

# Acronyms for Article Three of the Uniform Commercial Code

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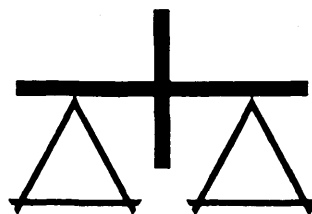
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# ACRONYMS<sup>1</sup> FOR ARTICLE THREE<sup>2</sup> OF THE UNIFORM COMMERCIAL CODE<sup>3</sup>

by Christine Neylon O'Brien\*

## INTRODUCTION

If you are searching for new ways to teach the essential<sup>4</sup> sections of Article Three of the Uniform Commercial Code [U.C.C.], and you adhere to the notion that students learn more when they are awake and

\* Wallace E. Carroll School of Management, Boston College. The author wishes to thank Gerald A. Madek, Bentley College for his early comments on this article, as well as the reviewers and editors of the *Journal of Legal Studies Education*. She dedicates this paper to Paul J. O'Brien, Jr. and Thomas J. O'Brien.

<sup>1</sup> An acronym is a word formed from the initial letters of a name, or by combining initial letters or parts of a series of words. *THE ILLUSTRATED HERITAGE DICTIONARY AND INFORMATION BOOK 12* (Houghton Mifflin Co. 1977). I apologize here for two things. One is the footnotes, which are way too long. Cf. Frances E. Zollers, *Editor's Corner*, iii 34 AM. BUS. L.J. (1996) (advocating the use of footnotes despite Oscar Wilde's argument that they are like having to answer the doorbell at a moment when one is otherwise engaged). The second thing I apologize for is the foolishness of the acronyms. Maybe an innovative reader will come up with better ones and then we'll all be happy.

<sup>2</sup> The need for acronyms to address Article 3 occurred to the author after reading Anonymous (a/k/a Marianne Moody Jennings), *Now That's Funny : A Guide For Using Humor In Legal Studies*, 13 J. LEGAL STUD. EDUC. 287, 301 and n. 101 (1995). Professor Jennings reflects therein that commercial paper both "looks dull...feels dull...induces sleep. And can bring on despondency." This article is hereinafter referred to as "Jennings" rather than allowing the cloak of anonymity to hide the highly esteemed author. For what does it mean to be a nationally (or arguably, internationally now that Sally Gunz is a member of the Academy's Executive Committee...Sally, this is only a part of why we wanted you) recognized scholar? It means that people all over the United States, Canada, and maybe even the world know just what a nut you are. Compare, however, Professor Jennings's serious mien in the video entitled: "Functions and Forms of Commercial Paper," by Insight Films (1989), with what her scholarly readers known of her deeper thoughts on the subject matter. Jennings, *supra* at 301-302.

<sup>3</sup> All references to the Uniform Commercial Code are to the 1990 version unless otherwise noted. The title would have read better if U.C.C. were used but the Bluebook expects the words. See Rule 15.2. Alternative titles for this manuscript were: *Article Three: What a Joke*, (or more accurately) *There's Nothing Funny About Article Three of the U.C.C.*, (again the initials sound better than the words) but think how either of those would look on a curriculum vitae.

<sup>4</sup> I'm sure that there are those who would argue that none of Article Three is essential, but these skeptics ignore all the students I envision scribbling these acronyms next to a problem on the Certified Public Accounting examination. I hope that they will scribble it next to a relevant question. Even original drafters of the Code lament at the obsolescence of concepts codified in Article Three. See Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979).

laughing,<sup>5</sup> albeit at their instructor's expense,<sup>6</sup> these acronyms are for you. Frankly, there are so few places where one feels comfortable discussing Article Three,<sup>7</sup> or even admitting that one teaches it,<sup>8</sup> that the author perceives a genuine need to bring the topic out in the open.<sup>9</sup>

<sup>5</sup> Jennings, *supra* note 2 at 287-88.

<sup>6</sup> See *id.* at 289 n. 15.

