

ACT 162

H.B. NO. 1259

A Bill for an Act Relating to the Uniform Commercial Code.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 490, Hawaii Revised Statutes, is amended by adding a new article to be designated and to read as follows:

**“ARTICLE 1
GENERAL PROVISIONS
PART 1. GENERAL PROVISIONS**

§490:1-101 Short titles. (a) This chapter may be cited as the Uniform Commercial Code.

(b) This article may be cited as Uniform Commercial Code - General Provisions.

§490:1-102 Scope of article. This article applies to a transaction to the extent that it is governed by another article of this chapter.

§490:1-103 Construction of chapter to promote its purposes and policies; applicability of supplemental principles of law. (a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies, which are:

- (1) To simplify, clarify, and modernize the law governing commercial transactions;
- (2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
- (3) To make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause shall supplement its provisions.

§490:1-104 Construction against implied repeal. This chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

§490:1-105 Severability. If any provision or clause of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

§490:1-106 Use of singular and plural; gender. In this chapter, unless the statutory context otherwise requires:

- (1) Words in the singular number include the plural, and those in the plural include the singular; and
- (2) Words of any gender also refer to any other gender.

§490:1-107 Section captions. Section captions are part of this chapter.

§490:1-108 Relation to electronic signatures in global and national commerce act. This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, title 15 United States Code section 7001 et seq., except that nothing in this article modifies, limits, or supersedes section 7001(c) of that Act or authorizes electronic delivery of any of the notices described in section 7003(b) of that Act.

PART 2. GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

§490:1-201 General definitions. (a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of this chapter that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of this chapter that apply to particular articles or parts thereof:

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

“Aggrieved party” means a party entitled to pursue a remedy.

“Agreement”, as distinguished from “contract”, means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in section 490:1-303.

“Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, financial services loan company, and trust company.

“Bearer” means a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank.

“Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods.

“Branch” includes a separately incorporated foreign branch of a bank.

“Burden of establishing” a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

“Buyer in ordinary course of business” means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a right to

recover the goods from the seller under article 2 may be a buyer in ordinary course of business. "Buyer in the ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

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

- (1) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- (2) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

"Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

"Contract", as distinguished from "agreement", means the total legal obligation that results from the parties' agreement as determined by this chapter and as supplemented by any other applicable law.

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

"Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

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

"Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt, or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document shall purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

"Fault" means a default, breach, or wrongful act or omission.

"Fungible goods" means:

- (1) Goods that any unit, by nature or usage of trade, is the equivalent of any other like unit; or
- (2) Goods that by agreement are treated as equivalent.

"Genuine" means free of forgery or counterfeiting.

"Good faith" means honesty in fact.

"Holder" means:

- (1) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or
- (2) The person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

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

"Insolvent" means:

- (1) Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;
- (2) Being unable to pay debts as they become due; or
- (3) Being insolvent within the meaning of federal bankruptcy law.

“Money” means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

“Organization” means a person other than an individual.

“Party”, as distinct from a “third party”, means a person that has engaged in a transaction or made an agreement subject to this chapter.

“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.

“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.

“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.

“Purchaser” means a person that takes by purchase.

“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.

“Remedy” means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

“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.

“Right” includes remedy.

“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. “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 490:2-401, but a buyer may also acquire a “security interest” by complying with article 9. Except as otherwise provided in section 490:2-505, the right of a seller or lessor of goods under article 2 or 2A to retain or acquire possession of the goods is not a “security interest”, but a seller or lessor may also acquire a “security interest” by complying with article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under section 490:2-401 is limited in effect to a reservation of a “security interest”. Whether a transaction in the form of a lease creates a “security interest” is determined pursuant to section 490:1-203.

“Send” in connection with a writing, record, or notice means:

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

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

“Signed” includes any symbol executed or adopted with present intention to adopt or accept a writing.

“State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

“Surety” includes a guarantor or other secondary obligor.

“Term” means a portion of an agreement that relates to a particular matter.

“Unauthorized signature” means a signature made without actual, implied, or apparent authority. The term includes a forgery.

“Warehouse receipt” means a receipt issued by a person engaged in the business of storing goods for hire.

“Writing” includes printing, typewriting, or any other intentional reduction to tangible form. “Written” has a corresponding meaning.

§490:1-202 Notice; knowledge. (a) Subject to subsection (f), a person has “notice” of a fact if the person:

- (1) Has actual knowledge of it;
- (2) Has received a notice or notification of it; or
- (3) From all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

(b) “Knowledge” means actual knowledge. “Knows” has a corresponding meaning.

(c) “Discover”, “learn”, or words of similar import refer to knowledge rather than to reason to know.

(d) A person “notifies” or “gives” a notice or notification to another by taking steps reasonably required to inform the other in ordinary course, whether or not the other person actually comes to know of it.

