provisions or its purposes and  
39 policies.

40 The language of subsection (b) is intended to reflect both the concept of  
41 supplementation and the concept of preemption. Some courts, however, had difficulty in  
42 applying the identical language of former Section 1-103 to determine when other law  
43 appropriately may be applied to supplement the Uniform Commercial Code, and when  
44 that law has been displaced by the Code. Some decisions applied other law in situations  
45 in which that application, while not inconsistent with the text of any particular provision

1 of the Uniform Commercial Code, clearly was inconsistent with the underlying purposes  
2 and policies reflected in the relevant provisions of the Code. *See, e.g., Sheerbonnet, Ltd.*  
3 *v. American Express Bank, Ltd.*, 951 F. Supp. 403 (S.D.N.Y. 1995). In part, this  
4 difficulty arose from Comment 1 to former Section 1-103, which stated that “this section  
5 indicates the continued applicability to commercial contracts of all supplemental bodies  
6 of law except insofar as they are explicitly displaced by this Act.” The “explicitly  
7 displaced” language of that Comment did not accurately reflect the proper scope of  
8 Uniform Commercial Code preemption, which extends to displacement of other law that  
9 is inconsistent with the purposes and policies of the Uniform Commercial Code, as well  
10 as with its text.

11

12 **3. Application of subsection (b) to statutes.** The primary focus of Section 1-103 is  
13 on the relationship between the Uniform Commercial Code and principles of common  
14 law and equity as developed by the courts. State law, however, increasingly is statutory.  
15 Not only are there a growing number of state statutes addressing specific issues that come  
16 within the scope of the Uniform Commercial Code, but in some States many general  
17 principles of common law and equity have been codified. When the other law relating to  
18 a matter within the scope of the Uniform Commercial Code is a statute, the principles of  
19 subsection (b) remain relevant to the court’s analysis of the relationship between that  
20 statute and the Uniform Commercial Code, but other principles of statutory interpretation  
21 that specifically address the interrelationship between statutes will be relevant as well. In  
22 some situations, the principles of subsection (b) still will be determinative. For example,  
23 the mere fact that an equitable principle is stated in statutory form rather than in judicial  
24 decisions should not change the court’s analysis of whether the principle can be used to  
25 supplement the Uniform Commercial Code – under subsection (b), equitable principles  
26 may supplement provisions of the Uniform Commercial Code only if they are consistent  
27 with the purposes and policies of the Uniform Commercial Code as well as its text. In  
28 other situations, however, other interpretive principles addressing the interrelationship  
29 between statutes may lead the court to conclude that the other statute is controlling, even  
30 though it conflicts with the Uniform Commercial Code. This, for example, would be the  
31 result in a situation where the other statute was specifically intended to provide additional  
32 protection to a class of individuals engaging in transactions covered by the Uniform  
33 Commercial Code.

34 **4. Listing not exclusive.** The list of sources of supplemental law in subsection (b) is  
35 intended to be merely illustrative of the other law that may supplement the Uniform  
36 Commercial Code, and is not exclusive. No listing could be exhaustive. Further, the fact  
37 that a particular section of the Uniform Commercial Code makes express reference to  
38 other law is not intended to suggest the negation of the general application of the  
39 principles of subsection (b). Note also that the word “bankruptcy” in subsection (b),  
40 continuing the use of that word from former Section 1-103, should be understood not as a  
41 specific reference to federal bankruptcy law but, rather as a reference to general  
42 principles of insolvency, whether under federal or state law.



1 (This section is §1-106 of Revision of Uniform Commercial Code, Article 1 –  
2 General Provisions (2001).)

3 **Source:** Former Section 1-102(5). See also 1 U.S.C. Section 1.

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

6 1. This section makes it clear that the use of singular or plural in the text of the  
7 Uniform Commercial Code is generally only a matter of drafting style – singular words  
8 may be applied in the plural, and plural words may be applied in the singular. Only  
9 when it is clear from the statutory context that the use of the singular or plural does not  
10 include the other is this rule inapplicable. *See, e.g.*, Section 9-322.

11 **§1-1107. Section captions**

12 Section captions are part of the Uniform Commercial Code.

13 **Official Comments**

14 (This section is §1-107 of Revision of Uniform Commercial Code, Article 1 –  
15 General Provisions (2001).)

16 **Source:** Former Section 1-109.

17 **Changes from former law:** None.

18 1. Section captions are a part of the text of the Uniform Commercial Code, and not  
19 mere surplusage. This is not the case, however, with respect to subsection headings  
20 appearing in Article 9. See Comment 3 to Section 9-101 (“subsection headings are not a  
21 part of the official text itself and have not been approved by the sponsors.”).

22 **§1-1108. Relation to electronic signatures in Electronic Signatures in Global and**  
23 **National Commerce Act**

24 This Article modifies, limits and supersedes the federal Electronic Signatures in  
25 Global and National Commerce Act, 15 United States Code, Section 7001 et seq., except  
26 that nothing in this Article modifies, limits or supersedes Section 7001(c) of that Act or  
27 authorizes electronic delivery of any of the notices described in Section 7003(b) of that  
28 Act.

29 **Official Comments**

30 (This section is §1-108 of Revision of Uniform Commercial Code, Article 1 –  
31 General Provisions (2001).)

32  
33 **Source:** New

34  
35 1. The federal Electronic Signatures in Global and National Commerce Act, 15  
36 U.S.C. Section 7001 *et seq* became effective in 2000. Section 102(a) of that Act provides



1 that a State statute may modify, limit, or supersede the provisions of section 101 of that  
2 Act with respect to state law if such statute, *inter alia*, specifies the alternative procedures  
3 or requirements for the use or acceptance (or both) of electronic records or electronic  
4 signatures to establish the legal effect, validity, or enforceability of contracts or other  
5 records, and (i) such alternative procedures or requirements are consistent with Titles I  
6 and II of that Act, (ii) such alternative procedures or requirements do not require, or  
7 accord greater legal status or effect to, the implementation or application of a specific  
8 technology or technical specification for performing the functions of creating, storing,  
9 generating, receiving, communicating, or authenticating electronic records or electronic  
10 signatures; and (iii) if enacted or adopted after the date of the enactment of that Act,  
11 makes specific reference to that Act. Article 1 fulfills the first two of those three criteria;  
12 this Section fulfills the third criterion listed above.

13 2. As stated in this section, however, Article 1 does not modify, limit, or supersede  
14 Section 101(c) of the Electronic Signatures in Global and National Commerce Act  
15 (requiring affirmative consent from a consumer to electronic delivery of transactional  
16 disclosures that are required by state law to be in writing); nor does it authorize electronic  
17 delivery of any of the notices described in Section 103(b) of that Act.

18 **PART 2**

19 **GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION**

20 **§1-1201. General definitions**

21 Unless the context otherwise requires, words or phrases defined in this section, or in  
22 the additional definitions contained in other Articles of the Uniform Commercial Code  
23 that apply to particular Articles or Parts thereof, have the meanings stated.

24 Subject to definitions contained in other Articles of the Uniform Commercial Code  
25 that apply to particular Articles or Parts thereof, the following terms have the following  
26 meanings.

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

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

31 (3). "Agreement," as distinguished from "contract," means the bargain of the parties  
32 in fact, as found in their language or inferred from other circumstances, including course  
33 of performance, course of dealing or usage of trade as provided in section 1-1303.

34 (4). "Bank" means a person engaged in the business of banking and includes a  
35 savings bank, savings and loan association, credit union and trust company.

36 (5). "Bearer" means a person in control of a negotiable electronic document of title  
37 or a person in possession of a negotiable instrument, negotiable tangible document of title  
38 or certificated security that is payable to bearer or indorsed in blank.

1           (6). "Bill of lading" means a document of title evidencing the receipt of goods for  
2 shipment issued by a person engaged in the business of directly or indirectly transporting  
3 or forwarding goods. The term does not include a warehouse receipt.

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

5           (8). "Burden of establishing" a fact means the burden of persuading the trier of fact  
6 that the existence of the fact is more probable than its nonexistence.

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

21           (10). "Conspicuous," with reference to a term, means so written, displayed or  
22 presented that a reasonable person against which it is to operate ought to have noticed it.  
23 Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms  
24 include the following:

25           (a). A heading in capitals equal to or greater in size than the surrounding text, or in  
26 contrasting type, font or color to the surrounding text of the same or lesser size; and

27           (b). Language in the body of a record or display in larger type than the surrounding  
28 text, or in contrasting type, font or color to the surrounding text of the same size, or  
29 set off from surrounding text of the same size by symbols or other marks that call  
30 attention to the language.

31           (11). "Consumer" means an individual who enters into a transaction primarily for  
32 personal, family or household purposes.

33           (12). "Contract," as distinguished from "agreement," means the total legal obligation  
34 that results from the parties' agreement as determined by the Uniform Commercial Code  
35 as supplemented by any other applicable laws.

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

1           (14). "Defendant" includes a person in the position of defendant in a counterclaim,  
2 cross-claim or 3rd-party claim.

3           (15). "Delivery," with respect to an electronic document of title means voluntary  
4 transfer of control and with respect to an instrument, a tangible document of title or  
5 chattel paper, means voluntary transfer of possession.

6           (16). "Document of title" means a record:

7           (a). That in the regular course of business or financing is treated as adequately  
8 evidencing that the person in possession or control of the record is entitled to receive,  
9 control, hold and dispose of the record and the goods the record covers; and

10          (b). That purports to be issued by or addressed to a bailee and to cover goods in the  
11 bailee's possession that are either identified or are fungible portions of an identified  
12 mass.

13          The term includes a bill of lading, transport document, dock warrant, dock receipt,  
14 warehouse receipt and order for delivery of goods. An electronic document of title means  
15 a document of title evidenced by a record consisting of information stored in an electronic  
16 medium. A tangible document of title means a document of title evidenced by a record  
17 consisting of information that is inscribed on a tangible medium.

18          (17). "Fault" means a default, breach or wrongful act or omission.

19          (18). "Fungible goods" means:

20          (a). Goods of which any unit, by nature or usage of trade, is the equivalent of any  
21 other like unit; or

22          (b). Goods that by agreement are treated as equivalent.

23          (19). "Genuine" means free of forgery or counterfeiting.

24          (20). "Good faith," except as otherwise provided in Article 5, means honesty in fact  
25 and the observance of reasonable commercial standards of fair dealing.

26          (21). "Holder" means:

27          (a). The person in possession of a negotiable instrument that is payable either to  
28 bearer or to an identified person that is the person in possession;

29          (b). The person in possession of a negotiable tangible document of title if the goods  
30 are deliverable either to bearer or to the order of the person in possession; and

31          (c). The person in control of a negotiable electronic document of title.

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

34          (23). "Insolvent" means:

35          (a). Having generally ceased to pay debts in the ordinary course of business other  
36 than as a result of bona fide dispute;

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

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

(24). "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between 2 or more countries.

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

(26). "Party," as distinguished from "3rd party," means a person that has engaged in a transaction or made an agreement subject to the Uniform Commercial Code.

(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.

(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.

(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.

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

(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.

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

(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.

(34). "Right" includes remedy.

(35). "Security interest" means an interest in personal property or fixtures that 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-A. "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-A. Except as otherwise provided in section 2-505,

1 the right of a seller or lessor of goods under Article 2 or 2-A to retain or acquire  
2 possession of the goods is not a "security interest," but a seller or lessor may also acquire  
3 a "security interest" by complying with Article 9-A. The retention or reservation of title  
4 by a seller of goods notwithstanding shipment or delivery to the buyer under section  
5 2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in  
6 the form of a lease creates a "security interest" is determined pursuant to section 1-1203.

7 (36). "Send" in connection with a writing, record or notice means:

8 (a). To deposit in the mail or deliver for transmission by any other usual means of  
9 communication with postage or cost of transmission provided for and properly  
10 addressed and, in the case of an instrument, to an address specified thereon or  
11 otherwise agreed, or if there be none to any address reasonable under the  
12 circumstances; or

13 (b). In any other way to cause to be received any record or notice within the time it  
14 would have arrived if properly sent.