<sup>7</sup> Article Three is hardly cocktail-party talk. I say this upon some authority, and based upon a recent discussion at just such a venue where an overly-inquisitive lawyer maintained a skeptical and condescending attitude toward the author's vocation of teaching law at a business school. There are many 'regular' lawyers who envy us our calling and purposely act obtuse about it in an attempt to either inflate themselves or discover how to get our jobs. Article Three provided a wonderful end to the inquisition. As in, if you wish to get the dog off your bone, begin by particularizing to the Articles of the U.C.C. (refer to it as "The Code") that you teach, brightly alluding to the stimulation of the recent repeals and revisions. While any or all of Articles 2A, 3, 4, 6, and/or 9 will achieve the desired result in this regard, Article Three will virtually ensure that the listener will move on to a more inviting conversationalist.

Article Two is not included in the above list because of its continuing perceived relevance as a complement to contract law, business, and perhaps life in general. Cf. O. Lee Reed, et al., *The Role of Contracts in the Introductory and Only Law Course That Most Business Students Will Ever Take*, 9 J. LEGAL STUD. EDUC. 1, 15-16 (1990) (indicating panelist Tom Dunfee's support of the continuing relevance of contract law). If you insist upon using Article Two in the above-mentioned, inquisition-ending context, by all means rapidly refer to the least enticing sections. Rattling off U.C.C. §2-401, §2-501, and §2-509 are recommended. If your numeric memory leaves you wanting here, then such terms as insurable interests, risk of loss, and the impact of the nature of the goods (existing, identified, and future) might get you into *almost* the same position as a reference to Article Three. If it doesn't, then try some shipping terms (e.g., C.I.F., F.O.B., F.A.S. *but not* C.O.D. because it is too commonly understood). I created a new signal here - *but not*. This probably won't catch on with the Bluebook revisers, but maybe some critical legal-types could use it.

<sup>8</sup> I admit it here amongst my peers with some temerity. Actually, teaching the Code during mid-life does have its advantages. It has greatly aided my numeric memory. So when filling out forms that require numbers, for example, automobile registration numbers, they roll right off my pen with no need to run to the driveway for verification. And in this world of digitized identification and passwords, the numeric memory may aid your access to voicemail, e-mail, regular mail, your office, your apartment or house, etc. That is if these are things you desire access to in the absence of having written such combinations down and not misplaced same.

<sup>9</sup> We teachers of Article Three have been held in due course for too long. Even the author wonders exactly what that means but please note the importance of using the unique Article Three terminology at every turn in order to place it into common usage. So, *bear* with me or I'll *order* you around! For, at the present time, the language is decidedly uncommon, one might even say eccentric. The drafters of Article Three appear to have sought out this special status. Why else the unexplained use of *indorse*, the variant of *endorse*, at U.C.C. § 3-204, etc., unless the entire American Law Institute is orthographically-challenged? (I hope no one has to look that word up). If you have ever run across a better explanation for the Code's use of the secondary spelling, please let the author and/or the readers know. There is no point in unnecessary creation of paranoia. However, in support of my theory, I ask that (if you still use them) you please turn over a check (that is, a form of draft that is payable on demand, drawn on a bank, and no

Part of bringing the topic into the open, then, is to make it understandable and also memorable. If Article Three *is* so boring, and indeed it more or less is, perhaps it is best to use that truth as an instructional stepping-stone. While it might not help to write a catchy, or even corny motto on the classroom board, the instructor may take inspiration from such thoughts as: "Yes, Article Three *is* deadly, but why not die laughing?"<sup>10</sup>

In terms of student morale, depending upon the composition of the class, why not adopt the macho theme "So this course is *not* all fun and games! Do you want to be a C.P.A. or don't you?" Alternative themes to evoke as justification for the pain and suffering of studying Article Three include (for law school hopefuls): "You'll want to get a good grade in this course so that I can write you a nice letter of recommendation."<sup>11</sup> Another effective entreaty for the pre-law student may be: "This is noth-ing compared to the rigors of a law school curriculum."<sup>12</sup> This theme works well with the first acronym. (See figure 1- WIMPS DO US IN).

