CHAPTER 55
Uniform Commercial Code

ARTICLE 1
General Provisions

ANNOTATIONS

Compiler's notes. — Laws 1961, ch. 96 enacted New Mexico's version of the Uniform Commercial Code. The 1972 revision of the code, which revised primarily Article 9, was adopted by Laws 1985, ch. 193, effective January 1, 1986. The 1977 revision of the code, which revised primarily Article 8, was adopted by Laws 1987, ch. 248, effective June 19, 1987. The 1987 and 1989 additions of Articles 2A and 4A, respectively, and the 1990 revisions of Articles 3 and 4, were adopted by Laws 1992, Chapter 114. Citations within the official commentary may be found within this compilation by prefacing the section number given with Chapter 55.

PART 1
SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT

55-1-101. Short titles.

(a) Chapter 55 NMSA 1978 shall be known and may be cited as the "Uniform Commercial Code"; and

(b) Chapter 55, Article 1 NMSA 1978 shall be known and may be cited as the "Uniform Commercial Code-General Provisions".

History: 1953 Comp., § 50A-1-101, enacted by Laws 1961, ch. 96, § 1-101; 1992, ch. 114, § 1; 2005, ch. 144, § 1.

OFFICIAL COMMENTS

Source. — Former Section 1-101 [55-1-101 NMSA 1978].

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

1. Each other article of the Uniform Commercial Code may also be cited by its own short title. *See* Sections 2-101, 2A-101, 3-101, 4-101, 4A-101, 5-101, 6-101, 7-101, 8-101, 9-101, 12-101, and 12A-101 [55-2-101, 55-2A-101, 55-3-101, 55-4-101, 55-4A-101, 55-5-101, 55-6-101, 55-7-101, 55-8-101, 55-9-101, 55-12-101, 55-12A-101 NMSA 1978, respectively].

ANNOTATIONS

The 2005 amendment, effective January 1, 2006, added Subsection (b) to define the "Uniform Commercial Code-General Provisions".

The 1992 amendment, effective July 1, 1992, substituted "Chapter 55 NMSA 1978" for "This act" and inserted "the".

Purpose of comments is to explain provisions of the code itself, in effect to promote uniformity of interpretation. *Burchett v. Allied Concord Fin. Corp.*, 1964-NMSC-231, 74 N.M. 575, 396 P.2d 186.

Comments deemed persuasive. — Official comments appearing as part of the Uniform Commercial Code are not direct authority for construction to be placed upon a section of the code, nevertheless they are persuasive and represent the opinion of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. *Burchett v. Allied Concord Fin. Corp.*, 1964-NMSC-231, 74 N.M. 575, 396 P.2d 186.

The court recognizes official comments to the code as persuasive, but not controlling, authority. *First State Bank v. Clark*, 1977-NMSC-088, 91 N.M. 117, 570 P.2d 1144.

Law reviews. — For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Fixtures and the Uniform Commercial Code in New Mexico," see 4 Nat. Resources J. 109 (1964).

Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), commented on in 4 Nat. Resources J. 175 (1964).

For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision' " see 4 Nat. Resources J. 398 (1964).

For comment, "Assignments - Maker's Defenses Cut Off - Uniform Commercial Code § 9-206," see 5 Nat. Resources J. 408 (1965).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966), commented on in 8 Nat. Resources J. 169 (1968).

For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," see 8 Nat. Resources J. 176 (1968).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), commented on in 8 Nat. Resources J. 713 (1968).

For comment, "The Miller Act in New Mexico - Materialman's Right to Recover on Prime's Surety Bond in Public Works Contracts - Notice as Condition Precedent to Action," see 9 Nat. Resources J. 295 (1969).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Survey of New Mexico Law, 1982-83: Commercial Law," see 14 N.M.L. Rev. 45 (1984).

For article, "Lender Recourse in Indian Country: A Navajo Case Study," see 21 N.M.L. Rev. 275 (1991).

For survey of 1990-91 commercial law, see 22 N.M.L. Rev. 661 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes § 42; 67 Am. Jur. 2d Sales § 1 et seq.; 68A Am. Jur. 2d Secured Transactions § 163 et seq.

Excessiveness or inadequacy of attorney's fees in matters involving commercial and general business activities, 23 A.L.R.5th 241.

82 C.J.S. Statutes § 221.

55-1-102. Scope of article.

Chapter 55, Article 1 NMSA 1978 applies to a transaction to the extent that it is governed by another article of the Uniform Commercial Code.

History: Laws 2005, ch. 144, § 2.

OFFICIAL COMMENTS

Prior uniform statutory provision. — Section 74, Uniform Sales Act; Section 57, Uniform Warehouse Receipts Act; Section 52, Uniform Bills of Lading Act; Section 19, Uniform Stock Transfer Act and Section 18, Uniform Trust Receipts Act.

Changes. — Rephrased and new material added.

1. Subsections (1) and (2) are intended to make it clear that:

This act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the act requires that its interpretation and application be limited to its reason.

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

The act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

2. Subsection (3) states affirmatively at the outset that freedom of contract is a principle of the 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 code seeks to avoid the type of interference with evolutionary growth found in *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 this act. But an agreement can change the legal consequences which would otherwise flow from the provisions of the act. "Agreement" here includes the effect given to course of dealing, usage of trade and course of performance by Sections 1-201, 1-205 and 2-208; the effect of an agreement on the rights of third parties is left to specific provisions of this act and to supplementary principles applicable under the next section. The rights of third parties under Section 9-301 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 act 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 9-501(3), on the other hand, is quite explicit. Under the exception for "the obligations of good faith, diligence, reasonableness and care prescribed by this act," provisions of the act 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 1-205 incorporating into the agreement prior course of dealing and usages of trade is of particular importance.

3. Subsection (4) is intended to make it clear that, as a matter of drafting, words such as "unless otherwise agreed" have been used to avoid controversy as to whether the subject matter of a particular section does or does not fall within the exceptions to Subsection (3), but absence of such words contains no negative implication since under Subsection (3) the general and residual rule is that the effect of all provisions of the act may be varied by agreement.

4. Subsection (5) is modelled on 1 U.S.C. Section 1 and New York General Construction Law Sections 22 and 35.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 2, effective January 1, 2006, repealed former 55-1-102 NMSA 1978, as enacted by Laws 1961, ch. 96, § 1-102, relating to rules of construction and variation by agreement, and enacted a new 55-1-

102 NMSA 1978. Former 55-1-102 NMSA 1978 is now part of Subsection A of 55-1-103 NMSA 1978. For provisions of former 55-1-102 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Compiler's notes. — Laws 1961, ch. 96, § 10-105, directed the compiler to retain article, part, section and subsection designations, headings, numbers, indentations and layout as used in Articles 1 to 9 of this act.

For current law governing variation by agreement, *see* 55-1-302 NMSA 1978

Law reviews. — For article, "Fixtures and the Uniform Commercial Code in New Mexico," see 4 Nat. Resources J. 109 (1964).

For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," see 8 Nat. Resources J. 176 (1968).

Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), commented on in 8 Nat. Resources J. 183 (1968).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes § 51; 68A Am. Jur. 2d Secured Transactions § 358 et seq.

Sufficiency of description of collateral in financing statement under U.C.C. §§ 9-110 and 9-402, 100 A.L.R.3d 10.

Sufficiency of secured party's signature on financing statement or security agreement under U.C.C. § 9-402, 100 A.L.R.3d 390.

Sufficiency of description of collateral in security agreement under U.C.C. §§ 9-110 and 9-203, 100 A.L.R.3d 940.

31 C.J.S. Estoppel §§ 55, 57, 98; 82 C.J.S. Statutes § 315.

55-1-103. Construction of Uniform Commercial Code to promote its purposes and policies; applicability of supplemental principles of law.

(a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) to simplify, clarify and modernize the law governing commercial transactions;

(2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and

(3) to make uniform the law among the various jurisdictions.

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

History: 1953 Comp., § 50A-1-103, enacted by Laws 1961, ch. 96, § 1-1032; 1978 Comp.; Laws 2005, ch. 144, § 3.

OFFICIAL COMMENTS

Source. — Former Section 1-102 (1)-(2) [55-1-102 (1)-(2) NMSA 1978]; Former Section 1-103 [55-1-103 NMSA 1978].

Changes from former law. — This section is derived from Subsections (1) and (2) of former Section 1-102 [55-1-102 NMSA 1978] and from former Section 1-103 [55-1-103 NMSA 1978]. Subsection (a) of this section combines Subsections (1) and (2) of former Section 1-102. Except for changing the form of reference to the Uniform Commercial Code and minor stylistic changes, its language is the same as Subsections (1) and (2) of former Section 1-102. Except for changing the form of reference to the Uniform Commercial Code and minor stylistic changes, Subsection (b) of this section is identical to former Section 1-103. The provisions have been combined in this section to reflect the interrelationship between them.

1. The Uniform Commercial Code is drawn to provide flexibility so that, since it is intended to be a semi-permanent and infrequently-amended piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in the Uniform Commercial Code to be applied by the courts in the light of unforeseen and new circumstances and practices. The proper construction of the Uniform Commercial Code requires, of course, that its interpretation and application be limited to its reason.

Even prior to the enactment of the Uniform Commercial Code, courts were careful to keep broad acts from being hampered in their effects by later acts of limited scope. *See Pacific Wool Growers v. Draper & Co.*, 158 Or. 1, 73 P.2d 1391 (1937), and compare Section 1-104 [55-1-104 NMSA 1978]. The courts have often recognized that the policies embodied in an act are applicable in reason to subject-matter that was not expressly included in the language of the act, *Commercial Nat. Bank of New Orleans v.*

Canal-Louisiana Bank & Trust Co., 239 U.S. 520, 36 S.Ct. 194, 60 L.Ed. 417 (1916) (bona fide purchase policy of Uniform Warehouse Receipts Act extended to case not covered but of equivalent nature), and did the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. *Agar v. Orda*, 264 N.Y. 248, 190 N.E. 479 (1934) (Uniform Sales Act change in seller's remedies applied to contract for sale of choses in action even though the general coverage of that Act was intentionally limited to goods "other than things in action.") They implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They disregarded a statutory limitation of remedy where the reason of the limitation did not apply. *Fiterman v. J. N. Johnson & Co.*, 156 Minn. 201, 194 N.W. 399 (1923) (requirement of return of the goods as a condition to rescission for breach of warranty; also, partial rescission allowed). Nothing in the Uniform Commercial Code stands in the way of the continuance of such action by the courts.

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

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

The language of Subsection (b) is intended to reflect both the concept of supplementation and the concept of preemption. Some courts, however, had difficulty in applying the identical language of former Section 1-103 [55-1-103 NMSA 1978] to determine when other law appropriately may be applied to supplement the Uniform Commercial Code, and when that law has been displaced by the Code. Some decisions applied other law in situations in which that application, while not inconsistent with the text of any particular provision of the Uniform Commercial Code, clearly was inconsistent with the underlying purposes and policies reflected in the relevant provisions of the Code. *See, e.g., Sheerbonnet, Ltd. v. American Express Bank, Ltd.*, 951 F. Supp. 403 (S.D.N.Y. 1995). In part, this difficulty arose from Comment 1 to former Section 1-103, which stated that "this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act." The "explicitly displaced" language of that Comment did not accurately reflect the proper scope of Uniform Commercial Code preemption, which extends to displacement of other law that is inconsistent with the purposes and policies of the Uniform Commercial Code, as well as with its text.

The supplemental principles of law and equity to which Subsection (b) refers may evolve over time to take into account developments in technology. These developments may include, for example, developing case law on contract formation in an electronic environment and the use of automated transactions and arrangements that are sometimes referred to as "electronic agents" (which may or may not actually reflect or create agency relationships under the applicable law of agency). See generally Uniform Electronic Transactions Act (UETA); Restatement (Third) of Agency § 1.04, Reporter's Note to Comment e (2006) (discussing the relationship between "electronic agents" and the law of principal and agent). The supplementation recognized by Subsection (b) should reflect this evolution.

3. **Application of Subsection (b) to statutes.** The primary focus of Section 1-103 [55-1-103 NMSA 1978] is on the relationship between the Uniform Commercial Code and principles of common law and equity as developed by the courts. State law, however, increasingly is statutory. Not only are there a growing number of state statutes addressing specific issues that come within the scope of the Uniform Commercial Code, but in some States many general principles of common law and equity have been codified. When the other law relating to a matter within the scope of the Uniform Commercial Code is a statute, the principles of Subsection (b) remain relevant to the court's analysis of the relationship between that statute and the Uniform Commercial Code, but other principles of statutory interpretation that specifically address the interrelationship between statutes will be relevant as well. In some situations, the principles of Subsection (b) still will be determinative. For example, the mere fact that an equitable principle is stated in statutory form rather than in judicial decisions should not change the court's analysis of whether the principle can be used to supplement the Uniform Commercial Code – under Subsection (b), equitable principles may supplement provisions of the Uniform Commercial Code only if they are consistent with the purposes and policies of the Uniform Commercial Code as well as its text. In other situations, however, other interpretive principles addressing the interrelationship between statutes may lead the court to conclude that the other statute is controlling, even though it conflicts with the Uniform Commercial Code. This, for example, would be the result in a situation where the other statute was specifically intended to provide additional protection to a class of individuals engaging in transactions covered by the Uniform Commercial Code.

4. **Listing not exclusive.** The list of sources of supplemental law in Subsection (b) is intended to be merely illustrative of the other law that may supplement the Uniform Commercial Code, and is not exclusive. No listing could be exhaustive. Further, the fact

that a particular section of the Uniform Commercial Code makes express reference to other law is not intended to suggest the negation of the general application of the principles of Subsection (b). Note also that the word "bankruptcy" in Subsection (b), continuing the use of that word from former Section 1-103 [55-1-103 NMSA 1978], should be understood not as a specific reference to federal bankruptcy law but, rather as a reference to general principles of insolvency, whether under federal or state law.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 3, effective January 1, 2006, repealed former 55-1-103 NMSA 1978, as enacted by Laws 1961, ch. 96, § 1-103, and enacted a new 55-1-103 NMSA 1978. Subsection (b) is almost identical to 55-1-103 NMSA 1978. Pursuant to 12-2A-14 NMSA 1978, this section is shown as amended.

The 2005 amendment, effective January 1, 2006, inserted a new Subsection (a) which included the substance of former 55-1-102 NMSA 1978.