15 (37). "Signed" includes using any symbol executed or adopted with present intention  
16 to adopt or accept a writing.

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

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

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

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

24 (42). "Warehouse receipt" means a document of title issued by a person engaged in  
25 the business of storing goods for hire.

26 (43). "Writing" includes printing, typewriting or any other intentional reduction to  
27 tangible form. "Written" has a corresponding meaning.

#### 28 **Official Comments**

29 (This section is §1-201 of Revision of Uniform Commercial Code, Article 1 –  
30 General Provisions (2001) and amended in 2003 with Article 7.)

31 **Source:** Former Section 1-201.

32 **Changes from former law:** In order to make it clear that all definitions in the  
33 Uniform Commercial Code (not just those appearing in Article 1, as stated in former  
34 Section 1-201, but also those appearing in other Articles) do not apply if the context  
35 otherwise requires, a new subsection (a) to that effect has been added, and the definitions  
36 now appear in subsection (b). The reference in subsection (a) to the “context” is intended  
37 to refer to the context in which the defined term is used in the Uniform Commercial  
38 Code. In other words, the definition applies whenever the defined term is used unless the

1 context in which the defined term is used in the statute indicates that the term was not  
2 used in its defined sense. Consider, for example, Sections 3-103(a)(9) (defining  
3 "promise," in relevant part, as "a written undertaking to pay money signed by the person  
4 undertaking to pay") and 3-303(a)(1) (indicating that an instrument is issued or  
5 transferred for value if "the instrument is issued or transferred for a promise of  
6 performance, to the extent that the promise has been performed"). It is clear from the  
7 statutory context of the use of the word "promise" in Section 3-303(a)(1) that the term  
8 was not used in the sense of its definition in Section 3-103(a)(9). Thus, the Section 3-  
9 103(a)(9) definition should not be used to give meaning to the word "promise" in Section  
10 3-303(a).

11 Some definitions in former Section 1-201 have been reformulated as substantive  
12 provisions and have been moved to other sections. See Sections 1-202 (explicating  
13 concepts of notice and knowledge formerly addressed in Sections 1-201(25)-(27)), 1-204  
14 (determining when a person gives value for rights, replacing the definition of "value" in  
15 former Section 1-201(44)), and 1-206 (addressing the meaning of presumptions, replacing  
16 the definitions of "presumption" and "presumed" in former Section 1-201(31)).  
17 Similarly, the portion of the definition of "security interest" in former Section 1-201(37)  
18 which explained the difference between a security interest and a lease has been relocated  
19 to Section 1-203.

20 Two definitions in former Section 1-201 have been deleted. The definition of  
21 "honor" in former Section 1-201(21) has been moved to Section 2-103(1)(b), inasmuch as  
22 the definition only applies to the use of the word in Article 2. The definition of  
23 "telegram" in former Section 1-201(41) has been deleted because that word no longer  
24 appears in the definition of "conspicuous."

25 Other than minor stylistic changes and renumbering, the remaining definitions in this  
26 section are as in former Article 1 except as noted below.

27 1. "Action." Unchanged from former Section 1-201, which was derived from similar  
28 definitions in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform  
29 Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of  
30 Lading Act.

31 2. "Aggrieved party." Unchanged from former Section 1-201.

32 3. "Agreement." Derived from former Section 1-201. As used in the Uniform  
33 Commercial Code the word is intended to include full recognition of usage of trade,  
34 course of dealing, course of performance and the surrounding circumstances as effective  
35 parts thereof, and of any agreement permitted under the provisions of the Uniform  
36 Commercial Code to displace a stated rule of law. Whether an agreement has legal  
37 consequences is determined by applicable provisions of the Uniform Commercial Code  
38 and, to the extent provided in Section 1-103, by the law of contracts.

39 4. "Bank." Derived from Section 4A-104.

40 5. "Bearer." Unchanged, except in one respect, from former Section 1-201, which  
41 was derived from Section 191, Uniform Negotiable Instruments Law. The term bearer

1 applies to negotiable documents of title and has been broadened to include a person in  
2 control of an electronic negotiable document of title. Control of an electronic document  
3 of title is defined in Article 7 (Section 7-102).

4 6. "Bill of Lading." Derived from former Section 1-201. The reference to, and  
5 definition of, an "airbill" has been deleted as no longer necessary. A bill of lading is one  
6 type of document of title as defined in subsection (16). This definition should be read in  
7 conjunction with the definition of carrier in Article 7 (Section 7-102).

8 7. "Branch." Unchanged from former Section 1-201.

9 8. "Burden of establishing a fact." Unchanged from former Section 1-201.

10 9. "Buyer in ordinary course of business." Except for minor stylistic changes,  
11 identical to former Section 1-201 (as amended in conjunction with the 1999 revisions to  
12 Article 9). The major significance of the phrase lies in Section 2-403 and in the Article  
13 on Secured Transactions (Article 9).

14 The first sentence of paragraph (9) makes clear that a buyer from a pawnbroker  
15 cannot be a buyer in ordinary course of business. The second sentence explains what it  
16 means to buy "in the ordinary course." The penultimate sentence prevents a buyer that  
17 does not have the right to possession as against the seller from being a buyer in ordinary  
18 course of business. Concerning when a buyer obtains possessory rights, see Sections  
19 2-502 and 2-716. However, the penultimate sentence is not intended to affect a buyer's  
20 status as a buyer in ordinary course of business in cases (such as a "drop shipment")  
21 involving delivery by the seller to a person buying from the buyer or a donee from the  
22 buyer. The requirement relates to whether *as against the seller* the buyer or one taking  
23 through the buyer has possessory rights.

24 10. "Conspicuous." Derived from former Section 1-201(10). This definition states  
25 the general standard that to be conspicuous a term ought to be noticed by a reasonable  
26 person. Whether a term is conspicuous is an issue for the court. Subparagraphs (A) and  
27 (B) set out several methods for making a term conspicuous. Requiring that a term be  
28 conspicuous blends a notice function (the term ought to be noticed) and a planning  
29 function (giving guidance to the party relying on the term regarding how that result can  
30 be achieved). Although these paragraphs indicate some of the methods for making a term  
31 attention-calling, the test is whether attention can reasonably be expected to be called to  
32 it. The statutory language should not be construed to permit a result that is inconsistent  
33 with that test.

34 11. "Consumer." Derived from Section 9-102(a)(25).

35 12. "Contract." Except for minor stylistic changes, identical to former Section  
36 1-201.

37 13. "Creditor." Unchanged from former Section 1-201.

38 14. "Defendant." Except for minor stylistic changes, identical to former Section  
39 1-201, which was derived from Section 76, Uniform Sales Act.

1           15. "Delivery." Derived from former Section 1-201. The reference to certificated  
2 securities has been deleted in light of the more specific treatment of the matter in Section  
3 8-301. The definition has been revised to accommodate electronic documents of title.  
4 Control of an electronic document of title is defined in Article 7 (Section 7-106).

5           16. "Document of title." Derived from former Section 1-201, which was derived  
6 from Section 76, Uniform Sales Act. This definition makes explicit that the obligation or  
7 designation of a third party as "bailee" is essential to a document of title and clearly  
8 rejects any such result as obtained in *Hixson v. Ward*, 254 Ill.App. 505 (1929), which  
9 treated a conditional sales contract as a document of title. Also the definition is left open  
10 so that new types of documents may be included, including documents which gain  
11 commercial recognition in the international arena. See UNCITRAL Draft Instrument on  
12 the Carriage of Goods By Sea.. It is unforeseeable what documents may one day serve  
13 the essential purpose now filled by warehouse receipts and bills of lading. The definition  
14 is stated in terms of the function of the documents with the intention that any document  
15 which gains commercial recognition as accomplishing the desired result shall be included  
16 within its scope. Fungible goods are adequately identified within the language of the  
17 definition by identification of the mass of which they are a part.

18           Dock warrants were within the Sales Act definition of document of title apparently  
19 for the purpose of recognizing a valid tender by means of such paper. In current  
20 commercial practice a dock warrant or receipt is a kind of interim certificate issued by  
21 shipping companies upon delivery of the goods at the dock, entitling a designated person  
22 to be issued a bill of lading. The receipt itself is invariably nonnegotiable in form  
23 although it may indicate that a negotiable bill is to be forthcoming. Such a document is  
24 not within the general compass of the definition, although trade usage may in some cases  
25 entitle such paper to be treated as a document of title. If the dock receipt actually  
26 represents a storage obligation undertaken by the shipping company, then it is a  
27 warehouse receipt within this section regardless of the name given to the instrument.

28           The goods must be "described," but the description may be by marks or labels and  
29 may be qualified in such a way as to disclaim personal knowledge of the issuer regarding  
30 contents or condition. However, baggage and parcel checks and similar "tokens" of  
31 storage which identify stored goods only as those received in exchange for the token are  
32 not covered by this Article. The definition is broad enough to include an airway bill.

33           A document of title may be either tangible or electronic. Tangible documents of title  
34 should be construed to mean traditional paper documents. Electronic documents of title  
35 are documents that are stored in an electronic medium instead of in tangible form. The  
36 concept of an electronic medium should be construed liberally to include electronic,  
37 digital, magnetic, optical, electromagnetic, or any other current or similar emerging  
38 technologies. As to reissuing a document of title in an alternative medium, see Article 7,  
39 Section 7-105. Control for electronic documents of title is defined in Article 7 (Section  
40 7-106).

41           17. "Fault." Derived from former Section 1-201. "Default" has been added to the  
42 list of events constituting fault.



1 18. "Fungible goods." Derived from former Section 1-201. References to securities  
2 have been deleted because Article 8 no longer uses the term "fungible" to describe  
3 securities. Accordingly, this provision now defines the concept only in the context of  
4 goods.

5 19. "Genuine." Unchanged from former Section 1-201.

6 20. "Good faith." Former Section 1-201(19) defined "good faith" simply as honesty  
7 in fact; the definition contained no element of commercial reasonableness. Initially, that  
8 definition applied throughout the Code with only one exception. Former Section 2-  
9 103(1)(b) provided that "in that Article, "'good faith' in the case of a merchant means  
10 honesty in fact and the observance of reasonable commercial standards of fair dealing in  
11 the trade." This alternative definition was limited in applicability, though, because it  
12 applied only to transactions within the scope of Article 2 and it applied only to merchants.

13 Over time, however, amendments to the Uniform Commercial Code brought the  
14 Article 2 merchant concept of good faith (subjective honesty and objective commercial  
15 reasonableness) into other Articles. First, Article 2A explicitly incorporated the Article 2  
16 standard. See Section 2A-103(7). Then, other Articles broadened the applicability of that  
17 standard by adopting it for all parties rather than just for merchants. See, e.g., Sections 3-  
18 103(a)(4), 4A-105(a)(6), 7-102(a)(6), 8-102(a)(10), and 9-102(a)(43). Finally, Articles 2  
19 and 2A were amended so as to apply the standard to non-merchants as well as merchants.  
20 See Sections 2-103(1)(j), 2A-103(1)(m). All of these definitions are comprised of two  
21 elements – honesty in fact *and* the observance of reasonable commercial standards of fair  
22 dealing. Only revised Article 5 defines "good faith" solely in terms of subjective  
23 honesty, and only Article 6 (in the few states that have not chosen to delete the Article) is  
24 without a definition of good faith. (It should be noted that, while revised Article 6 did not  
25 define good faith, Comment 2 to revised Section 6-102 states that "this Article adopts the  
26 definition of 'good faith' in Article 1 in all cases, even when the buyer is a merchant.")