Another savvy approach is an appeal to the general usefulness of such knowledge in adult life.<sup>13</sup> Also, the autocratic "We've got to get

longer requires the magic words "order or bearer or their equivalent" since the 1990 revision, U.C.C. § 3-104 (c)). Please confirm that the back says "Endorse here" or its equivalent, and that indorse does not seem to enjoy a preferred usage. My checks use the "Endorse here." Watertown Savings Bank, Watertown, Mass. No account number is provided here for verification purposes since anyone who teaches Article Three and Four recognizes the pitfalls of being too free and easy. I doubt the Bluebook would require same, as it has not yet, to my knowledge, addressed citation to a bank account.

<sup>10</sup> It has long been recognized that humor is even appropriate in the gallows...hence the term gallows humor! My dentist enjoys this type of humor. He has adapted to the level of enjoyment that his work provides to his clientele. A hypothetical dialogue with him might go something like this:

Dr.: "How did you break this tooth?"

Patient: "On a conversation heart."

Dr.: "Well what did it say?"

Patient: "What?"

Dr.: "On the heart?"

Patient: "Oh, it said, 'your dentist loves you.'"

Now if you'd like to use this anecdotal material in class, it would be preferable to do so when Valentine's Day falls right on the day that you discuss the implied warranty of merchantability in the sale of goods which includes food. U.C.C. § 2-314(2)(c). Of course this is a diversion from Article Three.

<sup>11</sup> So this is blackmail. Don't say it if you don't like to write letters of recommendation.

<sup>12</sup> This is puffing. Article Three is as bad as it gets. In a two-semester sequence on Commercial Law that I took in law school, the professor never touched upon Article Three. Lord, rest his soul. I don't blame him. Oh, and it wasn't a required course anyway.

<sup>13</sup> I wouldn't use this idea if the class is heavily endowed with adult-learners. They might think that you need new glasses or that you haven't given them credit for their advanced age and wisdom. They probably have figured out that Article Three is of

through this because its on the syllabus" may beg the question but avoids deep psychological or philosophical analysis. With luck, the fact that the instructor wrote the syllabus and thus is responsible for its contents, may not occur to the students. Finally, the instructor may choose to ignore the issue of the subject matter's characteristics, adopting a politician's (or administrator's) attitude. Upon an unexpected challenge, the response might be: "Oh is there something wrong here? I've been so engrossed in doing my job that I hadn't noticed."

And so, without further adieu, let us proceed to the land of Article Three acronymic inanity.

### ANALYSIS

First advise the students to analyze Article Three problems in the following manner:

1. Is the instrument negotiable?

(See figure 1 for requirements of negotiability)

2. If the instrument is negotiable, then is the party presenting the instrument for collection a holder in due course (HIDC) or a holder through a HIDC? (See figure 2 for requirements of HIDC)

3. If the requirements for 1 and 2 are present, then does a defense against payment exist, and if so, is the defense one that is valid against a HIDC (or holder through a HIDC).<sup>14</sup> (See figures 3 and 4)

To determine whether the instrument is negotiable, use the following phrase.

You may prefer to move the "sum certain" requirement up to the first word, keeping it closer to the "in money" theme. Although, as the acronym currently reads, "signature" is in the first word with "written" which is logical too.

marginal usefulness based upon their years of experience, unless they work in a bank or other setting where the rules of Article Three shed much light. In which case, they may know more than the sage instructor.

<sup>14</sup> I'd like to simply classify the defenses as Universal and Limited because the distinction between defenses is essentially preserved under the 1990 revision of the Code. However, U.C.C. § 3-305 and § 3-306 now refer to defenses and claims in recoupment and thus further explanations will unavoidably entail.

Figure 1

**The Requirements of Negotiability  
U.C.C. §3-104**

**WIMPS DO US IN**

**Written  
In  
Money  
Promise or order  
Signed (by maker or drawer)  
  
Definite time or on demand  
Order or bearer (or equivalent)\*  
  
Unconditional Character  
Sum Certain  
  
Is  
Negotiable**

\* Not required if instrument is a check under U.C.C. § 3-104 (c)(1990).