Variant meanings of "commercial paper". — "Commercial paper" in former Section 58-13-2H NMSA 1978 did not have a meaning identical to "commercial paper" under New Mexico's UCC; although a document might have been commercial paper under both acts, the purposes of the two acts were not the same. *State v. Sheets*, 1980-NMCA-041, 94 N.M. 356, 610 P.2d 760, cert. denied, 94 N.M. 675, 615 P.2d 992.

Reasonableness of guaranty contracts. — Guaranty contracts according to which the creditor bank was not, as a prerequisite to the guarantors' liability, obliged to take any security, although it had a right to do so, no provision of which required the bank to perfect security taken or otherwise to deal with it in any particular way, and under which the guarantors waived their rights to subrogation and waived and released any claims to the security and to "any benefit of, and any right to participate in any security now or hereafter held by bank," while the bank was given the right to "waive and release" the security at any time without the waiver or release affecting the guarantors' obligation to pay, are not inherently unreasonable. *American Bank of Commerce v. Covolo*, 1975-NMSC-053, 88 N.M. 405, 540 P.2d 1294.

Interpretation of reasonableness by court. — Since former 50A-3-606, 1953 Comp. allowed a surety to waive his defenses and this section allowed parties by agreement to determine the standards by which performance of their good faith obligations could be measured, a court could then interpret the provisions of the guaranty agreement to determine whether the guarantors should be relieved of liability under the general law of suretyship. *American Bank of Commerce v. Covolo*, 1975-NMSC-053, 88 N.M. 405, 540 P.2d 1294.

Applicability of former law. — It is evident that provisions of the code are not applicable as to transactions completed or entered into before the effective date of the code, but those transactions are governed by provisions of the former law even though repealed or amended by the code. 1962 Op. Att'y Gen. No. 62-12.

Preservation of common-law principles. — This section does not preserve common-law principles in area thoroughly covered by UCC simply because they are not expressly excluded. *Rutherford v. Darwin*, 1980-NMCA-087, 95 N.M. 340, 622 P.2d 245, cert. quashed sub nom., 95 N.M. 426, 622 P.2d 1046 (1981).

Common law claims are precluded. — Section 55-4-406 NMSA 1978 precludes common laws claims for negligence and breach of contract in transactions involving forged checks. *Assoc. Home & RV Sales, Inc. v. Bank of Belen*, 2013-NMCA-018, 294 P.3d 1276.

Common law claims were precluded. — Where plaintiffs' employee, who was employed to assist with bookkeeping and balancing plaintiffs' accounts, forged 211 checks over an eighteen month period; and when defendant refused to repay plaintiffs for the losses, plaintiffs sued defendant for common law claims of negligence and breach of contract, plaintiffs' common law claims were precluded by Section 55-4-406 NMSA 1978. *Associated Home & RV Sales, Inc. v. Bank of Belen*, 2013-NMCA-018, 294 P.3d 1276.

Under applicable equitable estoppel principles, the party estopped must know or have knowledge imputed to it of concealed material facts at the time of concealment; and the party asserting estoppel must not know the truth of the facts but must rely on the other's conduct to its detriment. *Bowlin's, Inc. v. Ramsey Oil Co.*, 1983-NMCA-038, 99 N.M. 660, 662 P.2d 661, cert. denied, 99 N.M. 644, 662 P.2d 645.

Applicability of pre-UCC contract law. — Under the Uniform Commercial Code, to the extent that the contract does not expressly regulate any matter relating to the exercise of such powers as options to purchase, the continuing pre-code contract law will supply the answer. *Cranetex, Inc. v. Mountain Dev. Corp.*, 1987-NMSC-051, 106 N.M. 5, 738 P.2d 123.

Action for conversion. — An action for conversion is not foreclosed where a plaintiff also sues under Section 55-8-401 NMSA 1978, relating to the duty of an issuer of a security to register transfer, pledge or release. *Broadcort Capital Corp. v. Summa Med. Corp.*, 972 F.2d 1183 (10th Cir. 1992).

Restitution. — A seller, who breached the contract by delivering nonconforming goods to the buyer, could nonetheless assert a claim of restitution against the buyer when the buyer used the goods to its benefit even though it may have rejected the goods. *Credit Inst. v. Veterinary Nutrition Corp.*, 2003-NMCA-010, 133 N.M. 248, 62 P.3d 339.

Statute of frauds has no application where there has been a full and complete performance of the contract by one of the contracting parties, and the party so performing may sue on the contract in a court of law, particularly where the agreement has been completely performed as to the part thereof which comes within the provisions of the statute, and the part remaining to be performed is merely the payment of money. *Boggs v. Anderson*, 1963-NMSC-087, 72 N.M. 136, 381 P.2d 419.

Law reviews. — For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision' " see 4 Nat. Resources J. 398 (1964).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), commented on in 8 Nat. Resources J. 183 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes §§ 45, 382; 15A Am. Jur. 2d Commercial Code §§ 15, 68, 75; 17A Am. Jur. 2d Contracts §§ 23, 24.

Liability of parent for dental services to minor child, 7 A.L.R. 1070.

Civil liability of father for necessaries furnished to child taken from home by mother, 32 A.L.R. 1466.

Damages of infant on rescission of exchange of goods, 52 A.L.R.2d 1114.

82 C.J.S. Statutes §§ 363, 364.

55-1-104. Construction against implicit repeal.

The Uniform Commercial Code being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

History: 1953 Comp., § 50A-1-104, enacted by Laws 1961, ch. 96, § 1-104; 2005, ch. 144, § 4.

OFFICIAL COMMENTS

Source. — Former Section 1-104 [55-1-104 NMSA 1978].

Changes from former law. — Except for changing the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-104 [55-1-104 NMSA 1978].

This section embodies the policy that an act that bears evidence of carefully considered permanent regulative intention should not lightly be regarded as impliedly repealed by subsequent legislation. The Uniform Commercial Code, carefully integrated and intended as a uniform codification of permanent character covering an entire "field" of law, is to be regarded as particularly resistant to implied repeal.

ANNOTATIONS

The 2005 amendment, effective January 1, 2006, changed the reference from "this act" to "the Uniform Commercial Code".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes § 51; 15A Am. Jur. 2d Commercial Code §§ 16, 25.

Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, 5 A.L.R.2d 1270.

82 C.J.S. Statutes § 291.

55-1-105. Severability.

If any provision or clause of the Uniform Commercial Code or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Uniform Commercial Code which can be given effect without the invalid provision or application, and to this end the provisions of the Uniform Commercial Code are severable.

History: 1953 Comp., § 50A-1-108, enacted by Laws 1961, ch. 96, § 1-108; 1978 Comp., § 55-1-108; recompiled by compiler as NMSA 1978, § 55-1-105; Laws 2005, ch. 144, § 5.

OFFICIAL COMMENTS

Source. — Former Section 1-108 [55-1-108 NMSA 1978].

Changes from former law. — Except for changing the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-108 [55-1-108 NMSA 1978].

This is the model severability section recommended by the National Conference of Commissioners on Uniform State Laws for inclusion in all acts of extensive scope.

Definitional cross references. — "Person". Section 1-201.

Prior uniform statutory provision. — None.

1. Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the five sections listed in Subsection (2), and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a short hand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course, the act applies to any transaction which takes place in its entirety in a state which has enacted the act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the code.

3. Where a transaction has significant contacts with a state which has enacted the act and also with other jurisdictions, the question of what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the code in an analogous situation. Application of the code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. *Compare Global Commerce Corp. v. Clark-Babbitt Industries, Inc.*, 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.

4. The act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the act in a court of such a state. Common law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

6. Section 9-103 should be consulted as to the rules for perfection of security interests and the effects of perfection and nonperfection.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 5, effective January 1, 2006, repealed former 55-1-105 NMSA 1978 as enacted by Laws 1961, ch. 96, § 1-105, as amended, and enacted a new 55-1-105 NMSA 1978. The substance of former 55-1-105 NMSA 1978 has been enacted as a new 55-1-301 NMSA 1978 by Laws 2005, ch. 144, § 15. For provisions of former 55-1-105 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Laws 2005, ch. 144, § 8 repealed former 55-1-108 NMSA 1978, relating to severability, and enacted a new 55-1-108 NMSA 1978. The compiler has recompiled former 55-1-108 NMSA 1978 as 55-1-105 NMSA 1978 as the former section 55-1-108 NMSA 1978 is substantially the same as the section published above.

The 2001 amendment, effective July 1, 2001, substituted the present last paragraph for "perfection provisions of the article on secured transactions. Section 55-9-103 NMSA 1978".

The 1997 amendment, effective July 1, 1997, inserted "letters of credit. Section 55-5-116 NMSA 1978;" in Subsection (2).

The 1996 amendment, effective May 15, 1996, in Subsection (2), substituted "Section 55-8-110" for "Section 55-8-105" and made a minor stylistic change.

The 1992 amendment, effective July 1, 1992, made section reference substitutions throughout the section; and, in Subsection (2), added the provisions relating to applicability of the article on leases and to governing law in the article on fund transfers, and deleted a former provision relating to the article on bulk transfers.

The 1985 amendment deleted "of" following "the law either of this state or" near the middle of Subsection (1), substituted "Perfection provisions of the article" for "policy and scope of the article" and "Section 9-103" for "Sections 9-102 and 9-103" near the end of Subsection (2) and made minor grammatical changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes § 100; 15A Am. Jur. 2d Commercial Code §§ 11, 13, 44; 68A Am. Jur. 2d Secured Transactions § 8 et seq.

17 C.J.S. Contracts § 12.

55-1-106. Use of singular and plural; gender.

In the Uniform Commercial Code, unless the statutory context otherwise requires:

(1) words in the singular number include the plural, and those in the plural include the singular; and

(2) words of any gender also refer to any other gender.

History: 1953 Comp., § 50A-1-106, enacted by Laws 1961, ch. 96, § 1-106; 2005, ch. 144, § 6.

OFFICIAL COMMENTS

Source. — Former Section 1-102(5) [55-1-102(5) NMSA 1978]. See also 1 U.S.C. Section 1.

Changes from former law. — Other than minor stylistic changes, this section is identical to former Section 1-102(5) [55-1-102 NMSA 1978].

This section makes it clear that the use of singular or plural in the text of the Uniform Commercial Code is generally only a matter of drafting style – singular words may be applied in the plural, and plural words may be applied in the singular. Only when it is clear from the statutory context that the use of the singular or plural does not include the other is this rule inapplicable. *See, e.g.*, Section 9-322 [55-9-322 NMSA 1978].

Purposes of changes and new matter. — Subsection (1) is intended to effect three things:

1. First, to negate the unduly narrow or technical interpretation of some remedial provisions of prior legislation by providing that the remedies in this act are to be liberally administered to the end stated in the section. Second, to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the act elsewhere makes it clear that damages must be minimized. *Cf.* Sections 1-203, 2-706 (1) and 2-712 (2). The third purpose of Subsection (1) is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more. *Cf.* Section 2-204(3).

2. Under Subsection (2) any right or obligation described in this act is enforceable by court action, even though no remedy may be expressly provided, unless a particular provision specifies a different and limited effect. Whether specific performance or other equitable relief is available is determined not by this section but by specific provisions and by supplementary principles. *Cf.* Sections 1-103 and 2-716.

3. "Consequential" or "special" damages and "penal" damages are not defined in terms in the code, but are used in the sense given them by the leading cases on the subject.

Cross references. — Sections 1-103, 1-203, 2-204 (3), 2-701, 2-706 (1), 2-712 (2) and 2-716.

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Rights". Section 1-201.

ANNOTATIONS

Compiler's notes. — This section was formerly Subsection (5) of 55-1-102 NMSA 1978.

Repeals and reenactments. — Laws 2005, ch. 144, § 6, effective January 1, 2006, repealed former 55-1-106 NMSA 1978, as enacted by Laws 1961, ch. 96, § 1-106, and enacted a new 55-1-106 NMSA 1978. The current law relating to remedies to be liberally administered has been enacted as a new 55-1-305 NMSA 1978 by Laws 2005, ch. 144, § 19. For provisions of former 55-1-106 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Commercial Code § 24; 68A Am. Jur. 2d Secured Transactions § 527 et seq.

Illegality as basis for denying remedy of specific performance for breach of contract, 58 A.L.R.5th 387.

1A C.J.S. Actions §§ 10 to 17.

55-1-107. Section captions.

Section captions are part of the Uniform Commercial Code.

History: 1953 Comp., § 50A-1-109, enacted by Laws 1961, ch. 96, § 1-109 1978 Comp., § 55-1-109; recompiled by compiler as NMSA 1978, § 55-1-107; Laws 2005, ch. 144, § 7.

OFFICIAL COMMENTS

Source. — Former Section 1-109 [55-1-109 NMSA 1978].

Changes from former law. — None.

Section captions are a part of the text of the Uniform Commercial Code, and not mere surplusage. This is not the case, however, with respect to subsection headings appearing in Articles 9, 12, and A (Transitional Provisions). *See* Section 9-101 [55-9-101 NMSA 1978], Comment 3 ("subsection headings are not a part of the official text itself and have not been approved by the sponsors."); Section 12-101 [55-12-101 NMSA 1978], Comment; Section A-101 [55-12A-101 NMSA 1978], Comment.

Cross references. — Sections 1-203, 2-201 and 2-209; and *see* Section 2-719.

"Aggrieved party". Section 1-201.

"Rights". Section 1-201.

"Signed". Section 1-201.

"Written". Section 1-201.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 7, effective January 1, 2006, repealed former 55-1-107 NMSA 1978 as enacted by Laws 1961, ch. 96, § 1-107, and enacted a new 55-1-107 NMSA 1978. The substance of former 55-1-107 NMSA 1978 has been enacted as a new 55-1-306 NMSA 1978 by Laws 2005, ch. 144, § 20. For provisions of former 55-1-107 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Law reviews. — Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), commented on in 8 Nat. Resources J. 183 (1968).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes §§ 382, 927, 934, 948 to 950; 28 Am. Jur. 2d Estoppel and Waiver § 162; 68A Am. Jur. 2d Secured Transactions §§ 434 et seq., 590 et seq., 638 et seq.

17A C.J.S. Contracts § 491.

55-1-108. Relation to Electronic Signatures in Global and National Commerce Act.

Chapter 55, Article 1 NMSA 1978 modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 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.

History: Laws 2005, ch. 144, § 8.

OFFICIAL COMMENTS

Source. — New.