27 Thus, the definition of "good faith" in this section merely confirms what has been the  
28 case for a number of years as Articles of the UCC have been amended or revised – the  
29 obligation of "good faith," applicable in each Article, is to be interpreted in the context of  
30 all Articles except for Article 5 as including both the subjective element of honesty in fact  
31 and the objective element of the observance of reasonable commercial standards of fair  
32 dealing. As a result, both the subjective and objective elements are part of the standard of  
33 "good faith," whether that obligation is specifically referenced in another Article of the  
34 Code (other than Article 5) or is provided by this Article.

35 Of course, as noted in the statutory text, the definition of "good faith" in this section  
36 does not apply when the narrower definition of "good faith" in revised Article 5 is  
37 applicable.

38 As noted above, the definition of "good faith" in this section requires not only  
39 honesty in fact but also "observance of reasonable commercial standards of fair dealing."  
40 Although "fair dealing" is a broad term that must be defined in context, it is clear that it is  
41 concerned with the fairness of conduct rather than the care with which an act is  
42 performed. This is an entirely different concept than whether a party exercised ordinary  
43 care in conducting a transaction. Both concepts are to be determined in the light of

1 reasonable commercial standards, but those standards in each case are directed to  
2 different aspects of commercial conduct. See e.g., Sections 3-103(a)(9) and 4-104(c) and  
3 Comment 4 to Section 3-103.

4 21. "Holder." Derived from former Section 1-201. The definition has been  
5 reorganized for clarity and amended to provide for electronic negotiable documents of  
6 title.

7 22. "Insolvency proceedings." Unchanged from former Section 1-201.

8 23. "Insolvent." Derived from former Section 1-201. The three tests of insolvency –  
9 "generally ceased to pay debts in the ordinary course of business other than as a result of  
10 a bona fide dispute as to them," "unable to pay debts as they become due," and "insolvent  
11 within the meaning of the federal bankruptcy law" – are expressly set up as alternative  
12 tests and must be approached from a commercial standpoint.

13 24. "Money." Substantively identical to former Section 1-201. The test is that of  
14 sanction of government, whether by authorization before issue or adoption afterward,  
15 which recognizes the circulating medium as a part of the official currency of that  
16 government. The narrow view that money is limited to legal tender is rejected.

17 25. "Organization." The former definition of this word has been replaced with the  
18 standard definition used in acts prepared by the National Conference of Commissioners  
19 on Uniform State Laws.

20 26. "Party." Substantively identical to former Section 1-201. Mention of a party  
21 includes, of course, a person acting through an agent. However, where an agent comes  
22 into opposition or contrast to the principal, particular account is taken of that situation.

23 27. "Person." The former definition of this word has been replaced with the standard  
24 definition used in acts prepared by the National Conference of Commissioners on  
25 Uniform State Laws.

26 28. "Present value." This definition was formerly contained within the definition of  
27 "security interest" in former Section 1-201(37).

28 29. "Purchase." Derived from former Section 1-201. The form of definition has  
29 been changed from "includes" to "means."

30 30. "Purchaser." Unchanged from former Section 1-201.

31 31. "Record." Derived from Section 9-102(a)(69).

32 32. "Remedy." Unchanged from former Section 1-201. The purpose is to make it  
33 clear that both remedy and right (as defined) include those remedial rights of "self help"  
34 which are among the most important bodies of rights under the Uniform Commercial  
35 Code, remedial rights being those to which an aggrieved party may resort on its own.

36 33. "Representative." Derived from former Section 1-201. Reorganized, and form  
37 changed from "includes" to "means."

- 1           34. "Right." Except for minor stylistic changes, identical to former Section 1-201.
- 2           35. "Security Interest." The definition is the first paragraph of the definition of  
3 "security interest" in former Section 1-201, with minor stylistic changes. The remaining  
4 portion of that definition has been moved to Section 1-203. Note that, because of the  
5 scope of Article 9, the term includes the interest of certain outright buyers of certain kinds  
6 of property.
- 7           36. "Send." Derived from former Section 1-201. Compare "notifies".
- 8           37. "Signed." Derived from former Section 1-201. Former Section 1-201 referred to  
9 "intention to authenticate"; because other articles now use the term "authenticate," the  
10 language has been changed to "intention to adopt or accept." The latter formulation is  
11 derived from the definition of "authenticate" in Section 9-102(a)(7). This provision  
12 refers only to writings, because the term "signed," as used in some articles, refers only to  
13 writings. This provision also makes it clear that, as the term "signed" is used in the  
14 Uniform Commercial Code, a complete signature is not necessary. The symbol may be  
15 printed, stamped or written; it may be by initials or by thumbprint. It may be on any part  
16 of the document and in appropriate cases may be found in a billhead or letterhead. No  
17 catalog of possible situations can be complete and the court must use common sense and  
18 commercial experience in passing upon these matters. The question always is whether  
19 the symbol was executed or adopted by the party with present intention to adopt or accept  
20 the writing.
- 21           38. "State." This is the standard definition of the term used in acts prepared by the  
22 National Conference of Commissioners on Uniform State Laws.
- 23           39. "Surety." This definition makes it clear that "surety" includes all secondary  
24 obligors, not just those whose obligation refers to the person obligated as a surety. As to  
25 the nature of secondary obligations generally, see Restatement (Third), Suretyship and  
26 Guaranty Section 1 (1996).
- 27           40. "Term." Unchanged from former Section 1-201.
- 28           41. "Unauthorized signature." Unchanged from former Section 1-201.
- 29           42. "Warehouse receipt." Derived from former Section 1-201, which was derived  
30 from Section 76(1), Uniform Sales Act; Section 1, Uniform Warehouse Receipts Act.  
31 Receipts issued by a field warehouse are included, provided the warehouseman and the  
32 depositor of the goods are different persons. The definition makes clear that the receipt  
33 must qualify as a document of title under subsection (16).
- 34           43. "Written" or "writing." Unchanged from former Section 1-201.

35           **§1-1202. Notice; knowledge**

- 36           (1). Subject to subsection (6), a person has "notice" of a fact if the person:
- 37           (a). Has actual knowledge of it;
- 38           (b). Has received a notice or notification of it; or

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

3 (2). "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.

4 (3). "Discover," "learn" or words of similar import refer to knowledge rather than to  
5 reason to know.

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

9 (5). Subject to subsection (6), a person "receives" a notice or notification when:

10 (a). It comes to that person's attention; or

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

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

#### 24 **Official Comments**

25 (This section is §1-202 of Revision of Uniform Commercial Code, Article 1 –  
26 General Provisions (2001).)

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

28 **Changes from former law:** These provisions are substantive rather than purely  
29 definitional. Accordingly, they have been relocated from Section 1-201 to this section.  
30 The reference to the “forgotten notice” doctrine has been deleted.

31 1. Under subsection (a), a person has notice of a fact when, *inter alia*, the person has  
32 received a notification of the fact in question.

33 2. As provided in subsection (d), the word “notifies” is used when the essential fact  
34 is the proper dispatch of the notice, not its receipt. Compare “Send.” When the essential  
35 fact is the other party’s receipt of the notice, that is stated. Subsection (e) states when a  
36 notification is received.

37 3. Subsection (f) makes clear that notice, knowledge, or a notification, although  
38 “received,” for instance, by a clerk in Department A of an organization, is effective for a

1 transaction conducted in Department B only from the time when it was or should have  
2 been communicated to the individual conducting that transaction.

3 **§1-1203. Lease distinguished from security interest**

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

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

9 (a). The original term of the lease is equal to or greater than the remaining economic  
10 life of the goods;

11 (b). The lessee is bound to renew the lease for the remaining economic life of the  
12 goods or is bound to become the owner of the goods;

13 (c). The lessee has an option to renew the lease for the remaining economic life of  
14 the goods for no additional consideration or for nominal additional consideration  
15 upon compliance with the lease agreement; or

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

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

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

24 (b). The lessee assumes risk of loss of the goods;

25 (c). The lessee agrees to pay, with respect to the goods, taxes, insurance, filing,  
26 recording or registration fees, or service or maintenance costs;

27 (d). The lessee has an option to renew the lease or to become the owner of the goods;

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

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

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



1 (2d ed.1980). The Article on Leases (Article 2A) did not change the law in that respect,  
2 except for leases of fixtures. Section 2A-309. An examination of the common law will  
3 not provide an adequate answer to the question of what is a lease. The definition of  
4 security interest in Section 1-201(37) of the 1978 Official Text of the Act provided that  
5 the Article on Secured Transactions (Article 9) governs security interests disguised as  
6 leases, *i.e.*, leases intended as security; however, the definition became vague and  
7 outmoded.

8 Lease is defined in Article 2A as a transfer of the right to possession and use of goods  
9 for a term, in return for consideration. Section 2A-103(1)(j). The definition continues by  
10 stating that the retention or creation of a security interest is not a lease. Thus, the task of  
11 sharpening the line between true leases and security interests disguised as leases  
12 continues to be a function of this Article.

13 This section begins where Section 1-201(35) leaves off. It draws a sharper line  
14 between leases and security interests disguised as leases to create greater certainty in  
15 commercial transactions.

16 Prior to enactment of the rules now codified in this section, the 1978 Official Text of  
17 Section 1-201(37) provided that whether a lease was intended as security (*i.e.*, a security  
18 interest disguised as a lease) was to be determined from the facts of each case; however,  
19 (a) the inclusion of an option to purchase did not itself make the lease one intended for  
20 security, and (b) an agreement that upon compliance with the terms of the lease the lessee  
21 would become, or had the option to become, the owner of the property for no additional  
22 consideration, or for a nominal consideration, did make the lease one intended for  
23 security.

24 Reference to the intent of the parties to create a lease or security interest led to  
25 unfortunate results. In discovering intent, courts relied upon factors that were thought to  
26 be more consistent with sales or loans than leases. Most of these criteria, however, were  
27 as applicable to true leases as to security interests. Examples include the typical net lease  
28 provisions, a purported lessor's lack of storage facilities or its character as a financing  
29 party rather than a dealer in goods. Accordingly, this section contains no reference to the  
30 parties' intent.

31 Subsections (a) and (b) were originally taken from Section 1(2) of the Uniform  
32 Conditional Sales Act (act withdrawn 1943), modified to reflect current leasing practice.  
33 Thus, reference to the case law prior to the incorporation of those concepts in this article  
34 will provide a useful source of precedent. Gilmore, *Security Law, Formalism and Article*  
35 *9*, 47 Neb.L.Rev. 659, 671 (1968). Whether a transaction creates a lease or a security  
36 interest continues to be determined by the facts of each case. Subsection (b) further  
37 provides that a transaction creates a security interest if the lessee has an obligation to  
38 continue paying consideration for the term of the lease, if the obligation is not terminable  
39 by the lessee (thus correcting early statutory gloss, *e.g.*, *In re Royer's Bakery, Inc.*, 1  
40 U.C.C. Rep.Serv. (Callaghan) 342 (Bankr.E.D.Pa.1963)) and if one of four additional  
41 tests is met. The first of these four tests, subparagraph (1), is that the original lease term  
42 is equal to or greater than the remaining economic life of the goods. The second of these  
43 tests, subparagraph (2), is that the lessee is either bound to renew the lease for the  
44 remaining economic life of the goods or to become the owner of the goods. *In re Gehrke*

1 *Enters.*, 1 Bankr. 647, 651-52 (Bankr.W.D.Wis.1979). The third of these tests,  
2 subparagraph (3), is whether the lessee has an option to renew the lease for the remaining  
3 economic life of the goods for no additional consideration or for nominal additional  
4 consideration, which is defined later in this section. *In re Celeryvale Transp.*, 44 Bankr.  
5 1007, 1014-15 (Bankr.E.D.Tenn.1984). The fourth of these tests, subparagraph (4), is  
6 whether the lessee has an option to become the owner of the goods for no additional  
7 consideration or for nominal additional consideration. All of these tests focus on  
8 economics, not the intent of the parties. *In re Berge*, 32 Bankr. 370, 371-73  
9 (Bankr.W.D.Wis.1983).