(e) Subject to subsection (f), a person “receives” a notice or notification when:

- (1) It comes to that person’s attention; or
- (2) It is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

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

§490:1-203 Lease distinguished from security interest. (a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of

the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

- (1) The original term of the lease is equal to or greater than the remaining economic life of the goods;
 - (2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
 - (3) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or
 - (4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.
- (c) A transaction in the form of a lease does not create a security interest merely because:
- (1) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;
 - (2) The lessee assumes risk of loss of the goods;
 - (3) The lessee agrees to pay, with respect to the goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs;
 - (4) The lessee has an option to renew the lease or to become the owner of the goods;
 - (5) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or
 - (6) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.
- (d) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:
- (1) When the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or
 - (2) When the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.
- (e) The "remaining economic life of the goods" and "reasonably predictable" fair market rent, fair market value, or cost of performing under the lease agreement shall be determined with reference to the facts and circumstances at the time the transaction is entered into.

§490:1-204 Value. Except as otherwise provided in articles 3, 4, and 5, a person gives value for rights if the person acquires them:

- (1) In return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;
- (2) As security for, or in total or partial satisfaction of, a preexisting claim;
- (3) By accepting delivery under a preexisting contract for purchase; or
- (4) In return for any consideration sufficient to support a simple contract.

§490:1-205 Reasonable time; seasonableness. (a) Whether a time for taking an action required by this chapter is reasonable depends on the nature, purpose, and circumstances of the action.

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

§490:1-206 Presumptions. Whenever this chapter creates a “presumption” with respect to a fact, or provides that a fact is “presumed”, the trier of fact shall find the existence of the fact unless evidence is introduced that supports a finding of its nonexistence.

PART 3. TERRITORIAL APPLICABILITY AND GENERAL RULES

§490:1-301 Territorial applicability; parties’ power to choose applicable law. (a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

(b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), the Uniform Commercial Code applies to transactions bearing an appropriate relation to this state.

(c) If one of the following provisions of the Uniform Commercial Code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

- (1) Section 490:2-402;
- (2) Sections 490:2A-105 and 490:2A-106;
- (3) Section 490:4-102
- (4) Section 490:4A-507;
- (5) Section 490:5-116;
- (6) Section 490:8-110; and
- (7) Sections 490:9-301 through 490:9-307.

§490:1-302 Variation by agreement. (a) Except as otherwise provided in subsection (b) or elsewhere in this chapter, the effect of provisions of this chapter may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by this chapter may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever this chapter requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of this chapter of the phrase “unless otherwise agreed,” or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

§490:1-303 Course of performance, course of dealing, and usage of trade. (a) A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if:

- (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
- (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

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

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

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

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

- (1) Express terms prevail over course of performance, course of dealing, and usage of trade;
- (2) Course of performance prevails over course of dealing and usage of trade; and
- (3) Course of dealing prevails over usage of trade.

(f) Subject to section 490:2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

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

§490:1-304 Obligation of good faith. Every contract or duty within this chapter imposes an obligation of good faith in its performance and enforcement.

§490:1-305 Remedies to be liberally administered. (a) The remedies provided by this chapter shall be liberally administered so that the aggrieved party is put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in this chapter or by other rule of law.

(b) Any right or obligation declared by this chapter is enforceable by action unless the provision declaring it specifies a different and limited effect.

§490:1-306 Waiver or renunciation of claim or right after breach. A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.

§490:1-307 Prima facie evidence by third-party documents. A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s or inspector’s certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party is prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

§490:1-308 Performance or acceptance under reservation of rights. (a) A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as “without prejudice”, “under protest”, or the like are sufficient.

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

§490:1-309 Option to accelerate at will. A term providing that one party or that party’s successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or when the party “deems itself insecure,” or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised.

§490:1-310 Subordinated obligations. An obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor.”

SECTION 2. Section 155-11, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

“(e) In case of the sale or transfer of the mortgaged land or goods [that] in which the department has a security interest, as that term is defined in section ~~[490:1-201(37);]~~ 490:1-201, the department may permit the mortgage or encumbrance to be assumed by the purchaser. In case of the death of the borrower, the borrower’s heir or heirs, or the borrower’s legal representative or representatives, shall have the option within six months of the death to assume the mortgage of the deceased. The department or its agents [~~may~~], pending the exercise of the option and pending possession being taken by the heirs or representatives, may take possession of all mortgaged property and carry on the operation connected therewith, and the expense of the same shall be added to the principal due upon the mortgage to bear interest at the applicable rate.”

SECTION 3. Section 489E-3, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) This chapter does not apply to a transaction to the extent it is governed by:

- (1) A law governing the creation and execution of wills, codicils, or testamentary trusts;
- (2) The Uniform Commercial Code other than [~~sections 490:1-107 and 490:1-206;~~] section 490:1-201, article 2, and article 2A; and
- (3) A law or rule governing notice of:
 - (i) Default, including but not limited to notices relating to acceleration, repossession, eviction, foreclosure, or the right to cure;
 - (ii) Utility shutoff, including water, telephone, gas and electricity; or
 - (iii) Cancellation, termination, lapse, or material alteration of a contract of insurance, insurance benefits, life settlement or viatical settlement agreement, or service contract.”