1. The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq became effective in 2000. Section 102(a) of that Act provides that a State statute may modify, limit, or supersede the provisions of section 101 of that Act with respect to state law if such statute, inter alia, specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, and (i) such alternative procedures or requirements are consistent with Titles I and II of that Act, (ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and (iii) if enacted or adopted after the date of the enactment of that Act, makes specific reference to that Act. Article 1 fulfills the first two of those three criteria; this Section fulfills the third criterion listed above.

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

Definitional cross references. — "Person". Section 1-201.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 8, effective January 1, 2006, repealed former 55-1-108 NMSA 1978, relating to severability, as enacted by Laws 1961, ch. 96, § 1-108, and enacted a new 55-1-108 NMSA 1978. The substance of former 55-1-108 NMSA 1978 has been enacted as a new 55-1-105 NMSA 1978 by Laws 2005, ch. 144, § 5. For provisions of former 55-1-108 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Cross references. — For the Electronic Authentication of Documents Act, *see* Chapter 14, Article 15 NMSA 1978.

For the Uniform Electronic Transactions Act, *see* Chapter 14, Article 15 NMSA 1978.

Federal Electronic Signatures in Global and National Commerce Act. — The federal Electronic Signatures in Global and National Commerce Act is codified, generally, as 15 U.S.C.S. § 7001 et seq. Section 102 of the act is codified as 15 U.S.C.S. § 7002.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes § 51; 15A Am. Jur. 2d Commercial Code § 30.

82 C.J.S. Statutes § 92.

55-1-109. Repealed.

History: 1953 Comp., § 50A-1-109, enacted by Laws 1961, ch. 96, § 1-109; repealed by Laws 2005, ch. 144, § 113.

ANNOTATIONS

Repeals. — Laws 2005, ch. 144, § 113 repealed 55-1-109 NMSA 1978, as enacted by Laws 1961, ch. 96, § 1-109, relating to section captions, effective January 1, 2006. For current comparable provisions, *see* 55-1-107 NMSA 1978.

55-1-110. Repealed.

History: Laws 2015, ch. 54, § 8; repealed by Laws 2021, ch. 86, § 4.

ANNOTATIONS

Repeals. — Laws 2021, ch. 86, § 4 repealed 55-1-110 NMSA 1978, as enacted by Laws 2015, ch. 54, § 8, relating to presumption that rule of law continues unchanged, effective June 18, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

PART 2
GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

55-1-201. General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of the Uniform Commercial Code that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of the Uniform Commercial Code that apply to particular articles or parts thereof:

(1) "action", in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity and any other proceeding in which rights are determined;

(2) "aggrieved party" means a party entitled to pursue a remedy;

(3) "agreement", as distinguished from "contract", means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing or usage of trade as provided in Section 55-1-303 NMSA 1978;

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

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

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

(7) "branch" includes a separately incorporated foreign branch of a bank;

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

(9) "buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of

business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property or on secured or unsecured credit and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Chapter 55, Article 2 NMSA 1978 may be a buyer in ordinary course of business. "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt;

(10) "conspicuous", with reference to a term, means so written, displayed or presented that, based upon the totality of the circumstances, 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;

(11) "consumer" means an individual who enters into a transaction primarily for personal, family or household purposes;

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

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

(14) "defendant" includes a person in the position of defendant in a counterclaim, cross-claim or third-party claim;

(15) "delivery", with respect to an electronic document of title, means voluntary transfer of control, and with respect to an instrument, a tangible document of title or an authoritative tangible copy of a record evidencing chattel paper, means voluntary transfer of possession;

(16) "document of title" means a record: (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold and dispose of the record and the goods the record covers; and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession that are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title

means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium;

(16A) "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities;

(17) "fault" means a default, breach or wrongful act or omission;

(18) "fungible goods" means:

(A) goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or

(B) goods that by agreement are treated as equivalent;

(19) "genuine" means free of forgery or counterfeiting;

(20) "good faith", except as otherwise provided in Chapter 55, Article 5 NMSA 1978, means honesty in fact and the observance of reasonable commercial standards of fair dealing;

(21) "holder" means:

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

(B) the person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(C) the person in control, other than pursuant to Subsection (g) of Section 55-7-106 NMSA 1978, of a negotiable electronic document of title;

(22) "insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved;

(23) "insolvent" means:

(A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;

(B) being unable to pay debts as they become due; or

(C) being insolvent within the meaning of federal bankruptcy law;

(24) "money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries. The term does not include an electronic record that is a medium of exchange recorded and transferable in a system that existed and operated for the medium of exchange before the medium of exchange was authorized or adopted by the government;

(25) "organization" means a person other than an individual;

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

(27) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality; or any other legal or commercial entity. The term includes a protected series, however denominated, of an entity if the protected series is established under law other than the Uniform Commercial Code that limits, or limits if conditions specified under the law are satisfied, the ability of a creditor of the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series;

(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 Chapter 55, Article 9 NMSA 1978. "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 55-2-401 NMSA 1978, but a buyer may also acquire a "security interest" by complying with Chapter 55, Article 9 NMSA 1978. Except as otherwise provided in Section 55-2-505 NMSA 1978, the right of a seller or lessor of goods under Chapter 55, Article 2 or 2A NMSA 1978 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 Chapter 55, Article 9 NMSA 1978. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 55-2-401 NMSA 1978 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 55-1-203 NMSA 1978;

(36) "send" in connection with a record or notification means:

(A) to deposit in the mail, deliver or transmit for transmission by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address specified thereon or otherwise agreed or, if there be none, to any address reasonable under the circumstances; or

(B) to cause the record or notification to be received within the time it would have been received if properly sent under Subparagraph (A) of this paragraph;

(37) "sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound or process. "Signed", "signing" and "signature" have corresponding meanings;

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

(39) "surety" includes a guarantor or other secondary obligor;

(40) "term" means a portion of an agreement that relates to a particular matter;

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

(42) "warehouse receipt" means a document of title issued by a person engaged in the business of storing goods for hire; and

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

History: 1953 Comp., § 50A-1-201, enacted by Laws 1961, ch. 96, § 1-201; 1967, ch. 186, § 4; 1985, ch. 193, § 2; 1987, ch. 248, § 1; 1992, ch. 114, § 3; 1993, ch. 214, § 1; 2001, ch. 139, § 127; 1978 Comp., § 55-1-201, repealed and reenacted by Laws 2005, ch. 144, § 9; 2023, ch. 142, § 1.

OFFICIAL COMMENTS

Source. — Former Section 1-201 [55-1-201 NMSA 1978].

Changes from former law. — In order to make it clear that all definitions in the Uniform Commercial Code (not just those appearing in Article 1, as stated in former Section 1-201 [55-1-201 NMSA 1978], but also those appearing in other Articles) do not apply if the context otherwise requires, a new Subsection (a) to that effect has been added, and the definitions now appear in Subsection (b). The reference in Subsection (a) to the "context" is intended to refer to the context in which the defined term is used in the Uniform Commercial Code. In other words, the definition applies whenever the defined term is used unless the context in which the defined term is used in the statute indicates that the term was not used in its defined sense. Consider, for example, Sections 3-103(a)(9) [55-3-103 NMSA 1978] (defining "promise," in relevant part, as "a written undertaking to pay money signed by the person undertaking to pay") and 3-303(a)(1) [55-3-303 NMSA 1978] (indicating that an instrument is issued or transferred for value if "the instrument is issued or transferred for a promise of performance, to the extent that the promise has been performed"). It is clear from the statutory context of the use of the word "promise" in Section 3-303(a)(1) that the term was not used in the sense of its definition in Section 3-103(a)(9). Thus, the Section 3-103(a)(9) definition should not be used to give meaning to the word "promise" in Section 3-303(a).

Some definitions in former Section 1-201 [55-1-201 NMSA 1978] have been reformulated as substantive provisions and have been moved to other sections. *See* Sections 1-202 [55-1-202 NMSA 1978] (explicating concepts of notice and knowledge formerly addressed in Sections 1-201(25)-(27)[55-1-201(25)-(27) NMSA 1978]), 1-204 [55-1-204 NMSA 1978](determining when a person gives value for rights, replacing the definition of "value" in former Section 1-201(44) [55-1-201(44) NMSA 1978]), and 1-206 [55-1-206 NMSA 1978] (addressing the meaning of presumptions, replacing the definitions of "presumption" and "presumed" in former Section 1-201(31)[55-1-201(31) NMSA 1978]). Similarly, the portion of the definition of "security interest" in former Section 1-201(37) [55-1-201(37) NMSA 1978] which explained the difference between a security interest and a lease has been relocated to Section 1-203 [55-1-203 NMSA 1978].

Two definitions in former Section 1-201 [55-1-201 NMSA 1978] have been deleted. The definition of "honor" in former Section 1-201(21) [55-1-201(21) NMSA 1978] has been moved to Section 2-103(1)(b) [55-2-103(1)(b) NMSA 1978], inasmuch as the definition only applies to the use of the word in Article 2. The definition of "telegram" in former Section 1-201(41) [55-1-201(41) NMSA 1978] has been deleted because that word no longer appears in the definition of "conspicuous."

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

1. **"Action."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978], which was derived from similar definitions in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act.

2. **"Aggrieved party."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

3. **"Agreement."** Derived from former Section 1-201. As used in the Uniform Commercial Code the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of the Uniform Commercial Code to displace a stated rule of law. Whether an agreement has legal consequences is determined by applicable provisions of the Uniform Commercial Code and, to the extent provided in Section 1-103, by the law of contracts. Concerning developments in technology, including, for example, contract formation in electronic environments, automated transactions, and electronic agents, *see* Section 1-103, Comment 2.

4. **"Bank."** Derived from Section 4A-104 [55-4A-104 NMSA 1978].

5. **"Bearer."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978], which was derived from Section 191, Uniform Negotiable Instruments Law.

6. **"Bill of Lading."** Derived from former Section 1-201 [55-1-201 NMSA 1978]. The reference to, and definition of, an "airbill" has been deleted as no longer necessary.

7. **"Branch."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

8. **"Burden of establishing a fact."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

9. **"Buyer in ordinary course of business."** Except for minor stylistic changes, identical to former Section 1-201 [55-1-201 NMSA 1978] (as amended in conjunction with the 1999 revisions to Article 9). The major significance of the phrase lies in Section 2-403 [55-2-403 NMSA 1978] and in the Article on Secured Transactions (Article 9).

The first sentence of paragraph (9) makes clear that a buyer from a pawnbroker cannot be a buyer in ordinary course of business. The second sentence explains what it means to buy "in the ordinary course." The penultimate sentence prevents a buyer that does not have the right to possession as against the seller from being a buyer in ordinary course of business. Concerning when a buyer obtains possessory rights, *see* Sections 2-502 and 2-716 [55-2-502 and 55-2-716 NMSA 1978]. However, the penultimate sentence is not intended to affect a buyer's status as a buyer in ordinary course of business in cases (such as a "drop shipment") involving delivery by the seller to a person buying from the buyer or a donee from the buyer. The requirement relates to whether as against the seller the buyer or one taking through the buyer has possessory rights.

10. **"Conspicuous."** Derived from former Section 1-201(10). This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person against which the term is to operate. Whether a term is conspicuous is an issue for the court. Whether the appearance and presentation of a particular term satisfy this standard is determined by reference to the totality of the circumstances and requires a case-by-case analysis.

Historically, contract terms were presented in writing, making the use of standards that relate to the size and appearance of type relevant to the determination of conspicuousness. Today terms in a record are frequently communicated electronically. New technologies have created opportunities for terms to be displayed or presented in novel ways, such as by the use of pop-up windows, text balloons, dynamically expanding or dynamically magnifying text, and non-visual elements such as vibrations, to name a few.

The definition has been revised in the Uniform Commercial Code Amendments (2022) (2022 Amendments) by deleting the statutory examples relating to the appearance of type and instead indicating in these comments a broader universe of factors that are applicable to both written and electronic presentations. This approach is intended to be both more protective of consumers and more useful to drafters by providing more clarity and flexibility in the methods that may be used to call attention to a term.

The attributes of a reasonable person against which a term is to operate can vary depending upon the nature of the transaction and the market in which the transaction occurs. For example, assume that a merchant of goods wishes to enter into a transaction for the sale or lease of goods which does not include an implied warranty of merchantability or fitness for particular purpose. Depending on the particular transaction, the person against which the term excluding implied warranties is to operate may be a large business buyer or lessee, a small business, or a consumer.

Similarly, the determination of whether a term is conspicuous may, depending on the context, yield a different conclusion when the term is used in a standard form agreement than when terms of the agreement are the subject of negotiation or discussion.

Terms presented in an online record raise issues that differ in some respects from the issues associated with presenting the same terms in a writing. For example, how a term appears depends to some extent on the equipment and settings used by the person presented with the term.

The test of whether a term is conspicuous remains constant notwithstanding the different contexts referenced above. A term is conspicuous if its appearance and presentation are such that it ought to be noticed by a reasonable person against which the term is to operate. If the term is in a standard form intended for use in many agreements, the determination of whether the term is conspicuous may be made with reference to typical likely parties to the agreements, taking into account all aspects of the transaction, the range of likely equipment and settings used by such parties, and the education, sophistication, disabilities, and other attributes of such parties. If the term is not in a standard form, the determination of whether it is conspicuous should be made with reference to a reasonable person in the position of the actual person against which it is to operate.

Factors relevant to whether a term is conspicuous include, but are not limited to, the following:

(i) The use of headings and text that contrast with the surrounding text. For example, a term is likely to be conspicuous if it is introduced by a heading in uppercase letters equal to or greater in size than the surrounding text. Similarly, a term is likely to be conspicuous if set out in 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. However, even with those characteristics, for a term to be conspicuous the overall statutory test must always be met. For example, even if in bold, uppercase letters, a term might not be conspicuous if placed among other terms also in bold, uppercase letters so there is no contrast with the surrounding text or if the application of other factors causes the term not to be provided such that a reasonable person against which it is to operate ought to have noticed it.

(ii) The placement of the term in the record. A term appearing at, or hyperlinked from, text at the beginning of a record, or near the place where the person against which the term is to operate must signify assent, is more likely to be conspicuous than a term in the middle of a lengthy record absent the use of a method reasonably designed to draw the person’s attention to the term in middle of the record (for example, by providing separate reasonable notice of the term before presenting the record containing the term to the person for assent or forcing the person to stop on a screen highlighting the term during the presentation of the record for assent).

(iii) If terms are available only through the use of a hyperlink, in addition to the placement of the hyperlink as described above, factors to be considered include whether there is language drawing attention to the hyperlink and describing its function, and the size and color of the text used for the hyperlink and any related language.