10 The focus on economics is reinforced by subsection (c). It states that a transaction  
11 does not create a security interest merely because the transaction has certain  
12 characteristics listed therein. Subparagraph (1) has no statutory derivative; it states that a  
13 full payout lease does not *per se* create a security interest. *Rushton v. Shea*, 419 F.Supp.  
14 1349, 1365 (D.Del.1976). Subparagraphs (2) and (3) provide the same regarding the  
15 provisions of the typical net lease. *Compare All-States Leasing Co. v. Ochs*, 42 Or.App.  
16 319, 600 P.2d 899 (Ct.App.1979), with *In re Tillery*, 571 F.2d 1361 (5th Cir.1978).  
17 Subparagraph (4) restates and expands the provisions of the 1978 Official Text of Section  
18 1-201(37) to make clear that the option can be to buy or renew. Subparagraphs (5) and  
19 (6) treat fixed price options and provide that fair market value must be determined at the  
20 time the transaction is entered into. *Compare Arnold Mach. Co. v. Balls*, 624 P.2d 678  
21 (Utah 1981), with *Aoki v. Shepherd Mach. Co.*, 665 F.2d 941 (9th Cir.1982).

22 The relationship of subsection (b) to subsection (c) deserves to be explored. The  
23 fixed price purchase option provides a useful example. A fixed price purchase option in a  
24 lease does not of itself create a security interest. This is particularly true if the fixed price  
25 is equal to or greater than the reasonably predictable fair market value of the goods at the  
26 time the option is to be performed. A security interest is created only if the option price  
27 is nominal and the conditions stated in the introduction to the second paragraph of this  
28 subsection are met. There is a set of purchase options whose fixed price is less than fair  
29 market value but greater than nominal that must be determined on the facts of each case  
30 to ascertain whether the transaction in which the option is included creates a lease or a  
31 security interest.

32 It was possible to provide for various other permutations and combinations with  
33 respect to options to purchase and renew. For example, this section could have stated a  
34 rule to govern the facts of *In re Marhoefer Packing Co.*, 674 F.2d 1139 (7th Cir.1982).  
35 This was not done because it would unnecessarily complicate the definition. Further  
36 development of this rule is left to the courts.

37 Subsections (d) and (e) provide definitions and rules of construction.

38 **§1-1204. Value**

39 Except as otherwise provided in Articles 3-A, 4 and 5-A, a person gives value for  
40 rights if the person acquires them:



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

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

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

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

7 **Official Comments**

8 (This section is §1-204 of Revision of Uniform Commercial Code, Article 1 –  
9 General Provisions (2001).)

10 **Source:** Former Section 1-201(44).

11 **Changes from former law:** Unchanged from former Section 1-201, which was  
12 derived from Sections 25, 26, 27, 191, Uniform Negotiable Instruments Law; Section 76,  
13 Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 58, Uniform  
14 Warehouse Receipts Act; Section 22(1), Uniform Stock Transfer Act; Section 1,  
15 Uniform Trust Receipts Act. These provisions are substantive rather than purely  
16 definitional. Accordingly, they have been relocated from former Section 1-201 to this  
17 section.

18 1. All the Uniform Acts in the commercial law field (except the Uniform Conditional  
19 Sales Act) have carried definitions of “value.” All those definitions provided that value  
20 was any consideration sufficient to support a simple contract, including the taking of  
21 property in satisfaction of or as security for a pre-existing claim. Subsections (1), (2), and  
22 (4) in substance continue the definitions of “value” in the earlier acts. Subsection (3)  
23 makes explicit that “value” is also given in a third situation: where a buyer by taking  
24 delivery under a pre-existing contract converts a contingent into a fixed obligation.

25 This definition is not applicable to Articles 3 and 4, but the express inclusion of  
26 immediately available credit as value follows the separate definitions in those Articles.  
27 See Sections 4-208, 4-209, 3-303. A bank or other financing agency which in good faith  
28 makes advances against property held as collateral becomes a bona fide purchaser of that  
29 property even though provision may be made for charge-back in case of trouble.  
30 Checking credit is “immediately available” within the meaning of this section if the bank  
31 would be subject to an action for slander of credit in case checks drawn against the credit  
32 were dishonored, and when a charge-back is not discretionary with the bank, but may  
33 only be made when difficulties in collection arise in connection with the specific  
34 transaction involved.

35 **§1-1205. Reasonable time; seasonableness**

36 (1). Whether a time for taking an action required by the Uniform Commercial Code  
37 is reasonable depends on the nature, purpose and circumstances of the action.

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

1 **Official Comments**

2 (This section is §1-205 of Revision of Uniform Commercial Code, Article 1 –  
3 General Provisions (2001).)

4 **Source:** Former Section 1-204(2)-(3).

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

8 1. Subsection (a) makes it clear that requirements that actions be taken within a  
9 “reasonable” time are to be applied in the transactional context of the particular action.

10 2. Under subsection (b), the agreement that fixes the time need not be part of the  
11 main agreement, but may occur separately. Notice also that under the definition of  
12 “agreement” (Section 1-201) the circumstances of the transaction, including course of  
13 dealing or usages of trade or course of performance may be material. On the question  
14 what is a reasonable time these matters will often be important.

15 **§1-1206. Presumptions**

16 Whenever the Uniform Commercial Code creates a "presumption" with respect to a  
17 fact, or provides that a fact is "presumed," the trier of fact must find the existence of the  
18 fact unless and until evidence is introduced that supports a finding of its nonexistence.

19 **Official Comments**

20 (This section is §1-206 of Revision of Uniform Commercial Code, Article 1 –  
21 General Provisions (2001).)

22 **Source:** Former Section 1-201(31).

23 **Changes from former law.** None, other than stylistic changes.

24 1. Several sections of the Uniform Commercial Code state that there is a  
25 “presumption” as to a certain fact, or that the fact is “presumed.” This section, derived  
26 from the definition appearing in former Section 1-201(31), indicates the effect of those  
27 provisions on the proof process.

28 **PART 3**

29 **TERRITORIAL APPLICABILITY AND GENERAL RULES**

30 **§1-1301. Territorial applicability; parties' power to choose applicable law**

31 (1). Except as otherwise provided in this section, when a transaction bears a  
32 reasonable relation to this State and also to another state or nation the parties may agree  
33 that the law either of this State or of such other state or nation shall govern their rights  
34 and duties.





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

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

1. Subsection (a) states affirmatively at the outset that freedom of contract is a principle of the Uniform Commercial Code: “the effect” of its provisions may be varied by “agreement.” The meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement. But the Uniform Commercial Code seeks to avoid the type of interference with evolutionary growth found in pre-Code cases such as *Manhattan Co. v. Morgan*, 242 N.Y. 38, 150 N.E. 594 (1926). Thus, private parties cannot make an instrument negotiable within the meaning of Article 3 except as provided in Section 3-104; nor can they change the meaning of such terms as “bona fide purchaser,” “holder in due course,” or “due negotiation,” as used in the Uniform Commercial Code. But an agreement can change the legal consequences that would otherwise flow from the provisions of the Uniform Commercial Code. “Agreement” here includes the effect given to course of dealing, usage of trade and course of performance by Sections 1-201 and 1-303; the effect of an agreement on the rights of third parties is left to specific provisions of the Uniform Commercial Code and to supplementary principles applicable under Section 1-103. The rights of third parties under Section 9-317 when a security interest is unperfected, for example, cannot be destroyed by a clause in the security agreement.

This principle of freedom of contract is subject to specific exceptions found elsewhere in the Uniform Commercial Code and to the general exception stated here. The specific exceptions vary in explicitness: the statute of frauds found in Section 2-201, for example, does not explicitly preclude oral waiver of the requirement of a writing, but a fair reading denies enforcement to such a waiver as part of the “contract” made unenforceable; Section 9-602, on the other hand, is a quite explicit limitation on freedom of contract. Under the exception for “the obligations of good faith, diligence, reasonableness and care prescribed by [the Uniform Commercial Code],” provisions of the Uniform Commercial Code prescribing such obligations are not to be disclaimed. However, the section also recognizes the prevailing practice of having agreements set forth standards by which due diligence is measured and explicitly provides that, in the absence of a showing that the standards manifestly are unreasonable, the agreement controls. In this connection, Section 1-303 incorporating into the agreement prior course of dealing and usages of trade is of particular importance.

Subsection (b) also recognizes that nothing is stronger evidence of a reasonable time than the fixing of such time by a fair agreement between the parties. However, provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract. The parties are not required to fix the most reasonable time but may fix any time which is not obviously unfair as judged by the time of contracting.

2. An agreement that varies the effect of provisions of the Uniform Commercial Code may do so by stating the rules that will govern in lieu of the provisions varied. Alternatively, the parties may vary the effect of such provisions by stating that their

1 relationship will be governed by recognized bodies of rules or principles applicable to  
2 commercial transactions. Such bodies of rules or principles may include, for example,  
3 those that are promulgated by intergovernmental authorities such as UNCITRAL or  
4 Unidroit (*see, e.g.*, Unidroit Principles of International Commercial Contracts), or non-  
5 legal codes such as trade codes.

6 3. Subsection (c) is intended to make it clear that, as a matter of drafting, phrases  
7 such as “unless otherwise agreed” have been used to avoid controversy as to whether the  
8 subject matter of a particular section does or does not fall within the exceptions to  
9 subsection (b), but absence of such words contains no negative implication since under  
10 subsection (b) the general and residual rule is that the effect of all provisions of the  
11 Uniform Commercial Code may be varied by agreement.

12 **§1-1303. Course of performance, course of dealing and usage of trade**

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

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

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

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

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

28 (4). A course of performance or course of dealing between the parties or usage of  
29 trade in the vocation or trade in which they are engaged or of which they are or should be  
30 aware is relevant in ascertaining the meaning of the parties’ agreement, may give  
31 particular meaning to specific terms of the agreement and may supplement or qualify the  
32 terms of the agreement. A usage of trade applicable in the place in which part of the  
33 performance under the agreement is to occur may be so utilized as to that part of the  
34 performance.

35 (5). Except as otherwise provided in subsection (6), the express terms of an  
36 agreement and any applicable course of performance, course of dealing or usage of trade  
37 must be construed whenever reasonable as consistent with each other. If such a  
38 construction is unreasonable:

39 (a). Express terms prevail over course of performance, course of dealing and usage  
40 of trade;



1 Sales whose very office is to control and restrict the actions of the parties, and which  
2 cannot be abrogated by agreement, or by a usage of trade, and those rules of law (such as  
3 those in Part 3 of Article 2 on Sales) which fill in points which the parties have not  
4 considered and in fact agreed upon. The latter rules hold "unless otherwise agreed" but  
5 yield to the contrary agreement of the parties. Part of the agreement of the parties to  
6 which such rules yield is to be sought for in the usages of trade which furnish the  
7 background and give particular meaning to the language used, and are the framework of  
8 common understanding controlling any general rules of law which hold only when there  
9 is no such understanding.

10 4. A usage of trade under subsection (c) must have the "regularity of observance"  
11 specified. The ancient English tests for "custom" are abandoned in this connection.  
12 Therefore, it is not required that a usage of trade be "ancient or immemorial,"  
13 "universal," or the like. Under the requirement of subsection (c) full recognition is thus  
14 available for new usages and for usages currently observed by the great majority of  
15 decent dealers, even though dissidents ready to cut corners do not agree. There is room  
16 also for proper recognition of usage agreed upon by merchants in trade codes.

17 5. The policies of the Uniform Commercial Code controlling explicit unconscionable  
18 contracts and clauses (Sections 1-304, 2-302) apply to implicit clauses that rest on usage  
19 of trade and carry forward the policy underlying the ancient requirement that a custom or  
20 usage must be "reasonable." However, the emphasis is shifted. The very fact of  
21 commercial acceptance makes out a *prima facie* case that the usage is reasonable, and the  
22 burden is no longer on the usage to establish itself as being reasonable. But the anciently  
23 established policing of usage by the courts is continued to the extent necessary to cope  
24 with the situation arising if an unconscionable or dishonest practice should become  
25 standard.