Once negotiability is ensured,<sup>15</sup> the next phase of analysis is to ascertain the status of the holder. A holder is the person in possession of the negotiable instrument that is either payable to his/her order (as payee or indorsee) or to bearer. The holder must satisfy several requirements in order to qualify for the preferred status of holder in due course.<sup>16</sup> In order to connect this acronym to its meaning, advise your students that the holder has a lot to GAIN from achieving HIDC status, in that there are a whole series of defenses against payment that are ineffective against a HIDC.

<sup>15</sup> If I were the The American Law Institute, I'd probably spell it insured.

<sup>16</sup> Don't forget the so-called shelter rule that also protects a holder through a holder in due course. U.C.C. § 3-203 (b) (1990).

Figure 2

The Requirements for Holder in Due Course  
U.C.C. §3-302

GAIN

Give value\*

Act in good faith\*\*

Ignorant of defenses or adverse claims\*\*\*

No knowledge paper overdue or dishonored

\*Present performance or exchange including receipt of a security interest or lien (separate from a lien obtained in a judicial proceeding), past obligation (unlike usual rule on contract consideration that past consideration is no consideration); executory promise to perform in the future is consideration here and deemed value for holder in due course purposes only to the extent the promise is performed. See U.C.C. §3-303 & Official Comment 1.

\*\*This includes "honesty in fact in the conduct or transaction" U.C.C. § 1-201(19), and also the "observance of reasonable commercial standards of fair dealing." U.C.C. §3-103(a)(4). The latter standard is concerned with the fairness of conduct rather than the care with which the conduct is performed (such as ordinary care). See U.C.C. §3-103 Official Comment 4.

\*\*\* at the time the instrument is acquired.

Once HIDC status is ascertained, the defenses that are valid even against a HIDC must be outlined. It might be wise to introduce this acronym with some self-deprecatory remarks which will assist the students in remembering the phrase. Since it spells out IM DIFFI,<sup>17</sup> one could also reflect that the poor HIDC met all the requirements of U.C.C. §3-302, and still is prevented from collecting. Thus, this acronymic phrase expresses the HIDC's exasperation. Of course there is no apostrophe between I and M, and who knows whether DIFFI refers to being different or is a bit like daffy, but there are simply limits on the letters available.<sup>18</sup>

<sup>17</sup> With my students, they only need look at me at this point to remember the phrase. Please excuse use of first person in text.

<sup>18</sup> This is Business Law, not an English course! We take lawyer-like (as opposed to poetic) license. See *supra* note 9, discussing orthographic license displayed by the



Figure 3

Defenses Valid Against A Holder in Due Course  
U.C.C. §3-305 (a)(1)\*  
(Previously Universal or Real Defenses)

IM DIFFI

Incapacity (infancy and otherwise severe enough to make a contract null)\*\*

Material alteration

Duress (depriving control)

Illegality (so null contract)

Fraud (in the essence, in the execution, or in the factum)

Forgery (unauthorized signature)\*\*\*

Insolvency proceedings discharge or knowledge of other discharge of party obligated on the instrument

\* The Defenses of Material Alteration and Forgery are technically not defenses against HIDCs only and are not stated in U.C.C. §3-305. See U.C.C. §3-302(a)(2)(iv). Forgery or lack of authority may be raised against any holder unless the party whose name was signed ratified same or is otherwise estopped from denying it. An alteration is an unauthorized change and where such are fraudulently made, the party obligated is discharged from that liability, but the instrument may be enforced (1) as to its original terms, (2) in the case of an incomplete instrument that is altered by unauthorized completion, according to its terms as completed. See U.C.C. §3-407(a), (b) & (c) and Official Comment 2.

\*\* The treatment of incapacity is largely statutory and varies by state. See U.C.C. §3-305 Official Comment 1.

\*\*\* This includes indorsements as well as other unauthorized signatures. See U.C.C. § 1-201 (43).