(iv) The language of the heading, if any. A misleading heading – such as the heading "Warranty" for a paragraph that contains a disclaimer of warranties – might cause a reasonable person to fail to notice the language that would disclaim warranties, so that the term would not be conspicuous.

(v) The effort needed to access the term. The process and flow of the display and presentation is also relevant. For example, a term accessible only by triggering multiple hyperlinks is less likely to be conspicuous than a term accessible from a single hyperlink.

(vi) Whether the person against which the term is to operate must separately assent to or acknowledge the term. Obtaining separate assent or acknowledgment of a term is generally sufficient to make the term conspicuous.

As noted above, the evolution of technology has led to an evolution in the ways in which terms in an electronic record are displayed or presented. A term displayed or presented in a novel way utilizing emerging technologies is, of course, conspicuous if the effect of the display or presentation is that a reasonable person against which the term is to operate ought to have noticed it.

This definition deals only with requirements that a term be conspicuous (or noted conspicuously) that are stated in particular provisions of the Uniform Commercial Code. Other protective doctrines designed to assure that assent is meaningful that are found in law outside the UCC may also apply. *See* Section 1-103(b).

11. **"Consumer."** Derived from Section 9-102(a)(25) [55-9-102 (a)(25) NMSA 1978].

12. **"Contract."** Except for minor stylistic changes, identical to former Section 1-201 [55-1-201 NMSA 1978].

13. **"Creditor."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

14. **"Defendant."** Except for minor stylistic changes, identical to former Section 1-201 [55-1-201 NMSA 1978], which was derived from Section 76, Uniform Sales Act.

15. **"Delivery."** Derived from former Section 1-201 [55-1-201 NMSA 1978]. The reference to certificated securities in a pre-2022 version was deleted in light of the more specific treatment of the matter in Section 8-301 [55-8-301 NMSA 1978]. The definition also was revised to accommodate electronic documents of title. Control of an electronic document of title is defined in Article 7 (Section 7-106 [55-7-106 NMSA 1978]). Another revision in the 2022 Amendments conformed the reference to chattel paper to the

revised definition of that term and the revised methods of perfection. See Sections 9-102(a)(11) [55-9-102 NMSA 1978] (defining "chattel paper"); 9-314A [55-9-314 NMSA 1978] (perfection by possession and control of chattel paper).

16. **"Document of title."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978], which was derived from Section 76, Uniform Sales Act. By making it explicit that the obligation or designation of a third party as "bailee" is essential to a document of title, this definition clearly rejects any such result as obtained in Hixson v. Ward, 254 Ill. App. 505 (1929), which treated a conditional sales contract as a document of title. Also the definition is left open so that new types of documents may be included. It is unforeseeable what documents may one day serve the essential purpose now filled by warehouse receipts and bills of lading. Truck transport has already opened up problems which do not fit the patterns of practice resting upon the assumption that a draft can move through banking channels faster than the goods themselves can reach their destination. There lie ahead air transport and such probabilities as teletype transmission of what may some day be regarded commercially as "Documents of Title." The definition is stated in terms of the function of the documents with the intention that any document which gains commercial recognition as accomplishing the desired result shall be included within its scope. Fungible goods are adequately identified within the language of the definition by identification of the mass of which they are a part.

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

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

The definition is broad enough to include an airway bill.

A document of title may be either tangible or electronic. Paper documents of title are "tangible documents of title." Electronic documents of title are documents that are stored in an electronic medium instead of in tangible form. "Electronic" is defined in paragraph 16A. As to reissuing a document of title in an alternative medium, *see* Article

7, Section 7-105 [55-7-105 NMSA 1978]. Control for electronic documents of title is defined in Article 7 (Section 7-106 [55-7-106 NMSA 1978]).

16A. **"Electronic."** The basic nature of most modern technologies and the need for a recognized, single term warrants the use of "electronic" as the defined term, even though not all technologies listed may be technically "electronic" in nature. The definition is intended to be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to validate commercial transactions regardless of the medium used by the parties to document them. *See generally* Uniform Electronic Transactions Act, Section 2, Comment 4.

17. **"Fault."** Derived from former Section 1-201 [55-1-201 NMSA 1978]. "Default" has been added to the list of events constituting fault.

18. **"Fungible goods."** Derived from former Section 1-201 [55-1-201 NMSA 1978]. References to securities have been deleted because Article 8 no longer uses the term "fungible" to describe securities. Accordingly, this provision now defines the concept only in the context of goods.

19. **"Genuine."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

20. **"Good faith."** Former Section 1-201(19) [55-1-201(19) NMSA 1978] defined "good faith" simply as honesty in fact; the definition contained no element of commercial reasonableness. Initially, that definition applied throughout the Code with only one exception. Former Section 2-103(1)(b) [55-2-103(1)(b) NMSA 1978] provided that "in that Article, 'good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." This alternative definition was limited in applicability, though, because it applied only to transactions within the scope of Article 2 and it applied only to merchants.

Over time, however, amendments to the Uniform Commercial Code brought the Article 2 merchant concept of good faith (subjective honesty and objective commercial standards of fair dealing) into other Articles. First, Article 2A explicitly incorporated the Article 2 standard. Then, other Articles broadened the applicability of that standard by adopting it for all parties rather than just for merchants. Finally, Articles 2 and 2A were amended to apply the standard to non-merchants as well as merchants. All of these definitions are comprised of two elements-honesty in fact and the observance of reasonable commercial standards of fair dealing. Only revised Article 5 continued to define "good faith" solely in terms of subjective honesty, and Article 6 (in the few states that have not chosen to delete the Article) is without a definition of good faith.

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

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

As noted above, the definition of "good faith" in this section requires not only honesty in fact but also "observance of reasonable commercial standards of fair dealing." Although "fair dealing" is a broad term that must be defined in context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed. This is an entirely different concept than whether a party exercised ordinary care in conducting a transaction. Both concepts are to be determined in the light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct. *See e.g.*, Sections 3-103(a)(9) and 4-104(c) [55-3-103(a)(9) and 55-4-104(c) NMSA 1978] and Comment 4 to Section 3-103 [55-3-103 NMSA 1978].

21. **"Holder."** The definition has been reorganized for clarity and amended to provide for electronic negotiable documents of title. The definition excludes persons who have control of an electronic document of title pursuant to Section 7-106(g) [55-7-106 NMSA 1978] through the acknowledgment by a person in control. This ensures that an issuer of a document can ascertain who is entitled to delivery from the document itself or from the system in which the document is recorded, without any obligation to look behind the document or the system to ascertain the identity of an undisclosed principal.

22. **"Insolvency proceedings."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

23. **"Insolvent."** Derived from former Section 1-201 [55-1-201 NMSA 1978]. The three tests of insolvency – "generally ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute as to them," "unable to pay debts as they become due," and "insolvent within the meaning of the federal bankruptcy law" – are expressly set up as alternative tests and must be approached from a commercial standpoint.

24. **"Money."** The definition of "money" applies to the term only as used in the Uniform Commercial Code. The definition does not determine whether an asset constitutes "money" for other purposes. Only something currently authorized or adopted as a medium of exchange by a government can be money. As further elaborated in the second sentence of the definition, adoption by a government may occur through establishment by an intergovernmental organization or pursuant to an agreement between governments. Coins and paper currency previously, but not currently, authorized or adopted as a medium of exchange by a government, and currently owned and traded only for their numismatic or historical value, are not money.

An electronic medium of exchange established pursuant to a country's law and that is recorded and transferable in a system that did not exist and did not operate for that medium of exchange before the electronic medium of exchange was authorized or adopted by the country's government also constitutes money. This is so even if ownership is established or maintained through a system not operated by the government. In contrast, an existing medium of exchange created or distributed by one or more private persons is not money solely because the government of one or more countries later authorizes or adopts the pre-existing medium of exchange.

Although the term "money" is used in several articles, the definition is particularly significant under Article 9. Under the pre-2022 version of this definition, money was generally understood to include only tangible coins, bills, notes, and the like, although the statutory text did not explicitly so limit the term. This worked well under Article 9, which provided that the only method of perfecting a security interest in money as original collateral was by taking possession of it. *See* pre-2022 Section 9-312(b)(3) [55-9-312 NMSA 1978]. The 2022 revised definition of money in Section 1-201(b)(24) [55-1-201 NMSA 1978] is broader and includes both "tangible money" and "electronic money" (new defined types of collateral under the 2022 revisions to Article 9). As under the pre-2022 Article 9, a security interest in tangible money as original collateral may be perfected only by possession. Section 9-312(b)(3) [55-9-312 NMSA 1978]. A security interest in electronic money as original collateral may be perfected only by control. Section 9-102(a)(31A) [55-9-102 NMSA 1978] (defining "electronic money"); 9-312(b)(4) (perfection by control for electronic money). Note that the definition of "money" in Section 9-102(a)(54A) is narrower in two respects than the definition in this section—the Article 9 definition excludes deposit accounts and money in electronic form that cannot be subjected to control under Section 9-105A [55-9-105 NMSA 1978]. *See* Section 9-102(a)(54A).

Examples: The following examples illustrate the definition of "money."

Example 1: Nation A enacts legislation authorizing or adopting an existing cryptocurrency (spitcoin), created on a private blockchain, as a medium of exchange. Because spitcoin was recorded and transferable in a system that existed and operated for that cryptocurrency before the electronic record was authorized or adopted by Nation A, spitcoin does not become "money" under this definition as a result of Nation A's legislation.

Example 2: Nation B creates a new cryptocurrency (beebuck) and authorizes or adopts it as a medium of exchange. Beebuck is "money." Beebuck is not recorded and transferable in a system that existed and operated for that cryptocurrency before the electronic record was authorized or adopted by Nation B.

Example 3: Nation C enacts legislation authorizing or adopting as a medium of exchange beebuck, the cryptocurrency previously adopted by Nation B in Example 2. Although beebuck is recorded and transferable in a system that existed and operated for beebuck before it was authorized or adopted by Nation C, beebuck was already money when authorized or adopted by Nation C. Consequently, beebuck is "money." Nation C's action had no relevance or effect on the characterization of beebuck as money.

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

26. **"Party."** Substantively identical to former Section 1-201 [55-1-201 NMSA 1978]. Mention of a party includes, of course, a person acting through an agent. However, where an agent comes into opposition or contrast to the principal, particular account is taken of that situation.

27. **"Person."** A previous definition of this term was replaced with the standard language used in acts prepared by the National Conference of Commissioners on Uniform State Laws. This definition recognizes the wide range of subjects that can enjoy legal rights and possess legal duties, including the catchall residual category of "any other legal or commercial entity." *See, e.g.*, JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gray rev., 2d ed., The MacMillan Co. 1931) ("a 'person' is a subject of legal rights and duties"). For additional authorities, *see* PEB Commentary No. 23, n. 5. The reference to a "public corporation" in the pre-2022 text of the definition has been deleted as unnecessary and duplicative of other examples in the definition of entities that are persons.

The second sentence of the definition provides needed clarity as to the status of a protected series for purposes of the Uniform Commercial Code. *See* PEB Commentary No. 23. Several states have enacted statutes that provide for protected series within a limited liability company or other unincorporated organization. These statutes afford rights and impose duties upon a protected series and generally empower a protected series to conduct its own activities under its own name. The types of protected series that are included as persons under the definition include, but are not limited to, those established under the Uniform Protected Series Act.

Providing that a protected series is a "person" for purposes of the enacting state's Uniform Commercial Code will expressly permit a protected series, whether created under the law of the enacting state or of another jurisdiction, to be a "seller" or a "buyer" under Article 2, a "lessor" or a "lessee" under Article 2A, or an "organization." It also permits a protected series to be a "debtor" under Article 9, and, if the law under which the protected series is organized requires a public filing for the protected series to be recognized under that law, a "registered organization" under Article 9.

28. **"Present value."** This definition was formerly contained within the definition of "security interest" in former Section 1-201(37) [55-1-201(37) NMSA 1978].

29. **"Purchase."** Derived from former Section 1-201 [55-1-201 NMSA 1978]. The form of definition has been changed from "includes" to "means."

30. **"Purchaser."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

31. **"Record."** Derived from Section 9-102(a)(69) [55-9-102(a)(69) NMSA 1978].

32. **"Remedy."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978]. The purpose is to make it clear that both remedy and right (as defined) include those remedial rights of "self help" which are among the most important bodies of rights under the Uniform Commercial Code, remedial rights being those to which an aggrieved party may resort on its own.

33. **"Representative."** Concerning developments in technology, including, for example, contract formation in electronic environments, automated transactions, and electronic agents, *see* Section 1-103 [55-1-103 NMSA 1978], Comment 2.

34. **"Right."** Except for minor stylistic changes, identical to former Section 1-201 [55-1-201 NMSA 1978].

35. **"Security Interest."** The definition is the first paragraph of the definition of "security interest" in former Section 1-201 [55-1-201 NMSA 1978], with minor stylistic changes. The remaining portion of that definition has been moved to Section 1-203 [55-1-203 NMSA 1978]. Note that, because of the scope of Article 9, the term includes the interest of certain outright buyers of certain kinds of property.

36. **"Send."** The definition of "send" adopts pre-2022 Section 9-102(a)(75) [55-9-102 NMSA 1978]. The explicit statement in the previous text of this definition on the appropriateness of sending to an agreed-upon address or to an "address reasonable under the circumstances" was limited to "the case of an instrument." The definition no longer includes that limitation relating to an instrument. Moreover, it is common for parties to rely on their agreement as to appropriate addresses for purposes of notifications and communications. Nothing in the definition or in the Uniform Commercial Code limits the effectiveness of sending a record or notification to an address that has been agreed upon by affected persons. *See generally* Sections 1-103 [55-1-103 NMSA 1978] and 1-302 [55-1-302 NMSA 1978].

37. **"Sign."** The definition of "sign" adopted in the 2022 Amendments is broad—it encompasses the authentication or adoption of all records, not just writings. The definition replaces the definition of "signed" in pre-2022 texts of this Article. This definition also makes it clear that, as the terms "sign," "signed," and "signature" are used in the Uniform Commercial Code, a complete signature is not necessary. A symbol may be printed, stamped, or written on, or electronically attached or associated with, a record. It may be by initials or by thumbprint or by electronic symbol, sound, or process. It may be on any part of a writing or other record and in appropriate cases may be found in a billhead or letterhead. No catalog of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol, sound, or process was executed or adopted by the party with present intention to authenticate or adopt the record.