26 6. Subsection (d), giving the prescribed effect to usages of which the parties "are or  
27 should be aware," reinforces the provision of subsection (c) requiring not universality but  
28 only the described "regularity of observance" of the practice or method. This subsection  
29 also reinforces the point of subsection (c) that such usages may be either general to trade  
30 or particular to a special branch of trade.

31 7. Although the definition of "agreement" in Section 1-201 includes the elements of  
32 course of performance, course of dealing, and usage of trade, the fact that express  
33 reference is made in some sections to those elements is not to be construed as carrying a  
34 contrary intent or implication elsewhere. Compare Section 1-302(c).

35 8. In cases of a well established line of usage varying from the general rules of the  
36 Uniform Commercial Code where the precise amount of the variation has not been  
37 worked out into a single standard, the party relying on the usage is entitled, in any event,  
38 to the minimum variation demonstrated. The whole is not to be disregarded because no  
39 particular line of detail has been established. In case a dominant pattern has been fairly  
40 evidenced, the party relying on the usage is entitled under this section to go to the trier of  
41 fact on the question of whether such dominant pattern has been incorporated into the  
42 agreement.





1 (This section is §1-305 of Revision of Uniform Commercial Code, Article 1 –  
2 General Provisions (2001).)

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

4 **Changes from former law:** Other than changes in the form of reference to the  
5 Uniform Commercial Code, this section is identical to former Section 1-106.

6 1. Subsection (a) is intended to effect three propositions. The first is to negate the  
7 possibility of unduly narrow or technical interpretation of remedial provisions by  
8 providing that the remedies in the Uniform Commercial Code are to be liberally  
9 administered to the end stated in this section. The second is to make it clear that  
10 compensatory damages are limited to compensation. They do not include consequential  
11 or special damages, or penal damages; and the Uniform Commercial Code elsewhere  
12 makes it clear that damages must be minimized. Cf. Sections 1-304, 2-706(1), and 2-  
13 712(2). The third purpose of subsection (a) is to reject any doctrine that damages must be  
14 calculable with mathematical accuracy. Compensatory damages are often at best  
15 approximate: they have to be proved with whatever definiteness and accuracy the facts  
16 permit, but no more. Cf. Section 2-204(3).

17 2. Under subsection (b), any right or obligation described in the Uniform  
18 Commercial Code is enforceable by action, even though no remedy may be expressly  
19 provided, unless a particular provision specifies a different and limited effect. Whether  
20 specific performance or other equitable relief is available is determined not by this  
21 section but by specific provisions and by supplementary principles. Cf. Sections 1-103,  
22 2-716.

23 3. “Consequential” or “special” damages and “penal” damages are not defined in the  
24 Uniform Commercial Code; rather, these terms are used in the sense in which they are  
25 used outside the Uniform Commercial Code.

26 **§1-1306. Waiver or renunciation of claim or right after breach**

27 A claim or right arising out of an alleged breach may be discharged in whole or in  
28 part without consideration by agreement of the aggrieved party in an authenticated  
29 record.

30 **Official Comments**

31 (This section is §1-306 of Revision of Uniform Commercial Code, Article 1 –  
32 General Provisions (2001).)

33 **Source:** Former Section 1-107.

34 **Changes from former law:** This section changes former law in two respects. First,  
35 former Section 1-107, requiring the “delivery” of a “written waiver or renunciation”  
36 merges the separate concepts of the aggrieved party’s agreement to forego rights and the  
37 manifestation of that agreement. This section separates those concepts, and explicitly  
38 requires *agreement* of the aggrieved party. Second, the revised section reflects  
39 developments in electronic commerce by providing for memorialization in an  
40 authenticated record. In this context, a party may “authenticate” a record by (i) signing a

1 record that is a writing or (ii) attaching to or logically associating with a record that is not  
2 a writing an electronic sound, symbol or process with the present intent to adopt or accept  
3 the record. See Sections 1-201(b)(37) and 9-102(a)(7).

4 1. This section makes consideration unnecessary to the effective renunciation or  
5 waiver of rights or claims arising out of an alleged breach of a commercial contract where  
6 the agreement effecting such renunciation is memorialized in a record authenticated by  
7 the aggrieved party. Its provisions, however, must be read in conjunction with the section  
8 imposing an obligation of good faith. (Section 1-304).

9 **§1-1307. Prima facie evidence by 3rd-party documents**

10 A document in due form purporting to be a bill of lading, policy or certificate of  
11 insurance, official weigher's or inspector's certificate, consular invoice or any other  
12 document authorized or required by the contract to be issued by a 3rd party is prima facie  
13 evidence of its own authenticity and genuineness and of the facts stated in the document  
14 by the 3rd party.

15 **Official Comments**

16 (This section is §1-307 of Revision of Uniform Commercial Code, Article 1 –  
17 General Provisions (2001).)

18 **Source:** Former Section 1-202.

19 **Changes from former law:** Except for minor stylistic changes, this Section is  
20 identical to former Section 1-202.

21 1. This section supplies judicial recognition for documents that are relied upon as  
22 trustworthy by commercial parties.

23 2. This section is concerned only with documents that have been given a preferred  
24 status by the parties themselves who have required their procurement in the agreement,  
25 and for this reason the applicability of the section is limited to actions arising out of the  
26 contract that authorized or required the document. The list of documents is intended to be  
27 illustrative and not exclusive.

28 3. The provisions of this section go no further than establishing the documents in  
29 question as prima facie evidence and leave to the court the ultimate determination of the  
30 facts where the accuracy or authenticity of the documents is questioned. In this  
31 connection the section calls for a commercially reasonable interpretation.

32 4. Documents governed by this section need not be writings if records in another  
33 medium are generally relied upon in the context.

34 **§1-1308. Performance or acceptance under reservation of rights**

35 (1). A party that with explicit reservation of rights performs or promises performance  
36 or assents to performance in a manner demanded or offered by the other party does not  
37 thereby prejudice the rights reserved. Such words as "without prejudice," "under protest"  
38 or the like are sufficient.



1 (This section is §1-309 of Revision of Uniform Commercial Code, Article 1 –  
2 General Provisions (2001).)

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

4 **Changes from former law:** Except for minor stylistic changes, this section is  
5 identical to former Section 1-208.

6 1. The common use of acceleration clauses in many transactions governed by the  
7 Uniform Commercial Code, including sales of goods on credit, notes payable at a definite  
8 time, and secured transactions, raises an issue as to the effect to be given to a clause that  
9 seemingly grants the power to accelerate at the whim and caprice of one party. This  
10 section is intended to make clear that despite language that might be so construed and  
11 which further might be held to make the agreement void as against public policy or to  
12 make the contract illusory or too indefinite for enforcement, the option is to be exercised  
13 only in the good faith belief that the prospect of payment or performance is impaired.

14 Obviously this section has no application to demand instruments or obligations whose  
15 very nature permits call at any time with or without reason. This section applies only to  
16 an obligation of payment or performance which in the first instance is due at a future  
17 date.

18 **§1-1310. Subordinated obligations**

19 An obligation may be issued as subordinated to performance of another obligation of  
20 the person obligated, or a creditor may subordinate its right to performance of an  
21 obligation by agreement with either the person obligated or another creditor of the person  
22 obligated. Subordination does not create a security interest as against either the common  
23 debtor or a subordinated creditor.

24 **Official Comments**

25 (This section is §1-310 of Revision of Uniform Commercial Code, Article 1 –  
26 General Provisions (2001).)

27 **Source:** Former Section 1-209.

28 **Changes from former law:** This section is substantively identical to former Section  
29 1-209. The language in that section stating that it “shall be construed as declaring the law  
30 as it existed prior to the enactment of this section and not as modifying it” has been  
31 deleted.

32 1. Billions of dollars of subordinated debt are held by the public and by institutional  
33 investors. Commonly, the subordinated debt is subordinated on issue or acquisition and  
34 is evidenced by an investment security or by a negotiable or non-negotiable note. Debt is  
35 also sometimes subordinated after it arises, either by agreement between the  
36 subordinating creditor and the debtor, by agreement between two creditors of the same  
37 debtor, or by agreement of all three parties. The subordinated creditor may be a  
38 stockholder or other “insider” interested in the common debtor; the subordinated debt  
39 may consist of accounts or other rights to payment not evidenced by any instrument. All

1 such cases are included in the terms "subordinated obligation," "subordination," and  
2 "subordinated creditor."

3 2. Subordination agreements are enforceable between the parties as contracts; and in  
4 the bankruptcy of the common debtor dividends otherwise payable to the subordinated  
5 creditor are turned over to the superior creditor. This "turn-over" practice has on  
6 occasion been explained in terms of "equitable lien," "equitable assignment," or  
7 "constructive trust," but whatever the label the practice is essentially an equitable remedy  
8 and does not mean that there is a transaction "that creates a security interest in personal  
9 property . . . by contract" or a "sale of accounts, chattel paper, payment intangibles, or  
10 promissory notes" within the meaning of Section 9-109. On the other hand, nothing in  
11 this section prevents one creditor from assigning his rights to another creditor of the same  
12 debtor in such a way as to create a security interest within Article 9, where the parties so  
13 intend.

14 3. The enforcement of subordination agreements is largely left to supplementary  
15 principles under Section 1-103. If the subordinated debt is evidenced by a certificated  
16 security, Section 8-202(a) authorizes enforcement against purchasers on terms stated or  
17 referred to on the security certificate. If the fact of subordination is noted on a negotiable  
18 instrument, a holder under Sections 3-302 and 3-306 is subject to the term because notice  
19 precludes him from taking free of the subordination. Sections 3-302(3)(a), 3-306, and 8-  
20 317 severely limit the rights of levying creditors of a subordinated creditor in such cases.

21 **Sec. A-3. Legislative intent.** This Act is the Maine enactment of the Uniform  
22 Commercial Code, Article 1 as revised by the National Conference of Commissioners on  
23 Uniform State Laws. The text of the uniform act has been changed to conform to Maine  
24 statutory conventions and the Article is enacted as Article 1-A. The changes are technical  
25 in nature and it is the intent of the Legislature that this Act be interpreted as substantively  
26 the same as the revised Article 1 of the uniform act.

27 **Sec. A-4. Effective date.** This Part takes effect January 1, 2010.

28 **PART B**

29 **Sec. B-1. 10 MRSA §1286,** as enacted by PL 1995, c. 462, Pt. A, §22 and affected  
30 by §23, is amended to read:

31 **§1286. Usage of trade**

32 The terms "utility" and "industrial," when used to refer to equipment, machinery,  
33 attachments, yard and garden equipment or repair parts, have the meanings commonly  
34 used and understood among dealers and suppliers of farm equipment as usage of trade in  
35 accordance with Title 11, section ~~1-205~~ 1-1303, subsection ~~2~~ (3).

36 **Sec. B-2. 10 MRSA §9403, sub-§2, ¶B,** as enacted by PL 1999, c. 762, §2, is  
37 amended to read:

38 B. The Uniform Commercial Code other than Title 11, sections ~~1-107 and 1-206~~  
39 section 1-1306 and Articles 2 and ~~2A~~ 2-A.



- 1 "Between merchants." Section 2-104, subsection (3).  
2 "Buyer." Section 2-103, subsection (1), paragraph (a).  
3 "Chattel paper." Section 9-1102, subsection (11).  
4 "Consumer goods." Section 9-1102, subsection (23).  
5 "Document." Section 9-1102, subsection (30).  
6 "Entrusting." Section 2-403, subsection (3).  
7 "General intangible" Section 9-1102, subsection (42).  
8 ~~"Good faith." Section 2-103, subsection (1), paragraph (b).~~  
9 "Instrument." Section 9-1102, subsection (47).  
10 "Merchant." Section 2-104, subsection (1).  
11 "Mortgage." Section 9-1102, subsection (55).  
12 "Pursuant to commitment." Section 9-1102, subsection (60).  
13 "Receipt." Section 2-103, subsection (1), paragraph (c).  
14 "Sale." Section 2-106, subsection (1).  
15 "Sale on approval." Section 2-326.  
16 "Sale or return." Section 2-326.  
17 "Seller." Section 2-103, subsection (1), paragraph (d).