Finally, the instructor turns to the defenses that are ineffective against a HIDC. These are referred to as defenses under U.C.C. §3-305(a)(2) and claims in recoupment under U.C.C. §3-305(a)(3). In typical Code fashion, a claim in recoupment is neither defined in §3-103 Definitions, nor within U.C.C. §3-305. Official Comment 3 to U.C.C. §3-

American Law Institute. Please note that one meaning of the word license is "to be lawful".

305 provides illustrations but is loathe to provide a direct definition.<sup>19</sup> Black's Law Dictionary defines recoupment:

To recover a loss by a subsequent gain. In pleading, to set forth a claim against the plaintiff when an action is brought against one as a defendant. A keeping back something which is due, because there is an equitable reason to withhold it. A right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations ... arising under the same contract.<sup>20</sup>

Examples of defenses and claims in recoupment that will still permit a HIDC to collect on the negotiable instrument follow.

<sup>19</sup> See DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON COMMERCIAL LAW 367 (1995) (commenting "what does that mean" in reference to "claims in recoupment" per U.C.C. § 3-305 (a) (3)).

<sup>20</sup> BLACK'S LAW DICTIONARY 1275 (6th ed. 1990). Recoupment is also characterized as "a purely defensive matter" and defined there as "the equivalent of the old counterclaim." *Id.*

Figure 4

**Defenses That Are Ineffective Against a Holder in Due Course  
U.C.C. §3-305 (a)(2)\*  
(Previously known as Limited or Personal Defenses)**

**I PICKED CD NUT**

Inducement fraud

Prior payment

Incapacity (but not infancy and otherwise not at level to make a  
contract null)

Cancellation

K (this refers to ordinary contract defenses\*\*)

Easy

these two work together-(such duress that it doesn't make  
contact void)

Duress

Conditional

these two work together

Delivery

Nondelivery or nonissuance

Unauthorized completion

Theft of paper

\* These defenses are not specifically listed in U.C.C. §3-305(a) (2). See RONALD ANDERSON, ET AL; BUSINESS LAW AND THE REGULATORY ENVIRONMENT 598-99 (13th ed. 1998); MICHAEL B. METZGER ET AL., BUSINESS LAW AND THE REGULATORY ENVIRONMENT 655-58 (9th ed. 1995).

\*\* I use "K" as shorthand for contract throughout the course. Examples of ordinary "K" defenses include: failure of consideration, breach of contract or warranty, illegality not at the essence such that contract is not void, failure to countersign a traveler's check (U.C.C. §3-106(c)), modification of an obligation by a separate agreement (U.C.C. §3-117), payment in violation of a restrictive indorsement.

In an attempt to remember this curious phrase, perhaps tell your students to focus on the "CD" portion of the acronym which may be equated with the notion of being limited in either of two ways. One way is that people who spend too much time listening to CDs (as in compact discs) may find this detrimental to their studies, thus limiting their learning. If your class is populated with Finance majors who are on the verge of millionaire investment status (at least in their mock portfolios), a reference to certificate of deposit<sup>21</sup> as the CD is even more interesting and all the better because certificates of deposit are Article Three language.<sup>22</sup> Your explanatory tie-in with a certificate of deposit would be that those who limit their portfolio to CDs will discover that the growth they experience will be limited compared to those investors who vary their portfolio. There is very little more one could say about the NUT portion of the acronym, but it is certainly related to all that has already been said here about Article Three.<sup>23</sup>

#### CONCLUSION

The above acronyms should assist both students and instructors of Article Three to remember the essential elements for analyzing negotiable instruments problems. Maintaining even a nodding acquaintance with the requirements of negotiability, holder in due course status, and the categories of defenses may prove to be a dry task absent a practicable strategy. May the proof of that be in the pedagogy.

<sup>21</sup> U.C.C. § 3-104 (j) (1990).

<sup>22</sup> See *supra* note 9 advising instructor to use the language of Article Three in class.

<sup>23</sup> See *supra* notes 2 - 21 and accompanying text. Another alternative title for this article just occurred to me: *Article Three in a Nutshell*.