A "writing," which necessarily is in tangible form, must exist at the time it is signed and must be signed by the execution or adoption of a tangible symbol to qualify as a signed writing. A writing adopted only by use of an electronic symbol, sound, or process would not be a signed writing until and unless it results in a tangible symbol being on or affixed to the writing. Moreover, if an electronic record is electronically signed and subsequently printed in tangible form, the resulting writing would not constitute a signed writing unless and until some action is taken with "present intent to authenticate or adopt" the writing.

Concerning developments in technology, including, for example, contract formation in electronic environments, automated transactions, and electronic agents, *see also* Section 1-103 [55-1-103 NMSA 1978], Comment 2.

38. **"State."** This is the standard definition of the term used in acts prepared by the National Conference of Commissioners on Uniform State Laws.

39. **"Surety."** This definition makes it clear that "surety" includes all secondary obligors, not just those whose obligation refers to the person obligated as a surety. As to the nature of secondary obligations generally, see Restatement (Third), Suretyship and Guaranty Section 1 (1996).

40. **"Term."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

41. **"Unauthorized signature."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978].

42. **"Warehouse receipt."** Unchanged from former Section 1-201 [55-1-201 NMSA 1978], which was derived from Section 76(1), Uniform Sales Act; Section 1, Uniform Warehouse Receipts Act. Receipts issued by a field warehouse are included, provided the warehouseman and the depositor of the goods are different persons.

43. **"Written"** or **"writing."** Several amendments to the Uniform Commercial Code over the years have replaced the terms "written" and "writing" with the term "record," defined in paragraph (31) and also in some other Articles. Pursuant to the 2022 Amendments, additional references to the terms "writing," "writings," and "written" have been replaced by "record." For example, the 2022 revisions to Articles 2 and 2A made these changes in provisions where an affected party may be assumed to have assented to the use of a record that is not a writing. Where references to those terms remain in Articles 2 and 2A, the use by parties of a record other than a writing may be given effect for purposes of those Articles under law other than the Uniform Commercial Code, such as the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., and the Uniform Electronic Transactions Act. *See* Sections 2-207 [55-2-207 NMSA 1978], Comment 8; 2A-102 [55-2A-102 NMSA 1978], Comment (g).

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 9, effective January 1, 2006, repealed former 55-1-201 NMSA 1978, relating to general definitions as enacted by Laws 1961, ch. 96, § 1-201, as amended, and enacted a new 55-1-201 NMSA 1978, also relating to general definitions. The section has been treated as a continuation of rather than a new section of the NMSA 1978. For current provisions relating to "notice" and "knowledge", former Subsections 25 to 27 of 55-1-201 NMSA 1978, *see* 55-1-202 NMSA 1978.

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The 2023 amendment, effective January 1, 2024, defined "electronic" and "sign" and revised the definitions of "conspicuous," "delivery," "holder," "money," "person" and "send"; in Paragraph (b)(10), after "presented that", added "based upon the totality of the circumstances", and after "court", deleted "Conspicuous terms include the following"; deleted Paragraphs (b)(10)(A) and (B); in Paragraph (b)(15), after "title or", added "an authoritative tangible copy of a record evidencing"; added Paragraph (b)(16A); in Paragraph (b)(21)(C), added "other than pursuant to Subsection (g) of Section 55-7-106 NMSA 1978"; in Paragraph (b)(24), added "The term does not include an electronic record that is a medium of exchange recorded and transferable in a system that existed and operated for the medium of exchange before the medium of exchange was authorized or adopted by the government"; in Paragraph (b)(27), after "instrumentality", deleted "public corporation", and added "The term includes a protected series, however denominated, of an entity if the protected series is established under law other than the Uniform Commercial Code that limits, or limits if conditions specified under the law are satisfied, the ability of a creditor of the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series"; in Paragraph (b)(36), in the introductory clause, after "with a", deleted "writing", and after "record or", deleted "notice" and added "notification"; in Paragraph (b)(36)(A), after "deliver", added "or transmit", and, after "transmission provided for", deleted "and properly addressed and, in the case of an instrument, to an" and added "addressed to any"; in Paragraph (b)(36)(B), deleted "in any other way to cause to be received any record or notice within the time it would have arrived if properly sent" and added "to cause the record or notification to be received within the time it would have been received if properly sent under Subparagraph (A) of this paragraph"; in Paragraph (b)(37), deleted "'signed' includes using any symbol executed or adopted with present intention to adopt or accept a writing" and added "'sign' means, with present intent to authenticate or adopt a record"; and added Paragraphs (b)(37)(A) and (B).

The 2001 amendment, effective July 1, 2001, rewrote Subsection (9); inserted "security interest" in Subsection (32); in the first paragraph of Subsection (37), substituted "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" for "any interest of a buyer of accounts or chattel paper is subject" in the first sentence, deleted the former fourth sentence which read "Unless a consignment is intended as security, reservation of title thereunder is not a 'security interest', but a consignment in any event is subject to the provisions on consignment sales (Section 55-2-326 NMSA 1978)"; and added the present fourth sentence.

The 1993 amendment, effective July 1, 1993, substituted "Sections 55-1-205, 55-2-208 and 55-2A-207 NMSA 1978" for "Sections 55-1-205, and 55-2-208 NMSA 1978" in Subsection (3); made a stylistic change in Subsection (25); and in Subsection (44), substituted "(Sections 55-3-303, 55-4-210 and 55-4-211 NMSA 1978)" for "(Sections 55-3-303, 55-4-208 and 55-4-209 NMSA 1978)" and made stylistic changes within the subsection.

The 1992 amendment, effective July 1, 1992, inserted "means goods or securities" in the first sentence of Subsection (17); rewrote Subsection (20); substituted all of the present language of Subsection (24) following "government" for "as a part of its currency"; rewrote Subsection (37); and deleted "or indorsement" following "signature" in Subsection (43).

The 1987 amendment, effective June 19, 1987, substituted "the Uniform Commercial Code" for "this act" and NMSA citations for UCC citations at several places throughout the section, inserted "certificated" in Subsections (5), (14) and (20), and made minor stylistic changes throughout the section.

The 1985 amendment added the second sentence in Subsection (9), deleted "means goods or securities" following "with respect to goods or securities" near the beginning of Subsection (17), substituted "buyer of accounts or chattel paper which is subject to Article 9" for "buyer of accounts, chattel paper or contract rights which is subject to Article 9" in the third sentence of Subsection (37), and made minor grammatical changes.

I. GENERAL CONSIDERATION.

Remedies of guarantors. — A contributing guarantor has the right to seek reimbursement, restitution, or subrogation against a defaulting principal debtor to the extent of his or her contribution. *Randles v. Hanson*, 2011-NMCA-059, 150 N.M. 362, 258 P.3d 1154.

Rights of co-guarantors. — A co-guarantor who has fulfilled a duty of contribution to a performing co-guarantor is entitled to recourse against a principle debtor as though the contributing co-guarantor had performed the guaranty to the same extent as his or her contribution. A performing co-guarantor’s claim against a principal debtor is reduced to the extent that he or she receives contribution from another co-guarantor. *Randles v. Hanson*, 2011-NMCA-059, 150 N.M. 362, 258 P.3d 1154.

Rights of a contributing guarantor. — Where five individuals, including plaintiff, personally guaranteed a $500,000 bank loan to a third party; the five guarantors entered into an agreement which provided that each guarantor was jointly and severally liable for all unpaid amounts on the loan and that each guarantor would be responsible for paying an equal share of any unpaid amounts; when the third party defaulted on the loan, plaintiff refused to pay a pro-rata share of the amount due; three of the guarantors paid the $500,000 due on the loan and recovered a judgment against plaintiff for plaintiff's $100,000 pro-rata share, which plaintiff paid; and the third party subsequently reimbursed the three guarantors the $500,000 they had paid on the loan, plaintiff was entitled to receive $100,000 of the amount received by the three guarantors. *Randles v. Hanson*, 2011-NMCA-059, 150 N.M. 362, 258 P.3d 1154.

II. CONTRACT.

Intent where written contract uncertain. — Where a written contract is uncertain or ambiguous, the intent of the parties may be ascertained by their language and conduct, the objects sought to be accomplished, and surrounding circumstances at the time of execution of the contract. *Leonard v. Barnes*, 1965-NMSC-080, 75 N.M. 331, 404 P.2d 292.

Purchase order qualified as contract for sale of goods. *State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc.*, 1987-NMSC-114, 106 N.M. 539, 746 P.2d 645.

III. SECURITY INTEREST.

When lease deemed security interest. — Where agreement provides that upon full payment of rentals lessee will become owner of property with no other or further consideration, this provision introduces an element under which an equity interest in the property is being created in lessee through payment of rentals. In accordance with the undisputed facts and language of the agreements the parties are deemed as a matter of law to have intended lease as one creating a security interest within the meaning of the Code. *Rust Tractor Co. v. Bureau of Revenue*, 1970-NMCA-107, 82 N.M. 82, 475 P.2d 779, cert. denied, 82 N.M. 81, 475 P.2d 778.

Intention of parties controls instrument. — Under general law, the character of the instrument is not to be determined by its form, but from the intention of the parties as shown by the contents of the instrument. *Transamerica Leasing Corp. v. Bureau of Revenue*, 1969-NMCA-011, 80 N.M. 48, 450 P.2d 934.

Payment of "money" to satisfy real estate note. — A borrower was not authorized by the promissory note and deed of trust in a real estate loan transaction to tender the real estate securing the note instead of currency to extinguish the obligation where the lender only agreed to look solely to the property for satisfaction of the principal debt in the event of default rather than take a personal judgment against the borrower. To require the maker of a promissory note, in the absence of a specific agreement otherwise, to pay the note in "money" is consistent with the demands of modern commercial practice. *Brown v. Financial Sav.*, 1992-NMSC-025, 113 N.M. 500, 828 P.2d 412.

Mortgage serving as security interest. — Although a mortgage, without more, is not sufficient to automatically attach to the proceeds of a separate real estate contract, when a contract vendor offered his interest in the property as security for a loan the mortgage served as a security interest and was perfected upon filing with the county clerk's office where the property was located. *Finch v. Beneficial N.M., Inc.*, 1995-NMSC-068, 120 N.M. 658, 905 P.2d 198.

IV. SIGNED.

Effect of lack of signature on purchase order. — Where purchase order was completely filled in with all relevant information regarding the backhoe to be purchased, including the full purchase price, approximate delivery date and purchaser's signature, the lack of the salesman's signature on the appropriate line did not negate present intention to authenticate the purchase order. *Watson v. Tom Growney Equip., Inc.*, 1986-NMSC-046, 104 N.M. 371, 721 P.2d 1302.

V. BUYER IN ORDINARY COURSE OF BUSINESS.

The significance of being a buyer in the ordinary course of business is the acquisition of goods free of any outstanding claims from those who may be the true owners. Therefore, a buyer in the ordinary course of business is a privileged status that is conferred upon a purchaser, even against the true owners, if he meets the requirements of Paragraphs (9) and (19) (now 20) of this section. *Hunick v. Orona*, 1983-NMSC-009, 99 N.M. 306, 657 P.2d 633.

VI. CONSPICUOUS.

When language on reverse of form is conspicuous. — Language which refers the reader to conditions or provisions on the reverse side of a form suffices to make the language referred to conspicuous. *Deaton, Inc. v. Aeroglide Corp.*, 1982-NMSC-147, 99 N.M. 253, 657 P.2d 109.

Limited warranty conspicuous. — The defendant's disclaimer of the implied warranties of merchantability and fitness for a particular purpose was conspicuous as a matter of law, since the record indicated that the warranty was printed on both sides of a full-size page on a different grain of paper, was highlighted and contrasted by different colors, and was set out in capital letters. *LWT, Inc. v. Childers*, 19 F.3d 539 (10th Cir. 1994).

VII. GOOD FAITH.

Elements of "good faith". — Nothing in the definition of "good faith" suggests that in addition to being honest, the creditor must exercise due care or reasonable commercial standards or lack of negligence to be in good faith. *McKay v. Farmers & Stockmens Bank*, 1978-NMCA-070, 92 N.M. 181, 585 P.2d 325, cert. denied, 92 N.M. 79, 582 P.2d 1292 (specially concurring opinion).

"Good faith" usually question of fact. — "Good faith" is not generally a question of law, but is usually a question of fact. *McKay v. Farmers & Stockmens Bank*, 1978-NMCA-070, 92 N.M. 181, 585 P.2d 325, cert. denied, 92 N.M. 79, 582 P.2d 1292; *Citizens Bank v. Runyan*, 1990-NMSC-036, 109 N.M. 672, 789 P.2d 620.

VIII. HOLDER.

Payee in possession of instrument. — A negotiable instrument payee is always a holder if the payee has the instrument in his possession, since the payee is the person to whom the instrument was issued. *Edwards v. Mesch*, 1988-NMSC-085, 107 N.M. 704, 763 P.2d 1169.

Where issued cashier's check, bank not holder in due course upon subsequent presentment. — In issuing a cashier's check, a bank acts as both drawer and drawee, since a cashier's check constitutes a draft drawn by the bank upon itself, and upon the subsequent presentment of the check, the bank is not a holder in due course. *Casarez v. Garcia*, 1983-NMCA-013, 99 N.M. 508, 660 P.2d 598, cert. denied, 99 N.M. 578, 661 P.2d 478.

The requisites of an effective signature are liberal in scope. 1962 Op. Att'y Gen. No. 62-03.

Making of instruments generally. — Instruments offered for filing are not required to be either made or written in ink or with an indelible pencil, but such may be either made or executed by lead pencil, or by any other methods of writing or execution. 1962 Op. Att'y Gen. No. 62-132.

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For article, "New Mexico's Uniform Commercial Code: Who is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), commented on in 4 Nat. Resources J. 175 (1964).

For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision' " see 4 Nat. Resources J. 398 (1964).

For comment, "Assignments - Maker's Defenses Cut Off - Uniform Commercial Code § 9-206," see 5 Nat. Resources J. 408 (1965).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For comment on Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966), see 8 Nat. Resources J. 169 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M. L. Rev. 1 (1974).

For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

For note, "Commercial Law - And Then Personal Property Became Real Property: In re Anthony," see 23 N.M.L. Rev. 263 (1993).

For article, "Secured Transactions History: The Fraudulent Myth," see 29 N.M.L. Rev. 363 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes §§ 48, 49; 15A Am. Jur. 2d Commercial Code §§ 4, 27, 104, 115; 67 Am. Jur. 2d Sales §§ 10 to 69; 68A Am. Jur. 2d Secured Transactions §§ 31, 163 et seq.