18 **Official Comment**

19 (a) "Buyer in ordinary course of business". Section 1-201(b)(9).

20 \* \* \*

21 (h) "Goods". Section ~~9-105(1)(h)~~ 9-102(a)(44). See Section 2A-103(3) for  
22 reference to the definition of "Account", "Chattel paper", "Document", "General  
23 intangibles" and "Instrument". See Section 2A-217 for determination of the time and  
24 manner of identification.

25 \* \* \*

26 (j) "Lease". New. There are several reasons to codify the law with respect to leases  
27 of goods. An analysis of the case law as it applies to leases of goods suggests at least  
28 several significant issues to be resolved by codification. First and foremost is the  
29 definition of a lease. It is necessary to define lease to determine whether a transaction  
30 creates a lease or a security interest disguised as a lease. If the transaction creates a  
31 security interest disguised as a lease, the transaction will be governed by the Article on  
32 Secured Transactions (Article 9) and the lessor will be required to file a financing  
33 statement or take other action to perfect its interest in the goods against third parties.  
34 There is no such requirement with respect to leases under the common law and, except  
35 with respect to leases of fixtures (Section 2A-309), this Article imposes no such  
36 requirement. Yet the distinction between a lease and a security interest disguised as a



1 lease is not clear from the case law at the time of the promulgation of this Article.  
2 DeKoven, *Leases of Equipment: Puritan Leasing Company v. August, A Dangerous*  
3 *Decision*, 12 U.S.F. L.Rev. 257 (1978).

4 At common law a lease of personal property is a bailment for hire. While there are  
5 several definitions of bailment for hire, all require a thing to be let and a price for the  
6 letting. Thus, in modern terms and as provided in this definition, a lease is created when  
7 the lessee agrees to furnish consideration for the right to the possession and use of goods  
8 over a specified period of time. Mooney, *Personal Property Leasing: A Challenge*, 36  
9 *Bus.Law.* 1605, 1607 (1981). Further, a lease is neither a sale (Section 2-106(1)) nor a  
10 retention or creation of a security interest (Sections 1-201(37)(b)(35) and 1-203). Due to  
11 extensive litigation to distinguish true leases from security interests, an amendment to  
12 former Section 1-201(37) (now codified as Section 1-203) was has been promulgated  
13 with this Article to create a sharper distinction.

14 This section as well as Section ~~1-201(37)~~ 1-203 must be examined to determine  
15 whether the transaction in question creates a lease or a security interest. The following  
16 hypotheticals indicate the perimeters of the issue. Assume that A has purchased a  
17 number of copying machines, new, for \$1,000 each; the machines have an estimated  
18 useful economic life of three years. A advertises that the machines are available to rent  
19 for a minimum of one month and that the monthly rental is \$100.00. A intends to enter  
20 into leases where A provides all maintenance, without charge to the lessee. Further, the  
21 lessee will rent the machine, month to month, with no obligation to renew. At the end of  
22 the lease term the lessee will be obligated to return the machine to A's place of business.  
23 This transaction qualifies as a lease under the first half of the definition, for the  
24 transaction includes a transfer by A to a prospective lessee of possession and use of the  
25 machine for a stated term, month to month. The machines are goods (Section  
26 2A-103(1)(h)). The lessee is obligated to pay consideration in return, \$100.00 for each  
27 month of the term.

28 However, the second half of the definition provides that a sale or a security interest is  
29 not a lease. Since there is no passing of title, there is no sale. Sections 2A-103(3) and  
30 2-106(1). Under pre-Act security law this transaction would have created a bailment for  
31 hire or a true lease and not a conditional sale. *Da Rocha v. Macomber*, 330 Mass. 611,  
32 614-15, 116 N.E.2d 139, 142 (1953). Under Section ~~1-201(37)~~ 1-203, ~~as amended with~~  
33 ~~the promulgation of this Article~~, the same result would follow. While the lessee is  
34 obligated to pay rent for the one month term of the lease, one of the other four conditions  
35 of ~~the second paragraph of Section 1-201(37)~~ Section 1-203(b) must be met and none is.  
36 The term of the lease is one month and the economic life of the machine is 36 months;  
37 thus, ~~subparagraph (a) of Section 1-201(37)~~ Section 1-203(b)(1) is not now satisfied.  
38 Considering the amount of the monthly rent, absent economic duress or coercion, the  
39 lessee is not bound either to renew the lease for the remaining economic life of the goods  
40 or to become the owner. If the lessee did lease the machine for 36 months, the lessee  
41 would have paid the lessor \$3,600 for a machine that could have been purchased for  
42 \$1,000; thus, ~~subparagraph (b) of Section 1-201(37)~~ Section 1-203(b)(2) is not satisfied.  
43 Finally, there are no options; thus, subparagraphs (e3) and (d4) of Section ~~1-201(37)~~  
44 1-203(b) are not satisfied. This transaction creates a lease, not a security interest.  
45 However, with each renewal of the lease the facts and circumstances at the time of each

1 renewal must be examined to determine if that conclusion remains accurate, as it is  
2 possible that a transaction that first creates a lease, later creates a security interest.

3 Assume that the facts are changed and that A requires each lessee to lease the goods  
4 for 36 months, with no right to terminate. Under pre-Act security law this transaction  
5 would have created a conditional sale, and not a bailment for hire or true lease. *Hervey v.*  
6 *Rhode Island Locomotive Works*, 93 U.S. 664, 672-73 (1876). Under this subsection, and  
7 Section ~~1-203~~ ~~1-201(37)~~, as amended with the inclusion of this Article in the Act, the  
8 same result would follow. The lessee's obligation for the term is not subject to  
9 termination by the lessee and the term is equal to the economic life of the machine.

10 Between these extremes there are many transactions that can be created. Some of the  
11 transactions ~~have~~ were not ~~been~~ properly categorized by the courts in applying the 1978  
12 and earlier Official Texts of former Section 1-201(37). This subsection, together with  
13 Section ~~1-203~~ ~~1-201(37)~~, as amended with the promulgation of this Article, draws a  
14 brighter line, which should create a clearer signal to the professional lessor and lessee.

15 (k) "Lease agreement". This definition is derived from ~~the first sentence of~~ Section  
16 1-201(b)(3). Because the definition of lease is broad enough to cover future transfers,  
17 lease agreement includes an agreement contemplating a current or subsequent transfer.  
18 Thus it was not necessary to make an express reference to an agreement for the future  
19 lease of goods (Section 2-106(1)). This concept is also incorporated in the definition of  
20 lease contract. Note that the definition of lease does not include transactions in ordinary  
21 building materials that are incorporated into an improvement on land. Section 2A-309(2).

22 The provisions of this Article, if applicable, determine whether a lease agreement has  
23 legal consequences; otherwise the law of bailments and other applicable law determine  
24 the same. Sections 2A-103(4) and 1-103.

25 (l) "Lease contract". This definition is derived from the definition of contract in  
26 Section ~~1-201(11)~~(b)(12). Note that a lease contract may be for the future lease of goods,  
27 since this notion is included in the definition of lease.

28 \* \* \*

29 (o) "Lessee in ordinary course of business". Section 1-201(b)(9).

30 \* \* \*

31 (u) "Present value". ~~New. Authorities agree that present value should be used to~~  
32 ~~determine fairly the damages payable by the lessor or the lessee on default. E.g., *Taylor*~~  
33 ~~*v. Commercial Credit Equip. Corp.*, 170 Ga.App. 322, 316 S.E.2d 788 (1984). Present~~  
34 ~~value is defined to mean an amount that represents the discounted value as of a date~~  
35 ~~certain of one or more sums payable in the future. This is a function of the economic~~  
36 ~~principle that a dollar today is more valuable to the holder than a dollar payable in two~~  
37 ~~years. While there is no question as to the principle, reasonable people would differ as to~~  
38 ~~the rate of discount to apply in determining the value of that future dollar today. To~~  
39 ~~minimize litigation, this Article allows the parties to specify the discount or interest rate,~~  
40 ~~if the rate was not manifestly unreasonable at the time the transaction was entered into.~~

1 ~~In all other cases, the interest rate will be a commercially reasonable rate that takes into~~  
2 ~~account the facts and circumstances of each case, as of the time the transaction was~~  
3 ~~entered into.~~

4 (v) "Purchase". Section 1-201~~(32)(b)(29)~~. This definition omits the reference to lien  
5 contained in the definition of purchase in Article 1 (Section 1-201~~(32)(b)(29)~~). This  
6 should not be construed to exclude consensual liens from the definition of purchase in  
7 this Article; the exclusion was mandated by the scope of the definition of lien in Section  
8 2A-103(1)(r). Further, the definition of purchaser in this Article adds a reference to  
9 lease; as purchase is defined in Section 1-201~~(32)(b)(29)~~ to include any other voluntary  
10 transaction creating an interest in property, this addition is not substantive.

11 \* \* \*

12 **Sec. B-8. 11 MRSA §2-1207**, as enacted by PL 1991, c. 805, §4, is repealed.

13 **Sec. B-9. 11 MRSA §2-1501, sub-§(4)**, as enacted by PL 1991, c. 805, §4, is  
14 amended to read:

15 (4). Except as otherwise provided in section ~~1-106~~ 1-1305, subsection (1), this  
16 Article or the lease agreement, the rights and remedies referred to in subsections (2) and  
17 (3) are cumulative.

18 **Official Comment** (§2-1501)

19 **Uniform Statutory Source:** Former Section 9-501 (now codified as Section 9-601).

20 \* \* \*

21 2. Subsection (2) is a version of the first sentence of Section ~~9-501(1)~~ 9-601(a),  
22 revised to reflect leasing terminology.

23 3. Subsection (3), an expansive version of the second sentence of Section ~~9-501(1)~~  
24 9-601(a), lists the procedures that may be followed by the party seeking enforcement; in  
25 effect, the scope of the procedures listed in subsection (3) is consistent with the scope of  
26 the procedures available to the foreclosing secured party.

27 4. Subsection (4) establishes that the parties' rights and remedies are cumulative.  
28 DeKoven, *Leases of Equipment: Puritan Leasing Company v. August, A Dangerous*  
29 *Decision*, 12 U.S.F.L.Rev. 257, 276-80 (1978). Cumulation, and largely unrestricted  
30 selection, of remedies is allowed in furtherance of the general policy of the Commercial  
31 Code, stated in Section ~~1-106~~ 1-305, that remedies be liberally administered to put the  
32 aggrieved party in as good a position as if the other party had fully performed. Therefore,  
33 cumulation of, or selection among, remedies is available to the extent necessary to put the  
34 aggrieved party in as good a position as it would have been in had there been full  
35 performance. However, cumulation of, or selection among, remedies is not available to  
36 the extent that the cumulation or selection would put the aggrieved party in a better  
37 position than it would have been in had there been full performance by the other party.

38 5. Section ~~9-501(3)~~ 9-602, which, among other things, states that certain rules, to the  
39 extent they give rights to the debtor and impose duties on the secured party, may not be

1 waived or varied, was is not incorporated in this Article. Given the significance of  
2 freedom of contract in the development of the common law as it applies to bailments for  
3 hire and the lessee's lack of an equity of redemption, there was is no reason to impose that  
4 restraint.

5 **Cross References:**

6 Sections ~~1-106~~ 1-305, 2A-508, 2A-523, Article 9, especially Sections ~~9-501(1)~~  
7 9-601 and ~~9-501(3)~~ 9-602.

8 **Definitional Cross References:**

9 \* \* \*

10 "Party". Section 1-201(29)(b)(26).