SECTION 4. Section 489E-16, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

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“(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in section [490:1-201(20)] 490:1-201 of the Uniform Commercial Code, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under section 490:3-302(a), 490:7-501, or 490:9-330 of the Uniform Commercial Code are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.”

SECTION 5. Section 490:2-202, Hawaii Revised Statutes, is amended to read as follows:

“**§490:2-202 Final written expression: parol or extrinsic evidence.** Terms with respect to which the confirmatory memoranda of the parties agree or [which] that are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented by:

- (a) [By] Course of performance, course of dealing, or usage of trade (section [490:1-205] ~~or by course of performance (section 490:2-208);~~ 490:1-303); and
- (b) [By evidence] Evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.”

SECTION 6. Section 490:2A-501, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

“(d) Except as otherwise provided in section [490:1-106(1) ~~or~~] 490:1-305(a), this [Article] article, or the lease agreement, the rights and remedies referred to in subsections (b) and (c) are cumulative.”

SECTION 7. Section 490:2A-518, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 490:2A-504) or otherwise determined pursuant to agreement of the parties (sections [490:1-102(3)] 490:1-302 and 490:2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term [which] that is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.”

SECTION 8. Section 490:2A-519, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 490:2A-504) or otherwise determined pursuant to agreement of the parties (sections [490:1-102(3)] 490:1-302 and 490:2A-503), 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 490:2A-518(b), 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, less expenses saved in consequence of the lessor's default."

SECTION 9. Section 490:2A-527, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 490:2A-504) or otherwise determined pursuant to agreement of the parties (sections ~~[490:1-102(3)]~~ 490:1-302 and 490:2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term ~~[which]~~ that is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under section 490:2A-530, less expenses saved in consequence of the lessee's default."

SECTION 10. Section 490:2A-528, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 490:2A-504) or otherwise determined pursuant to agreement of the parties (sections ~~[490:1-102(3)]~~ 490:1-302 and 490:2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under section 490:2A-527(b), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in section 490:2A-523(a) or 490:2A-523(c)(1), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under section 490:2A-530, less expenses saved in consequence of the lessee's default."

SECTION 11. Section 490:3-103, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) In this ~~[Article:]~~ article:

- (1) "Acceptor" means a drawee that has accepted a draft.
- (2) "Drawee" means a person ordered in a draft to make payment.
- (3) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.
- (4) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.
- (5) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

- (6) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.
- (7) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this ~~[Article]~~ article or ~~[Article]~~ article 4.
- (8) "Party" means a party to an instrument.
- (9) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.
- (10) "Prove" with respect to a fact means to meet the burden of establishing the fact (section ~~[490:1-201(8)]~~; 490:1-201).
- (11) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser."

SECTION 12. Section 490:4A-105, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) In this ~~[Article:]~~ article:

- (1) "Authorized account" means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.
- (2) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, financial services loan company, and trust company. A branch or separate office of a bank is a separate bank for purposes of this ~~[Article:]~~ article.
- (3) "Customer" means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.
- (4) "Funds-transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.
- (5) "Funds-transfer system" means a wire transfer network, automated ~~[clearing house,]~~ clearinghouse, or other communication system of a ~~[clearing house]~~ clearinghouse or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.
- (6) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

- (7) “Prove” with respect to a fact means to meet the burden of establishing the fact (section [~~490:1-201(8)~~]; 490:1-201).”

SECTION 13. Section 490:4A-106, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“~~[H](a)[]~~ The time of receipt of a payment order or communication canceling or amending a payment order is determined by the rules applicable to receipt of a notice stated in section [~~490:1-201(27)~~]; 490:1-202. A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications canceling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication canceling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.”

SECTION 14. Section 490:4A-204, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Reasonable time under subsection (a) may be fixed by agreement as stated in section [~~490:1-204(1)~~]; 490:1-302(b), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement.”

SECTION 15. Section 490:5-103, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) With the exception of this subsection, subsections (a) and (d), sections 490:5-102(a), 490:5-106(d), and 490:5-114(d), the effect of this [~~Article~~] article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking, except to the extent prohibited in sections [~~490:1-102(3)~~]; 490:1-302 and 490:5-117(d). A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this [~~Article~~]; article.”

SECTION 16. Section 490:2-208, Hawaii Revised Statutes, is repealed.

SECTION 17. Section 490:2A-207, Hawaii Revised Statutes, is repealed.

SECTION 18. Article 1 of chapter 490, Hawaii Revised Statutes, is repealed.

SECTION 19. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 20. This Act shall take effect upon its approval.

(Approved July 2, 2004.)

Note

1. Edited pursuant to HRS §23G-16.5.