Who is "buyer in ordinary course of business" under Uniform Commercial Code, 87 A.L.R.3d 11.

What constitutes "money" within meaning of Uniform Commercial Code, 40 A.L.R.4th 346.

Who is "creditor" within meaning of § 103(f) of Truth in Lending Act (15 U.S.C.A. § 1602(f)), 157 A.L.R. Fed. 419.

82 C.J.S. Statutes § 315.

55-1-202. Notice; knowledge.

(a) Subject to Subsection (f) of this section, a person has "notice" of a fact if the person:

(1) has actual knowledge of it;

(2) has received a notice or notification of it; or

(3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

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

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

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

(e) Subject to Subsection (f) of this section, a person "receives" a notice or notification when:

(1) it comes to that person's attention; or

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

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

History: Laws 2005, ch. 144, § 10.

OFFICIAL COMMENTS

Source. — Former Section 1-201 [55-1-201 NMSA 1978].

Changes from former law. — In order to make it clear that all definitions in the Uniform Commercial Code (not just those appearing in Article 1, as stated in former Section 1-201 [55-1-201 NMSA 1978], but also those appearing in other Articles) do not apply if the context otherwise requires, a new Subsection (a) to that effect has been added, and the definitions now appear in Subsection (b). The reference in Subsection (a) to the "context" is intended to refer to the context in which the defined term is used in the Uniform Commercial Code. In other words, the definition applies whenever the defined term is used unless the context in which the defined term is used in the statute indicates that the term was not used in its defined sense. Consider, for example, Sections 3-103(a)(9) [55-3-103(a)(9) NMSA 1978] (defining "promise," in relevant part, as "a written undertaking to pay money signed by the person undertaking to pay") and 3-303(a)(1) [55-3-303(a)(1) NMSA 1978] (indicating that an instrument is issued or transferred for value if "the instrument is issued or transferred for a promise of performance, to the extent that the promise has been performed"). It is clear from the statutory context of the use of the word "promise" in Section 3-303(a)(1) that the term was not used in the sense of its definition in Section 3-103(a)(9). Thus, the Section 3-103(a)(9) definition should not be used to give meaning to the word "promise" in Section 3-303(a).

Some definitions in former Section 1-201 [55-1-201 NMSA 1978] have been reformulated as substantive provisions and have been moved to other sections. *See* Sections 1-202 [55-1-202 NMSA 1978] (explicating concepts of notice and knowledge formerly addressed in Sections 1-201(25)-(27)[55-1-201(25)-(27) NMSA 1978]), 1-204 [55-1-204 NMSA 1978](determining when a person gives value for rights, replacing the definition of "value" in former Section 1-201(44) [55-1-201(44) NMSA 1978]), and 1-206 [55-1-206 NMSA 1978] (addressing the meaning of presumptions, replacing the definitions of "presumption" and "presumed" in former Section 1-201(31)[55-1-201(31) NMSA 1978]). Similarly, the portion of the definition of "security interest" in former Section 1-201(37) [55-1-201(37) NMSA 1978] which explained the difference between a security interest and a lease has been relocated to Section 1-203 [55-1-203 NMSA 1978].

Two definitions in former Section 1-201 [55-1-201 NMSA 1978] have been deleted. The definition of "honor" in former Section 1-201(21) [55-1-201(21) NMSA 1978] has been moved to Section 2-103(1)(b) [55-2-103(1)(b) NMSA 1978], inasmuch as the definition only applies to the use of the word in Article 2. The definition of "telegram" in former Section 1-201(41) [55-1-201(41) NMSA 1978] has been deleted because that word no longer appears in the definition of "conspicuous."

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

1. "Action." Unchanged from former Section 1-201 [55-1-201 NMSA 1978], which was derived from similar definitions in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act.

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

3. "Agreement." Derived from former Section 1-201. As used in the Uniform Commercial Code the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of the Uniform Commercial Code to displace a stated rule of law. Whether an agreement has legal consequences is determined by applicable provisions of the Uniform Commercial Code and, to the extent provided in Section 1-103 [55-1-103 NMSA 1978], by the law of contracts.

4. "Bank." Derived from Section 4A-104 [55-4A-104 NMSA 1978].

5. "Bearer." Unchanged from former Section 1-201, which was derived from Section 191, Uniform Negotiable Instruments Law.

6. "Bill of Lading." Derived from former Section 1-201. The reference to, and definition of, an "airbill" has been deleted as no longer necessary.

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

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

9. "Buyer in ordinary course of business." Except for minor stylistic changes, identical to former Section 1-201 (as amended in conjunction with the 1999 revisions to Article 9). The major significance of the phrase lies in Section 2-403 [55-2-403 NMSA 1978] and in the Article on Secured Transactions (Article 9).

The first sentence of paragraph (9) makes clear that a buyer from a pawnbroker cannot be a buyer in ordinary course of business. The second sentence explains what it means to buy "in the ordinary course." The penultimate sentence prevents a buyer that does not have the right to possession as against the seller from being a buyer in ordinary course of business. Concerning when a buyer obtains possessory rights, see Sections 2-502 and 2-716 [55-2-502, 55-2-716 NMSA 1978]. However, the penultimate sentence is not intended to affect a buyer’s status as a buyer in ordinary course of business in cases (such as a "drop shipment") involving delivery by the seller to a person buying from the buyer or a donee from the buyer. The requirement relates to whether as against the seller the buyer or one taking through the buyer has possessory rights.

10. "Conspicuous." Derived from former Section 1-201(10) [55-1-201(10) NMSA 1978]. This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person. Whether a term is conspicuous is an issue for the court. Subparagraphs (A) and (B) set out several methods for making a term conspicuous. Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved). Although these paragraphs indicate some of the methods for making a term attention-calling, the test is whether attention can reasonably be expected to be called to it. The statutory language should not be construed to permit a result that is inconsistent with that test.

11. "Consumer." Derived from Section 9-102(a)(25) [55-9-102 (a)(25) NMSA 1978].

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

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

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

15. "Delivery." Derived from former Section 1-201. The reference to certificated securities has been deleted in light of the more specific treatment of the matter in Section 8-301 [55-8-301 NMSA 1978].

16. "Document of title." Unchanged from former Section 1-201, which was derived from Section 76, Uniform Sales Act. By making it explicit that the obligation or designation of a third party as "bailee" is essential to a document of title, this definition clearly rejects any such result as obtained in Hixson v. Ward, 254 Ill.App. 505 (1929), which treated a conditional sales contract as a document of title. Also the definition is left open so that new types of documents may be included. It is unforeseeable what documents may one day serve the essential purpose now filled by warehouse receipts and bills of lading. Truck transport has already opened up problems which do not fit the patterns of practice resting upon the assumption that a draft can move through banking channels faster than the goods themselves can reach their destination. There lie ahead air transport and such probabilities as teletype transmission of what may some day be regarded commercially as "Documents of Title." The definition is stated in terms of the function of the documents with the intention that any document which gains commercial recognition as accomplishing the desired result shall be included within its scope. Fungible goods are adequately identified within the language of the definition by identification of the mass of which they are a part.

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

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

The definition is broad enough to include an airway bill.

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

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

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

20. "Good faith." Former Section 1-201(19) [55-1-201(19) NMSA 1978] defined "good faith" simply as honesty in fact; the definition contained no element of commercial reasonableness. Initially, that definition applied throughout the Code with only one exception. Former Section 2-103(1)(b) [55-2-103(1)(b) NMSA 1978] provided that "in that Article, "'good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." This alternative definition was limited in applicability, though, because it applied only to transactions within the scope of Article 2 and it applied only to merchants.

Over time, however, amendments to the Uniform Commercial Code brought the Article 2 merchant concept of good faith (subjective honesty and objective commercial reasonableness) into other Articles. First, Article 2A explicitly incorporated the Article 2 standard. *See* Section 2A-103(7) [55-2A-103(7) NMSA 1978]. Then, other Articles broadened the applicability of that standard by adopting it for all parties rather than just for merchants. *See, e.g.*, Sections 3-103(a)(4), 4A-105(a)(6), 7-102(a)(6), 8-102(a)(10), and 9-102(a)(43) [55-3-103(a)(4), 55-4A-105(a)(6), 55-7-102(a)(6), 55-8-102(a)(10), and

55-9-102(a)(43) NMSA 1978]. Finally, Articles 2 and 2A were amended so as to apply the standard to non-merchants as well as merchants. *See* Sections 2-103(1)(j), 2A-103(1)(m) [55-2-103(1)(j), 55-2A-103(1)(m) NMSA 1978]. All of these definitions are comprised of two elements – honesty in fact and the observance of reasonable commercial standards of fair dealing. Only revised Article 5 defines "good faith" solely in terms of subjective honesty, and only Article 6 (in the few states that have not chosen to delete the Article) is without a definition of good faith. (It should be noted that, while revised Article 6 did not define good faith, Comment 2 to revised Section 6-102 [55-6-102 NMSA 1978] states that "this Article adopts the definition of 'good faith' in Article 1 in all cases, even when the buyer is a merchant.")

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

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

As noted above, the definition of "good faith" in this section requires not only honesty in fact but also "observance of reasonable commercial standards of fair dealing." Although "fair dealing" is a broad term that must be defined in context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed. This is an entirely different concept than whether a party exercised ordinary care in conducting a transaction. Both concepts are to be determined in the light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct. *See e.g.*, Sections 3-103(a)(9) and 4-104(c) [55-3-103(a)(9) and 55-4-104(c) NMSA 1978] and Comment 4 to Section 3-103 [55-3-103 NMSA 1978].

21. "Holder." Derived from former Section 1-201. The definition has been reorganized for clarity.

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

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

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

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

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

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

28. "Present value." This definition was formerly contained within the definition of "security interest" in former Section 1-201(37) [55-1-201(37) NMSA 1978].

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

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

31. "Record." Derived from Section 9-102(a)(69) [55-9-102(a)(69) NMSA 1978].

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

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

34. "Right." Except for minor stylistic changes, identical to former Section 1-201.

35. "Security Interest." The definition is the first paragraph of the definition of "security interest" in former Section 1-201, with minor stylistic changes. The remaining portion of that definition has been moved to Section 1-203 [55-1-203 NMSA 1978]. Note that, because of the scope of Article 9, the term includes the interest of certain outright buyers of certain kinds of property.

36. "Send." Derived from former Section 1-201 [55-1-201 NMSA 1978]. Compare "notifies".

37. "Signed." Derived from former Section 1-201. Former Section 1-201 referred to "intention to authenticate"; because other articles now use the term "authenticate," the language has been changed to "intention to adopt or accept." The latter formulation is derived from the definition of "authenticate" in Section 9-102(a)(7) [55-9-102(a)(7) NMSA 1978]. This provision refers only to writings, because the term "signed," as used in some articles, refers only to writings. This provision also makes it clear that, as the term "signed" is used in the Uniform Commercial Code, a complete signature is not necessary. The symbol may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing.

38. "State." This is the standard definition of the term used in acts prepared by the National Conference of Commissioners on Uniform State Laws.

39. "Surety." This definition makes it clear that "surety" includes all secondary obligors, not just those whose obligation refers to the person obligated as a surety. As to the nature of secondary obligations generally, *see* Restatement (Third), Suretyship and Guaranty Section 1 (1996).

40. "Term." Unchanged from former Section 1-201.

41. "Unauthorized signature." Unchanged from former Section 1-201.

42. "Warehouse receipt." Unchanged from former Section 1-201, which was derived from Section 76(1), Uniform Sales Act; Section 1, Uniform Warehouse Receipts Act. Receipts issued by a field warehouse are included, provided the warehouseman and the depositor of the goods are different persons.

43. "Written" or "writing." Unchanged from former Section 1-201.

"Bill of lading". Section 1-201.

"Contract". Section 1-201.

"Genuine". Section 1-201.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 10, effective January 1, 2006, repealed former 55-1-202 NMSA 1978, relating to prima facie evidence by third party, as enacted by Laws 1961, ch. 96, § 1-202, and enacted a new 55-1-202 NMSA 1978 relating to "notice" and "knowledge". For previous law relating to "notice" and "knowledge", *see* former Subsections 25 to 27 of 55-1-201 NMSA 1978 on the 2004 NMSA 1978 on *NMOneSource.com.*

Compiler's notes. — For current law governing prima facie evidence, *see* 55-1-307 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Commercial Code § 33.

32A C.J.S. Evidence §§ 819, 820, 967.

55-1-203. 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 must be determined with reference to the facts and circumstances at the time the transaction is entered into.

History: Laws 2005, ch. 144, § 11.

OFFICIAL COMMENTS

Source. — Former Section 1-201(37) [55-1-201(37) NMSA 1978].

Changes from former law. — This section is substantively identical to those portions of former Section 1-201(37) distinguished "true" leases from security interests, except that the definition of "present value" formerly embedded in Section 1-201(37) has been placed in Section 1-201(28) [55-1-201(28) NMSA 1978].

1. An interest in personal property or fixtures which secures payment or performance of an obligation is a "security interest." *See* Section 1-201(37) [55-1-201(37) NMSA 1978]. Security interests are sometimes created by transactions in the form of leases. Because it can be difficult to distinguish leases that create security

interests from those that do not, this section provides rules that govern the determination of whether a transaction in the form of a lease creates a security interest.

2. One of the reasons it was decided to codify the law with respect to leases was to resolve an issue that created considerable confusion in the courts: what is a lease? The confusion existed, in part, due to the last two sentences of the definition of security interest in the 1978 Official Text of the Act, Section 1-201(37). The confusion was compounded by the rather considerable change in the federal, state and local tax laws and accounting rules as they relate to leases of goods. The answer is important because the definition of lease determines not only the rights and remedies of the parties to the lease but also those of third parties. If a transaction creates a lease and not a security interest, the lessee's interest in the goods is limited to its leasehold estate; the residual interest in the goods belongs to the lessor. This has significant implications to the lessee's creditors. "On common law theory, the lessor, since he has not parted with title, is entitled to full protection against the lessee's creditors and trustee in bankruptcy . . . ." 1 G. Gilmore, *Security Interests in Personal Property* Section 3.6, at 76 (1965).