11 "Remedy". Section 1-201(~~34~~)(b)(32).

12 "Rights". Section 1-201(~~36~~)(b)(34).

13 **Sec. B-10. 11 MRSA §2-1518, sub-§(2)**, as enacted by PL 1991, c. 805, §4, is  
14 amended to read:

15 (2). Except as otherwise provided with respect to damages liquidated in the lease  
16 agreement (section 2-1504) or otherwise determined pursuant to agreement of the parties  
17 (section ~~1-102, subsection (3)~~ 1-1302 and section 2-1503), if a lessee's cover is by a lease  
18 agreement substantially similar to the original lease agreement and the new lease  
19 agreement is made in good faith and in a commercially reasonable manner, the lessee  
20 may recover from the lessor as damages:

21 (a). The present value, as of the date of the commencement of the term of the new  
22 lease agreement, of the rent under the new lease agreement applicable to that period  
23 of the new lease term comparable to the then remaining term of the original lease  
24 agreement minus the present value as of the same date of the total rent for the then  
25 remaining lease term of the original lease agreement; and

26 (b). Any incidental or consequential damages minus expenses saved in consequence  
27 of the lessor's default.

28 **Official Comment**

29 \* \* \*

30 1. Subsection (1) allows the lessee to take action to fix its damages after default by  
31 the lessor. Such action may consist of the lease of goods. The decision to cover is a  
32 function of commercial judgment, not a statutory mandate replete with sanctions for  
33 failure to comply. Cf. Section ~~9-507~~ 9-625.

34 **Cross References:**

35 Sections 2-712(1), 2A-519 and ~~9-507~~ 9-625.

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**Definitional Cross References:**

- “Agreement”. Section 1-201**(b)**(3).
- “Contract”. Section 1-201~~(11)~~**(b)**(12).
- “Good faith”. Sections 1-201(b)(20) 1-201(19) and 2-103(1)(b).
- “Goods”. Section 2A-103(1)(h).
- “Lease”. Section 2A-103(1)(j).
- “Lease agreement”. Section 2A-103(1)(k).
- “Lease contract”. Section 2A-103(1)(l).
- “Lessee”. Section 2A-103(1)(n).
- “Lessor”. Section 2A-103(1)(p).
- “Party”. Section 1-201~~(29)~~**(b)**(26).
- “Present value”. Section ~~2A-103(1)(u)~~ **1-201(b)**(28).
- “Purchase”. Section 2A-103(1)(v).

**Sec. B-11. 11 MRSA §2-1519, sub-§(1)**, as enacted by PL 1991, c. 805, §4, is amended to read:

**(1).** Except as otherwise provided with respect to damages liquidated in the lease agreement (section 2-1504), or otherwise determined pursuant to agreement of the parties (section ~~1-102, subsection (3)~~ **1-1302** and section 2-1503) if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under section 2-1518, subsection (2) or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages minus expenses saved in consequence of the lessor's default.

**Official Comment (Our §2-1519)**

\* \* \*

**Definitional Cross References:**

- “Conforming”. Section 2A-103(1)(d).
- “Delivery”. Section 1-201~~(14)~~**(b)**(15).
- “Goods”. Section 2A-103(1)(h).

1 "Lease". Section 2A-103(1)(j).  
2 "Lease agreement". Section 2A-103(1)(k).  
3 "Lessee". Section 2A-103(1)(n).  
4 "Lessor". Section 2A-103(1)(p).  
5 "Notification". Section 1-201(26) 1-202.  
6 "Present value". Section 2A-103(1)(u) 1-201(b)(28).  
7 "Value". Section ~~1-201(44)~~-1-204.

8  
9 **Sec. B-12. 11 MRSA §2-1527, sub-§(2)**, as enacted by PL 1991, c. 805, §4, is  
10 amended to read:

11 (2). Except as otherwise provided with respect to damages liquidated in the lease  
12 agreement (section 2-1504) or otherwise determined pursuant to agreement of the parties  
13 (section ~~1-102, subsection (3)~~ 1-1302 and section 2-1503), if the disposition is by lease  
14 agreement substantially similar to the original lease agreement and the new lease  
15 agreement is made in good faith and in a commercially reasonable manner, the lessor  
16 may recover from the lessee as damages:

- 17 (a). Accrued and unpaid rent as of the date of the commencement of the term of the  
18 new lease agreement;
- 19 (b). The present value, as of the same date, of the total rent for the then remaining  
20 lease term of the original lease agreement minus the present value, as of the same  
21 date, of the rent under the new lease agreement applicable to that period of the new  
22 lease term comparable to the then remaining term of the original lease agreement; and
- 23 (c). Any incidental damages allowed under section 2-1530 minus expenses saved in  
24 consequence of the lessee's default.

25 **Official Comment (Our § 2-1527)**

26 \* \* \*

27 1. Subsection (1), a revised version of the first sentence of subsection 2-706(1),  
28 allows the lessor the right to dispose of goods after a statutory or other material default by  
29 the lessee (even if the goods remain in the lessee's possession—Section 2A-525(2)), after  
30 the lessor refuses to deliver or takes possession of the goods, or, if agreed, after other  
31 contractual default. The lessor's decision to exercise this right is a function of a  
32 commercial judgment, not a statutory mandate replete with sanctions for failure to  
33 comply. Cf. Section ~~9-507~~ 9-625. As the owner of the goods, in the case of a lessor, or  
34 as the prime lessee of the goods, in the case of a sublessor, compulsory disposition of the  
35 goods is inconsistent with the nature of the interest held by the lessor or the sublessor and  
36 is not necessary because the interest held by the lessee or the sublessee is not protected by  
37 a right of redemption under the common law or this Article. Subsection 2A-527(5).

1           2. The rule for determining the measure of damages recoverable by the lessor against  
2 the lessee is a function of several variables. If the lessor has elected to effect disposition  
3 under subsection (1) and such disposition is by lease that qualifies under subsection (2),  
4 the measure of damages set forth in subsection (2) will apply, absent agreement to the  
5 contrary. Sections 2A-504, 2A-103(4) and ~~1-102(3)~~ 1-302.

6           \* \* \*

7           **Cross References:**

8           Sections ~~1-102(3)~~ 1-302, 2-706(1), 2-706(5), 2-706(6), 2A-103(4), 2A-304(1),  
9 2A-504, 2A-507(2), 2A-523(1)(e), 2A-525(2), 2A-527(5), 2A-528 and ~~9-507~~ 9-625.

10          "Buyer" and "Buying". Section 2-103(1)(a).

11          "Delivery". Section ~~1-201(14)~~(b)(15).

12          "Good faith". Sections ~~1-201(b)(20)~~~~1-201(19)~~ and ~~2-103(1)(b)~~.

13          "Goods". Section 2A-103(1)(h).

14          "Lease". Section 2A-103(1)(j).

15          "Lease contract". Section 2A-103(1)(l).

16          "Lessee". Section 2A-103(1)(n).

17          "Lessor". Section 2A-103(1)(p).

18          "Present value". Section ~~2A-103(1)(u)~~ 1-201(b)(28).

19          "Rights". Section ~~1-201(36)~~(b)(34).

20          "Sale". Section 2-106(1).

21          "Security interest". Sections ~~1-201(37)~~(b)(35) and 1-203.

22          "Value". Section ~~1-201(44)~~1-204.

23           **Sec. B-13. 11 MRSA §2-1528**, as enacted by PL 1991, c. 805, §4, is amended to  
24 read:

25           **§2-1528. Lessor's damages for nonacceptance, failure to pay, repudiation or other**  
26           **default**

27           (1). Except as otherwise provided with respect to damages liquidated in the lease  
28 agreement (section 2-1504) or otherwise determined pursuant to agreement of the parties,  
29 (section ~~1-102, subsection (3)~~ 1-1302 and section 2-1503), if a lessor elects to retain the  
30 goods or a lessor elects to dispose of the goods and the disposition is by lease agreement  
31 that for any reason does not qualify for treatment under section 2-1527, subsection (2), or  
32 is by sale or otherwise, the lessor may recover from the lessee as damages for a default of

1 the type described in section 2-1523, subsection (1) or section 2-1523, subsection (3),  
2 paragraph (a), or, if agreed, for other default of the lessee:

3 (a). Accrued and unpaid rent as of the date of default if the lessee has never taken  
4 possession of the goods, or, if the lessee has taken possession of the goods, as of the  
5 date the lessor repossesses the goods or an earlier date on which the lessee makes a  
6 tender of the goods to the lessor;

7 (b). The present value as of the date determined under this subsection of the total rent  
8 for the then remaining lease term of the original lease agreement minus the present  
9 value as of the same date of the market rent at the place where the goods are located  
10 computed for the same lease term; and

11 (c). Any incidental damages allowed under section 2-1530 minus expenses saved in  
12 consequence of the lessee's default.

13 (2). If the measure of damages provided in subsection (1) is inadequate to put a  
14 lessor in as good a position as performance would have, the measure of damages is the  
15 present value of the profit, including reasonable overhead, the lessor would have made  
16 from full performance by the lessee together with any incidental damages allowed under  
17 section 2-1530, due allowance for costs reasonably incurred and due credit for payments  
18 or proceeds of disposition.

19 **Official Comment** (Our §2-1528)

20 \* \* \*

21 1. Subsection (1), a substantially revised version of Section 2-708(1), states the basic  
22 rule governing the measure of lessor's damages for a default described in Section  
23 2A-523(1) or (3)(a), and, if agreed, for a contractual default. This measure will apply if  
24 the lessor elects to retain the goods (whether undelivered, returned by the lessee, or  
25 repossessed by the lessor after acceptance and default by the lessee) or if the lessor's  
26 disposition does not qualify under subsection 2A-527(2). Section 2A-527(3). Note that  
27 under some of these conditions, the lessor may recover damages from the lessee pursuant  
28 to the rule set forth in Section 2A-529. There is no sanction for disposition that does not  
29 qualify under subsection 2A-527(2). Application of the rule set forth in this section is  
30 subject to agreement to the contrary. Sections 2A-504, 2A-103(4) and ~~1-102(3)~~ 1-302.

31 \* \* \*

32 **Cross References:**

33 Sections ~~1-102(3)~~ 1-302, 2-708, 2A-103(1)(u), 2A-402, 2A-504, 2A-507,  
34 2A-527(2) and 2A-529.

35 **Definitional Cross References:**

36 "Agreement". Section 1-201(b)(3).

37 "Goods". Section 2A-103(1)(h).

38 "Lease". Section 2A-103(1)(j).



1 "Lease agreement". Section 2A-103(1)(k).  
2 "Lessee". Section 2A-103(1)(n).  
3 "Lessor". Section 2A-103(1)(p).  
4 "Party". Section 1-201~~(29)~~(b)(26).  
5 "Present value". Section 2A-103(1)(u) 1-201(b)(28).  
6 "Sale". Section 2-106(1).

7 **Sec. B-14. 11 MRSA §3-1103, sub-§(1), ¶(d)**, as enacted by PL 1993, c. 293,  
8 Pt. A, §2, is repealed.

9 **Sec. B-15. 11 MRSA §3-1103, sub-§(1), ¶(j)**, as enacted by PL 1993, c. 293, Pt.  
10 A, §2, is amended to read:

11 (j). "Prove" with respect to a fact means to meet the burden of establishing the fact  
12 (section ~~1-201~~ 1-1201, subsection (8)).

13

14 **Official Comment (Our §3-1103)**

15 \* \* \*

16 ~~4. Subsection (a)(4) introduces a definition of good faith to apply to Articles 3 and 4.~~  
17 ~~Former Articles 3 and 4 used the definition in Section 1-201(19). The definition in~~  
18 ~~subsection (a)(4) is consistent with the definitions of good faith applicable to Articles 2,~~  
19 ~~2A, 4, and 4A. The definition requires not only honesty in fact but also "observance of~~  
20 ~~reasonable commercial standards of fair dealing." Although fair dealing is a broad term~~  
21 ~~that must be defined in context, it is clear that it is concerned with the fairness of conduct~~  
22 ~~rather than the care with which an act is performed. Failure to exercise ordinary care in~~  
23 ~~conducting a transaction is an entirely different concept than failure to deal fairly in~~  
24 ~~conducting the transaction. Both fair dealing and ordinary care, which is defined in~~  
25 ~~Section 3-103(a)(7), are to be judged in the light of reasonable commercial standards, but~~  
26 ~~those standards in each case are directed to different aspects of commercial conduct.~~

27 54. Subsection (a)(7) is a definition of ordinary care which is applicable not only to  
28 Article 3 but to Article 4 as well. See Section 4-104(c). The general rule is stated in the  
29 first sentence of subsection (a)(7) and it applies both to banks and to persons engaged in  
30 businesses other than banking. Ordinary care means observance of reasonable  
31 commercial standards of the relevant businesses prevailing in the area in which the  
32 person is located. The second sentence of subsection (a)(7) is a particular rule limited to  
33 the duty of a bank to examine an instrument taken by a bank for processing for collection  
34 or payment by automated means. This particular rule applies primarily to Section 4-406  
35 and it is discussed in Comment 4 to that section. Nothing in Section 3-103(a)(7) is  
36 intended to prevent a customer from proving that the procedures followed by a bank are  
37 unreasonable, arbitrary, or unfair.

1           65. In subsection (c) reference is made to a new definition of "bank" in amended  
2 Article 4.

3           **Sec. B-16. 11 MRSA §4-104, sub-§(3)**, as amended by PL 2003, c. 594, §9, is  
4 further amended to read:

5           (3). The following definitions in other Articles apply to this Article:

6	"Acceptance."	Section 3-1409.
7	"Alteration."	Section 3-1407.
8	"Cashier's check."	Section 3-1104.
9	"Certificate of deposit."	Section 3-1104.
10	"Certified Check."	Section 3-1409.
11	"Check."	Section 3-1104.
12	"Demand draft."	Section 3-1104.
13	"Draft."	Section 3-1104.
14	<del>"Good faith."</del>	<del>Section 3-1103.</del>
15	"Holder in due course."	Section 3-1102.
16	"Instrument."	Section 3-1104.
17	"Notice of dishonor."	Section 3-1503.
18	"Order."	Section 3-1103.
19	"Ordinary care."	Section 3-1103.
20	"Person entitled to enforce."	Section 3-1301.
21	"Presentment."	Section 3-1501.
22	"Promise."	Section 3-1103.
23	"Prove."	Section 3-1103.
24	"Teller's check."	Section 3-1104.
25	"Unauthorized signature."	Section 3-1403.

26           **Sec. B-17. 11 MRSA §4-1105, sub-§(1), ¶(e)**, as enacted by PL 1991, c. 812,  
27 §2, is amended to read:

28           (e). "Funds transfer system" means a wire transfer network, automated clearing  
29 house or other communication system of a clearing house or other association of  
30 banks through which a payment order by a bank may be transmitted to the bank to  
31 which the order is addressed; and

32           **Sec. B-18. 11 MRSA §4-1105, sub-§(1), ¶(f)**, as enacted by PL 1991, c. 812,  
33 §2, is repealed.

34           **Sec. B-19. 11 MRSA §4-1105, sub-§(1), ¶(g)**, as enacted by PL 1991, c. 812,  
35 §2, is amended to read:

36           (g). "Prove" with respect to a fact means to meet the burden of establishing the fact  
37 (section ~~1-201~~ 1-1201, subsection (8)).

38           **Sec. B-20. 11 MRSA §4-1106, sub-§(1)**, as enacted by PL 1991, c. 812, §2, is  
39 amended to read:

1 (1). The time of receipt of a payment order or communication cancelling or  
2 amending a payment order is determined by the rules applicable to receipt of a notice  
3 stated in section ~~1-201, subsection 27~~ 1-1202. A receiving bank may fix a cut-off time or  
4 times on a funds transfer business day for the receipt and processing of payment orders  
5 and communications cancelling or amending payment orders. Different cut-off times  
6 may apply to payment orders, cancellations or amendments, or to different categories of  
7 payment orders, cancellations or amendments. A cut-off time may apply to senders  
8 generally or different cut-off times may apply to different senders or categories of  
9 payment orders. If a payment order or communication cancelling or amending a payment  
10 order is received after the close of a funds transfer business day or after the appropriate  
11 cut-off time on a funds transfer business day, the receiving bank may treat the payment  
12 order or communication as received at the opening of the next funds transfer business  
13 day.

14 **Section 4A-106. TIME PAYMENT ORDER IS RECEIVED.** (Our §4-1106)

15 \* \* \*

16 **Official Comment**

17 The time that a payment order is received by a receiving bank usually defines the  
18 payment date or the execution date of a payment order. Section 4A-401 and Section  
19 4A-301. The time of receipt of a payment order, or communication cancelling or  
20 amending a payment order is defined in subsection (a) by reference to the rules stated in  
21 Section ~~1-201(27)~~ 1-202. Thus, time of receipt is determined by the same rules that  
22 determine when a notice is received. Time of receipt, however, may be altered by a cut-  
23 off time.

24 **Sec. B-21. 11 MRSA §4-1204, sub-§(2)**, as enacted by PL 1991, c. 812, §2, is  
25 amended to read:

26 (2). Reasonable time under subsection (1) may be fixed by agreement as stated in  
27 section ~~1-204~~ 1-1302, subsection ~~(1)~~ (2), but the obligation of a receiving bank to refund  
28 payment as stated in subsection (1) may not otherwise be varied by agreement.

29 **Sec. B-22. 11 MRSA §5-1103, sub-§(3)**, as enacted by PL 1997, c. 429, Pt. A,  
30 §2 and affected by §4, is amended to read:

31 (3). With the exception of this subsection, subsections (1) and (4), section 5-1102,  
32 subsection (1), paragraphs (i) and (j), section 5-1106, subsection (4), and section 5-1114,  
33 subsection (4), and except to the extent prohibited in section ~~1-102, subsection (3)~~ 1-1302  
34 and section 5-1117, subsection (4), the effect of this Article may be varied by agreement  
35 or by a provision stated or incorporated by reference in an undertaking. A term in an  
36 agreement or undertaking generally excusing liability or generally limiting remedies for  
37 failure to perform obligations is not sufficient to vary obligations prescribed by this  
38 Article.

39 **Official Comment** (Our §5-1103)

40 \* \* \*

1 2. Like all of the provisions of the Uniform Commercial Code, Article 5 is  
2 supplemented by Section 1-103 and, through it, by many rules of statutory and common  
3 law. Because this article is quite short and has no rules on many issues that will affect  
4 liability with respect to a letter of credit transaction, law beyond Article 5 will often  
5 determine rights and liabilities in letter of credit transactions. Even within letter of credit  
6 law, the article is far from comprehensive; it deals only with "certain" rights of the  
7 parties. Particularly with respect to the standards of performance that are set out in  
8 Section 5-108, it is appropriate for the parties and the courts to turn to customs and  
9 practice such as the Uniform Customs and Practice for Documentary Credits, currently  
10 published by the International Chamber of Commerce as I.C.C. Pub. No. 500 (hereafter  
11 UCP). Many letters of credit specifically adopt the UCP as applicable to the particular  
12 transaction. Where the UCP are adopted but conflict with Article 5 and except where  
13 variation is prohibited, the UCP terms are permissible contractual modifications under  
14 Sections ~~1-102(3)~~ 1-302 and 5-103(c). See Section 5-116(c). Normally Article 5 should  
15 not be considered to conflict with practice except when a rule explicitly stated in the UCP  
16 or other practice is different from a rule explicitly stated in Article 5.

17 [remainder of comment 2 is unchanged]

18 \* \* \*

19 **Sec. B-23. 11 MRSA §7-102, sub-§(1), ¶(e), is amended to read:**

20 (e). "Document" means document of title as defined in the general definitions in  
21 Article 1 (section 1-201 1-1201).

22 **Sec. B-24. 11 MRSA §8-1102, sub-§(1), ¶(j), as enacted by PL 1997, c. 429, Pt. B,**  
23 **§2, is repealed.**

24 **Official Comment (Our §8-1102)**

25 \* \* \*

26 10. "Good faith." ~~Good faith is defined in Article 8 for purposes of the application to~~  
27 ~~Article 8 of Section 1-203, which provides that "Every contract or duty within this Act~~  
28 ~~[the Uniform Commercial Code] imposes an obligation of good faith in its performance~~  
29 ~~or enforcement." Section 1-201(b)(20) defines "good faith" as "honesty in fact and the~~  
30 ~~observance of reasonable commercial standards of fair dealing." The sole function of the~~  
31 ~~good faith definition in Revised Article 8 is to give content to the Section 1-203~~  
32 ~~obligation as it applies to contracts and duties that are governed by Article 8. The~~  
33 ~~standard is one of "reasonable commercial standards of fair dealing." The reference to~~  
34 ~~commercial standards makes clear that assessments of conduct are to be made in light of~~  
35 ~~the commercial setting. The substantive rules of Article 8 have been drafted to take~~  
36 ~~account of the commercial circumstances of the securities holding and processing system.~~  
37 ~~For example, Section 8-115 provides that a securities intermediary acting on an effective~~  
38 ~~entitlement order, or a broker or other agent acting as a conduit in a securities transaction,~~  
39 ~~is not liable to an adverse claimant, unless the claimant obtained legal process or the~~  
40 ~~intermediary acted in collusion with the wrongdoer. This, and other similar provisions,~~  
41 ~~see Sections 8-404 and 8-503(e), do not depend on notice of adverse claims, because it~~  
42 ~~would impair rather than advance the interest of investors in having a sound and efficient~~

1 securities clearance and settlement system to require intermediaries to investigate the  
2 propriety of the transactions they are processing. The good faith obligation does not  
3 supplant the standards of conduct established in provisions of this kind.

4 In Revised Article 8, the definition of good faith is not germane to the question  
5 whether a purchaser takes free from adverse claims. The rules on such questions as  
6 whether a purchaser who takes in suspicious circumstances is disqualified from protected  
7 purchaser status are treated not as an aspect of good faith but directly in the rules of  
8 Section 8-105 on notice of adverse claims.

9 \* \* \*

10 **Definitional Cross References:**

11 “Agreement”. Section 1-201(b)(3).

12 “Bank”. Section 1-201(b)(4).

13 “Person”. Section 1-201(30)(b)(27).

14 “Send”. Section 1-201(38)(b)(36).

15 “Signed”. Section 1-201(39)(b)(37).

16 “Writing”. Section 1-201(46)(b)(43).

17 **Sec. B-25. 11 MRSA §9-1102, sub-§(43)**, as enacted by PL 1999, c. 699, Pt. A,  
18 §2 and affected by §4, is repealed.

19 **Official Comment (Our §9-1102)**

20 \* \* \*

21 **3. Definitions Relating to Creation of a Security Interest.**

22 \* \* \*

23 b. **“Security Agreement.”** The definition of “security agreement” is  
24 substantially the same as under former Section 9-105—an agreement that creates or  
25 provides for a security interest. However, the term frequently was used colloquially  
26 in former Article 9 to refer to the document or writing that contained a debtor’s  
27 security agreement. This Article eliminates that usage, reserving the term for the  
28 more precise meaning specified in the definition.

29 Whether an agreement creates a security interest depends not on whether the parties  
30 intend that the law *characterize* the transaction as a security interest but rather on whether  
31 the transaction falls within the definition of “security interest” in Section 1-201. Thus, an  
32 agreement that the parties characterize as a “lease” of goods may be a “security  
33 agreement,” notwithstanding the parties’ stated intention that the law treat the transaction  
34 as a lease and not as a secured transaction. See Section 1-203.

35 \* \* \*



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This Act takes effect January 1, 2010.