Under pre-UCC chattel security law there was generally no requirement that the lessor file the lease, a financing statement, or the like, to enforce the lease agreement against the lessee or any third party; the Article on Secured Transactions (Article 9) did not change the common law in that respect. Coogan, Leasing and the Uniform Commercial Code, in *Equipment Leasing – Leveraged Leasing* 681, 700 n.25, 729 n.80 (2d ed.1980). The Article on Leases (Article 2A) did not change the law in that respect, except for leases of fixtures. Section 2A-309 [55-2A-309 NMSA 1978]. An examination of the common law will not provide an adequate answer to the question of what is a lease. The definition of security interest in Section 1-201(37) of the 1978 Official Text of the Act provided that the Article on Secured Transactions (Article 9) governs security interests disguised as leases, *i.e.*, leases intended as security; however, the definition became vague and outmoded.

Lease is defined in Article 2A as a transfer of the right to possession and use of goods for a term, in return for consideration. Section 2A-103(1)(j) [55-2A-103(1)(j) NMSA 1978]. The definition continues by stating that the retention or creation of a security interest is not a lease. Thus, the task of sharpening the line between true leases and security interests disguised as leases continues to be a function of this Article.

This section begins where Section 1-201(b)(35) [55-1-201(35) NMSA 1978] leaves off. It draws a sharper line between leases and security interests disguised as leases to create greater certainty in commercial transactions.

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

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

Subsections (a) and (b) were originally taken from Section 1(2) of the Uniform Conditional Sales Act (act withdrawn 1943), modified to reflect current leasing practice. Thus, reference to the case law prior to the incorporation of those concepts in this article will provide a useful source of precedent. Gilmore, *Security Law, Formalism and Article 9*, 47 Neb.L.Rev. 659, 671 (1968). Whether a transaction creates a lease or a security interest continues to be determined by the facts of each case. Subsection (b) further provides that a transaction creates a security interest if the lessee has an obligation to continue paying consideration for the term of the lease, if the obligation is not terminable by the lessee (thus correcting early statutory gloss, *e.g., In re Royer's Bakery, Inc.*, 1 U.C.C. Rep.Serv. (Callaghan) 342 (Bankr.E.D.Pa.1963)) and if one of four additional tests is met. The first of these four tests, subparagraph (1), is that the original lease term is equal to or greater than the remaining economic life of the goods. The second of these tests, subparagraph (2), is that the lessee is either bound to renew the lease for the remaining economic life of the goods or to become the owner of the goods. *In re Gehrke Enters.*, 1 Bankr. 647, 651-52 (Bankr.W.D.Wis.1979). The third of these tests, subparagraph (3), is whether 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, which is defined later in this section. *In re Celeryvale Transp.*, 44 Bankr. 1007, 1014-15 (Bankr.E.D.Tenn.1984). The fourth of these tests, subparagraph (4), is whether the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration. All of these tests focus on economics, not the intent of the parties. *In re Berge*, 32 Bankr. 370, 371-73 (Bankr.W.D.Wis.1983).

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

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

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

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

Cross references. — Sections 1-201; 1-205; 1-208; 2-103; 2-508; 2-603; 2-614 and 2-615.

"Contract". Section 1-201.

"Good faith". Sections 1-201 and 2-103.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 11, effective January 1, 2006, repealed former 55-1-203 NMSA 1978, relating to "obligation of good faith", as enacted by Laws 1961, ch. 96, § 1-203, relating to lease distinguished from "security interest" and enacted a new 55-1-203 NMSA 1978 relating to "lease" distinguished from "security interest".

For prior law governing a whether a transaction creates a lease or security interest, *see* Subsection 37 of 55-1-201 NMSA 1978 on the 2004 NMSA 1978 on *NMOneSource.com.*

Compiler's notes. — Laws 2005, ch. 144, § 18, effective January 1, 2006, enacted a new 55-1-304 NMSA 1978, relating to obligation of good faith. Section 55-1-304 NMSA 1978 is almost identical to former 55-1-203 NMSA 1978. For provisions of former 55-1-203 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Distinction between a lease and a security agreement. — In a Chapter 12 bankruptcy case, where an equipment lessor moved for relief from stay so that he could pick up leased equipment, and where debtors objected on the theory that the lease was really a security interest and that the lessor was an unsecured creditor, the equipment lease in this case was a true lease because it was terminable at will by the debtor, and under the "One Factor" test, a lease terminable at will by the lessee is a true lease, and although the lease in this case contained a nominal buyout, which would generally indicate a security agreement, a nominal buyout is conclusive evidence of a security agreement only if the lease is not terminable. *In re Roberts*, 620 B.R. 336 (Bankr. D. N.M. 2020).

Law reviews. — For comment, "Commercial Law - Uniform Commercial Code - Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Commercial Code § 26; 17A Am. Jur. 2d Contracts § 380; 68A Am. Jur. 2d Secured Transactions § 184 et seq.

Sufficiency of designation of debtor or secured party in security agreement of financing statement under UCC § 9-402, 99 A.L.R.3d 478.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 A.L.R.3d 1194.

17A C.J.S. Contracts § 494.

55-1-204. Value.

Except as otherwise provided in Chapter 55, Articles 3, 4, 5 and 12 NMSA 1978, 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.

History: 1953 Comp., § 50A-1-204, enacted by Laws 1961, ch. 96, § 1-204; 1978 Comp., § 55-1-204, repealed and reenacted by Laws 2005, ch. 144, § 12; 2023, ch. 142, § 2.

OFFICIAL COMMENTS

Source. — Former Section 1-201(44) [55-1-201(44) NMSA 1978].

Changes from former law. — Unchanged from former Section 1-201 [55-1-201 NMSA 1978], which was derived from Sections 25, 26, 27, 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 58, Uniform Warehouse Receipts Act; Section 22(1), Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. These provisions are substantive rather than purely definitional. Accordingly, they have been relocated from former Section 1-201 to this section.

1. Historically, most Uniform Acts in the commercial law field have carried definitions of "value." Those definitions provided that value was any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre-existing claim. Subsections (1), (2), and (4) in substance continue the definitions of "value" in the earlier acts. Subsection (3) makes explicit that "value" is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingent into a fixed obligation.

This definition is not applicable to Articles 3 and 4, but the express inclusion of immediately available credit as value follows the separate definitions in those articles. *See* Sections 4-208 [55-4-208 NMSA 1978], 4-209 [55-4-209 NMSA 1978], 3-303 [55-3-303 NMSA 1978. A bank or other financing agency which in good faith makes advances against property held as collateral becomes a bona fide purchaser of that property even though provision may be made for charge-back in case of trouble. Checking credit is "immediately available" within the meaning of this section if the bank would be subject to an action for slander of credit in case checks drawn against the credit were dishonored, and when a charge-back is not discretionary with the bank, but may only be made when difficulties in collection arise in connection with the specific transaction involved. Article 12 adopts the substance of the Article 3 definition. *See* Section 12-102(a)(4) [55-12-102 NMSA 1978].

Definitional cross reference. — "Agreement". Section 1-201.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 12, effective January 1, 2006, repealed former 55-1-204 NMSA 1978 as enacted by Laws 1961, ch. 96, § 1-204, and enacted a new 55-1-204 NMSA 1978.

Laws 2005, ch. 144, § 12, effective January 1, 2006, repealed former 55-1-204 NMSA 1978 relating to "reasonable time" and "seasonably", as enacted by Laws 1961, ch. 96, § 1-204, and enacted a new 55-1-204 NMSA 1978 relating to value. The substance of former 55-1-204 NMSA 1978 has been enacted as a new 55-1-205 NMSA 1978 by Laws 2005, ch. 144, § 13. For provisions of former 55-1-204 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Compiler's notes. — For former law governing "value", *see* Subsection 44 of 55-1-201 NMSA 1978 on the 2004 NMSA 1978 on *NMOneSource.com.*

For current law governing reasonable time and seasonableness, *see* 55-1-205 NMSA 1978.

The 2023 amendment, effective January 1, 2024, in the introductory clause, after "Chapter 55, Articles 3, 4, 5", added "and 12 NMSA 1978".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes § 888.

86 C.J.S. Time § 8.

55-1-205. Reasonable time; seasonableness.

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

History: 1953 Comp., § 50A-1-204, enacted by Laws 1961, ch. 96, § 1-204; 1978 Comp., § 55-1-204; recompiled by compiler as NMSA 1978, § 55-1-205; Laws 2005, ch. 144, § 13.

OFFICIAL COMMENTS

Source. — Former Section 1-204(2)-(3) [55-1-204(2)-(3) NMSA 1978].

Changes from former law. — This section is derived from Subsections (2) and (3) of former Section 1-204 [55-1-204 NMSA 1978]. Subsection (1) of that section is now incorporated in Section 1-302(b) [55-1-302(b) NMSA 1978].

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

2. Under Subsection (b), the agreement that fixes the time need not be part of the main agreement, but may occur separately. Notice also that under the definition of "agreement" (Section 1-201 [55-1-201 NMSA 1978]) the circumstances of the transaction, including course of dealing or usages of trade or course of performance may be material. On the question what is a reasonable time these matters will often be important.

Point 1: Sections 1-203, 2-104 and 2-202.

Point 2: Section 2-208.

Point 4: Section 2-201 and Part 3 of Article 2.

Point 6: Sections 1-203 and 2-302.

Point 8: Sections 1-102 and 1-201.

Point 9: Section 2-204(3).

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Term". Section 1-201.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 13, effective January 1, 2006, repealed former 55-1-205 NMSA 1978 as enacted by Laws 1961, ch. 96, § 1-205, and enacted a new 55-1-205 NMSA 1978.

Laws 2005, ch. 144, § 13, effective January 1, 2006, repealed former 55-1-205 NMSA 1978, as enacted by Laws 1961, ch. 96, § 1-205, relating to course of dealing and usage of trade, and enacted a new 55-1-205 NMSA 1978. The substance of former 55-1-205 NMSA 1978 has been enacted as a new 55-1-303 NMSA 1978 by Laws 2005, ch. 144, § 13. For provisions of former 55-1-204 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Cross references. — For applicability of supplementary general principles, *see* 55-1-103 NMSA 1978.

Reasonable to require loss claims to be made within two days. — In general, a contract provision requiring claims of loss to be made within two days of delivery is reasonable, lawful and not unconscionable. *Bowlin's, Inc. v. Ramsey Oil Co.*, 1983-NMCA-038, 99 N.M. 660, 662 P.2d 661, cert. denied, 99 N.M. 644, 662 P.2d 645.

Lessee held to have acted reasonably. — Where lessee wrote assigner of leases before the expiration of either lease, the manner in which lessee notified assignee of its election to purchase certain cranes and the presentment of full payment in fewer than 30 days from expiration of the leases, were acts done in a reasonable fashion, and certainly within a reasonable time, as required by the Uniform Commercial Code. *Cranetex, Inc. v. Mountain Dev. Corp.*, 1987-NMSC-051, 106 N.M. 5, 738 P.2d 123.

Law reviews. — For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M. L. Rev. 367 (1976).

Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), commented on in 8 Nat. Resources J. 183 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 11 Am. Jur. 2d Bills and Notes §§ 39, 63; 15A Am. Jur. 2d Commercial Code §§ 3, 28, 52; 68A Am. Jur. 2d Secured Transactions §§ 31, 584 et seq.

17A C.J.S. Contracts § 325; 25 C.J.S. Customs and Usages §§ 1, 14.

55-1-206. Presumptions.

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

History: Laws 2005, ch. 144, § 14.

OFFICIAL COMMENTS

Source. — Former Section 1-201(31) [55-1-201(31) NMSA 1978].

Changes from former law. — None, other than stylistic changes.

Several sections of the Uniform Commercial Code state that there is a "presumption" as to a certain fact, or that the fact is "presumed." This section, derived from the definition appearing in former Section 1-201(31) [55-1-201(31) NMSA 1978], indicates the effect of those provisions on the proof process.

Purposes. — To fill the gap left by the statute of frauds provisions for goods (Section 2-201 [55-2-201 NMSA 1978]), securities (Section 2-319 [55-2-319 NMSA 1978]) and security interests (Section 9-203 [55-9-203 NMSA 1978]). The Uniform Sales Act covered the sale of "choses in action"; the principal gap relates to sale of the "general intangibles" defined in Article 9 (Section 9-106 [55-9-106 NMSA 1978]) and to transactions excluded from Article 9 by Section 9-104 [55-9-104 NMSA 1978]. Typical are the sale of bilateral contracts, royalty rights or the like. The informality normal to such transactions is recognized by lifting the limit for oral transactions to $5,000. In such transactions there is often no standard of practice by which to judge, and values can rise or drop without warning; troubling abuses are avoided when the dollar limit is exceeded by requiring that the subject-matter be reasonably identified in a signed writing which indicates that a contract for sale has been made at a defined or stated price.

"Action". Section 1-201.

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Sale". Section 2-106.

"Signed". Section 1-201.

"Writing". Section 1-201.

ANNOTATIONS

Repeals and reenactments. — Laws 2005, ch. 144, § 14, effective January 1, 2006, repealed former 55-1-206 NMSA 1978, relating to the statute of frauds, as enacted by Laws 1961, ch. 96, § 1-206, as amended, and enact a new 55-1-206 NMSA 1978, relating to presumptions.

Cross references. — For presumptions in civil cases, *see* 11-301 NMRA of the Rules of Evidence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Commercial Code §§ 37, 114; 72 Am. Jur. 2d Statute of Frauds § 130.

37 C.J.S. Frauds, Statute of § 138.

55-1-207. Repealed.

History: 1953 Comp., § 50A-1-207, enacted by Laws 1961, ch. 96, § 1-207; 1992, ch. 114, § 4; repealed by Laws 2005, ch. 144, § 113.

ANNOTATIONS

Repeals. — Laws 2005, ch. 144, § 113, repealed 55-1-207 NMSA 1978, as enacted by Laws 1961, ch. 96, § 1-207, relating to performance or acceptance under reservation of rights, effective January 1, 2006. For current law, *see* 55-1-308 NMSA 1978.

55-1-208. Repealed.

History: 1953 Comp., § 50A-1-208, enacted by Laws 1961, ch. 96, § 1-208; repealed by Laws 2005, ch. 144, § 113.

ANNOTATIONS

Repeals. — Laws 2005, ch. 144, § 113 repealed 55-1-208 NMSA 1978, as enacted by Laws 1961, ch. 96, § 1-208, relating to option to accelerate at will, effective January 1, 2006. For provisions of current law, *see* 55-1-309 NMSA 1978.

55-1-209. Repealed.

History: 1978 Comp., § 55-1-209, enacted by Laws 1992, ch. 114, § 5; repealed by Laws 2005, ch. 144, § 113.

ANNOTATIONS

Repeals. — Laws 2005, ch. 144, § 113 repealed 55-1-209 NMSA 1978, as enacted by Laws 1992, ch. 114, § 5, relating to subordinated obligations, effective January 1, 2006. For provisions of current law, *see* 55-1-310 NMSA 1978.

PART 3
TERRITORIAL APPLICABILITY AND GENERAL RULES

55-1-301. 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 of this section, and except as provided in Subsection C of this section, 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 55-2-402 NMSA 1978;

(2) Sections 55-2A-105 and 55-2A-106 NMSA 1978;

(3) Section 55-4-102 NMSA 1978;

(4) Section 55-4A-507 NMSA 1978;

(5) Section 55-5-116 NMSA 1978;

(6) Section 55-8-110 NMSA 1978;

(7) Sections 55-9-301 through 55-9-307 NMSA 1978; and

(8) Section 55-12-107 NMSA 1978.

History: 1953 Comp., § 50A-1-105, enacted by Laws 1961, ch. 96, § 1-105; 1978 Comp. §55-1-105; recompiled by compiler as 1978 Comp. § 55-1-105; Laws 2005, ch. 144, § 15; 2023, ch. 142, § 3.

OFFICIAL COMMENTS

Source. — Former Section 1-105 [55-1-105 NMSA 1978].

Changes from former law. — This section is substantively identical to former Section 1-105. Changes in language are stylistic only.

1. Subsection (a) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the sections listed in Subsection (c), and is limited to

jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. *Compare Global Commerce Corp. v. Clark-Babbitt Industries, Inc.*, 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.

4. Subsection (c) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

5. Sections 9-301 [55-9-301 NMSA 1978] through 9-307 [55-9-307 NMSA 1978] should be consulted as to the rules for perfection of security interests and agricultural liens and the effect of perfection and nonperfection and priority. In transactions to which the Hague Securities Convention applies, the requirements for foreclosure and the like, the characterization of a transfer as being outright or by way of security, and certain other issues will generally be governed by the law specified in the account agreement. *See* PEB Commentary No. 19.

6. This section is subject to Section 1-102 [55-1-102 NMSA 1978], which states the scope of Article 1. As that section indicates, the rules of Article 1, including this section, apply to a transaction to the extent that transaction is governed by one of the other Articles of the Uniform Commercial Code.

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 15, effective January 1, 2006, enacted a new 55-1-301 NMSA 1978 relating to territorial applicability and power to choose applicable law. The substance of former 55-1-105 NMSA 1978, relating to territorial applicability and power to choose applicable law, has been enacted as a new 55-1-301 NMSA 1978 by Laws 2005, ch. 144, § 15. *See* 12-2A-14 NMSA 1978 for repeal and reenactment of a law that is not a new enactment. For provisions of former 55-1-105 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

The 2023 amendment, effective January 1, 2024, added Section 55-12-107 NMSA 1978 to an existing provision that provided if any of the listed statutes specified the applicable law, that statute governed and a contrary agreement is effective only to the extent permitted by the law so specified; and added Paragraph C(8).

Public policy exception. — When the application of the law chosen by the parties offends New Mexico public policy, New Mexico courts may decline to enforce the choice-of-law provision and apply New Mexico law instread. *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, 144 N.M. 646, 118 P.3d 1215.

Jurisdiction where significant performance occurs governs choice of law. — The law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 1989-NMSC-030, 108 N.M. 467, 775 P.2d 233.

Public policy considerations in applying out-of-state law. — When the choice of law rule leads to the law of another state and that law is different from the law of the forum, the forum may decline to apply the out-of-state law if it offends the public policy of New Mexico. *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 1989-NMSC-030, 108 N.M. 467, 775 P.2d 233.

Determination of validity of contract executed in another state. — The validity of a contract executed in a sister state is determined according to the laws of that state, unless such construction conflicts with some settled policy of the forum state. *In re Estate of Voight*, 1981-NMCA-016, 95 N.M. 625, 624 P.2d 1022, cert. denied, 95 N.M. 669, 625 P.2d 1186.

Probate of will in forum state not significant. — The fact that the will is being probated in the forum state is not significant in determining whether or not to use the forum's law to decide the question of the validity of the contractual claims against the estate. *In re Estate of Voight*, 1981-NMCA-016, 95 N.M. 625, 624 P.2d 1022, cert. denied, 95 N.M. 669, 625 P.2d 1186.

Application of out-of-state liquor law. — Kentucky law and not the New Mexico Alcoholic Beverage Franchise Act applied to distributorship contracts, where the contracts bore a reasonable relation to the state of Kentucky and the choice of law provision therein did not violate some fundamental principle of justice. *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 1989-NMSC-030, 108 N.M. 467, 775 P.2d 233.

55-1-302. Variation by agreement.

(a) Except as otherwise provided in Subsection (b) of this section or elsewhere in the Uniform Commercial Code, the effect of provisions of the Uniform Commercial Code may be varied by agreement.

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

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

History: Laws 2005, ch. 144, § 16.

OFFICIAL COMMENTS

Source. — Former Sections 1-102(3)-(4) and 1-204(1) [55-1-102(3)-(4) and [55-1-204(1) NMSA 1978].

Changes. — This section combines the rules from Subsections (3) and (4) of former Section 1-102 [55-1-102 NMSA 1978] and Subsection (1) of former Section 1-204 [55-1-204 NMSA 1978]. 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 [55-3-104 NMSA 1978]; 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 [55-1-201 NMSA 1978] and 1-303 [55-1-303 NMSA 1978]; 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 [55-1-103 NMSA 1978]. The rights of third parties under Section 9-317 [55-9-317 NMSA 1978] 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 [55-9-602 NMSA 1978], 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 [55-1-303 NMSA 1978] 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 relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions. Such bodies of rules or principles may include, for example, those that are promulgated by intergovernmental authorities such as UNCITRAL or Unidroit (*see, e.g.*, Unidroit Principles of International Commercial Contracts), or non-legal codes such as trade codes.

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

ANNOTATIONS

Effective dates. — Laws 2005, ch. 144, § 115 made Laws 2005, ch. 144, § 16 effective January 1, 2006.

Compiler's notes. — This section replaced Subsections (3) and (4) of former 55-1-102 and Subsection (1) of former 55-1-204 NMSA 1978.

The UCC permits parties to override UCC provisions by agreement. — Where plaintiff bank filed a complaint for foreclosure, alleging that defendant had defaulted on a "no document" loan taken out in 2003, approval of which depended on whether defendant’s equity and credit score met certain guidelines, and where defendant argued that the district court’s failure to credit a 2011 partial payment submitted by defendant to the bank resulted in an erroneous application of the Uniform Commercial Code (UCC), claiming further that regardless of whether the bank rejected the "tender," the UCC required the bank to discharge the tendered portion of the debt, reduce the balance of the debt, and stop accrual of interest on the debt, the district court did not err in concluding that defendant was not entitled to credit for the payment, because 55-1-302(b) NMSA 1978, directs that the parties, by agreement, may determine standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable, and in this case, the 2003 loan agreement permitted the bank to reject partial payments. *Wells Fargo v. Graham*, 2023-NMCA-023.

55-1-303. 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 such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

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

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

(1) express terms prevail over course of performance, course of dealing and usage of trade;

(2) course of performance prevails over course of dealing and usage of trade; and

(3) course of dealing prevails over usage of trade.

(f) Subject to Sections 55-2-209 and 55-2A-208 NMSA 1978, 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.

History: 1953 Comp., § 50A-1-205, enacted by Laws 1961, ch. 96, § 1-205; 1978 Comp. §55-1-205; recompiled by compiler as 1978 Comp. § 55-1-303; Laws 2005, ch. 144, § 17; 2009, ch. 234, § 1.

OFFICIAL COMMENTS

Source. — Former Sections 1-205, 2-208, and 2A-207 [55-1-205, 55-2-208, and 55-2A-207 NMSA 1978, respectively].

Changes from former law. — This section integrates the "course of performance" concept from Articles 2 and 2A into the principles of former Section 1-205 [55-1-205 NMSA 1978], which deals with course of dealing and usage of trade. In so doing, the section slightly modifies the articulation of the course of performance rules to fit more comfortably with the approach and structure of former Section 1-205. There are also slight modifications to be more consistent with the definition of "agreement" in former Section 1-201(3) [55-1-201(3) NMSA 1978]. It should be noted that a course of performance that might otherwise establish a defense to the obligation of a party to a negotiable instrument is not available as a defense against a holder in due course who took the instrument without notice of that course of performance.

1. The Uniform Commercial Code rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

2. "Course of dealing," as defined in Subsection (b), is restricted, literally, to a sequence of conduct between the parties previous to the agreement. A sequence of conduct after or under the agreement, however, is a "course of performance." "Course of dealing" may enter the agreement either by explicit provisions of the agreement or by tacit recognition.

3. The Uniform Commercial Code deals with "usage of trade" as a factor in reaching the commercial meaning of the agreement that the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. By adopting in this context the term "usage of trade," the Uniform Commercial Code expresses its intent to reject those cases which see evidence of "custom" as representing an effort to displace or negate "established rules of law." A distinction is to be drawn between mandatory rules of law such as the Statute of Frauds provisions of Article 2 on Sales whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade, and those rules of law (such as those in Part 3 of Article 2 on Sales) which fill in points which the parties have not considered and in fact agreed upon. The latter rules hold "unless otherwise agreed" but yield to the contrary agreement of the parties. Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

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

5. The policies of the Uniform Commercial Code controlling explicit unconscionable contracts and clauses (Sections 1-304, 2-302 [55-1-304, 55-2-302 NMSA 1978]) apply to implicit clauses that rest on usage of trade and carry forward the policy underlying the ancient requirement that a custom or usage must be "reasonable." However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

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

7. Although the definition of "agreement" in Section 1-201 includes the elements of course of performance, course of dealing, and usage of trade, the fact that express reference is made in some sections to those elements is not to be construed as carrying a contrary intent or implication elsewhere. Compare Section 1-302(c) [55-1-302(c) NMSA 1978].

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

9. Subsection (g) is intended to insure that this Act's liberal recognition of the needs of commerce in regard to usage of trade shall not be made into an instrument of abuse.

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 17, effective January 1, 2006, enacted a new 55-1-303 NMSA 1978 relating to course of performance, course of dealing and usage of trade. The substance of former 55-1-205 NMSA 1978, relating to course of dealing and usage or trade has been enacted as a new 55-1-303 NMSA 1978 by Laws 2005, ch. 144, § 17. *See* 12-2A-14 NMSA 1978 for repeal and reenactment of a law that is not a new enactment. For provisions of former 55-1-205 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*.

The 2009 amendment, effective January 1, 2010, in Subsection (f), added the reference to Section 55-2A-208 NMSA 1978.

Establishes existence and terms of contract. — The course of conduct of the parties may not only establish the existence of a contract, but the terms as well. *Terrel v. Duke City Lumber Co.*, 1974-NMCA-041, 86 N.M. 405, 524 P.2d 1021, *rev'd on other grounds*, 1975-NMSC-041, 88 N.M. 299, 540 P.2d 229.

Where handbook controls contract. — Where undisputed evidence shows course of conduct that made handbook part of plaintiff's contract, handbook was treated as controlling the relationship between the university administration and its faculty, and failure of the university administration to follow procedures outlined therein constituted a breach of contract by the university. *Hillis v. Meister*, 1971-NMCA-034, 82 N.M. 474, 483 P.2d 1314.

Where the jury found that there was one continuing contract, not separate loans, then the furnishing of working capital may constitute a course of conduct. *Terrel v. Duke City Lumber Co.*, 1974-NMCA-041, 86 N.M. 405, 524 P.2d 1021, *rev'd on other grounds*, 1975-NMSC-041, 88 N.M. 299, 540 P.2d 229.

Terms of written contract may carry over into substantially identical oral contract. — Where, after a written contract is terminated, an oral contract is entered into, and where there is a course of dealing for a number of years under the oral contract, which is identical in all respects other than to whom payment would be made, the provisions of which are fully known to and understood by the buyer, who has the obligation to give timely notice or waive any and all claims, the terms of the written contract carry over into the oral arrangement. *Bowlin's, Inc. v. Ramsey Oil Co.*, 1983-NMCA-038, 99 N.M. 660, 662 P.2d 661, cert. denied, 99 N.M. 644, 662 P.2d 645.

Express terms control where irreconcilable with course of dealing. — Where the express terms of a contract cannot be reconciled with an established course of dealing, the express terms control. *Celebrity, Inc. v. Kemper*, 1981-NMSC-084, 96 N.M. 508, 632 P.2d 743.

Summary judgment improper. — The trial court erred in granting summary judgment to a bank, on a default clause in a note, where a question of fact existed as to whether the bank, by its conduct, had misled the customer as to its intention to declare a default and accelerate payments. *J.R. Hale Contracting Co. v. United N.M. Bank*, 1990-NMSC-089, 110 N.M. 712, 799 P.2d 581.

Use to determine meaning of contract. — It is proper for a trial court, having found an ambiguity to exist, to consider evidence relating to custom and usage of trade, in determining the meaning to be given a contract. *Major v. Bishop*, 462 F.2d 1277 (10th Cir. 1972).

Consent by implication. — Consent can be established by implication arising from a course of conduct as well as by express words, and implied consent to a sale of collateral can operate as a waiver of a lien or security interest in farm products, even where security agreement prohibited such sale without express written consent of secured party. *Clovis Nat'l Bank v. Thomas*, 1967-NMSC-061, 77 N.M. 554, 425 P.2d 726 (decided prior to 1968 amendment which added the exception clause at the end of Subsection (3) and added the second sentence to Subsection (4)).

55-1-304. Obligation of good faith.

Every contract or duty within the Uniform Commercial Code [55-1-101 NMSA 1978] imposes an obligation of good faith in its performance and enforcement.

History: 1953 Comp., § 50A-1-203, enacted by Laws 1961, ch. 96, § 1-203 1978 Comp. §55-1-205; recompiled by compiler as 1978 Comp. § 55-1-304; Laws 2005, ch. 144, § 18.

OFFICIAL COMMENTS

Source. — Former Section 1-203 [55-1-203 NMSA 1978].

Changes from former law. — Except for changing the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-203.

1. This section sets forth a basic principle running throughout the Uniform Commercial Code. The principle is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. While this duty is explicitly stated in some provisions of the Uniform Commercial Code, the applicability of the duty is broader than merely these situations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Act. It is further implemented by Section 1-303 [55-1-303 NMSA 1978] on course of dealing, course of performance, and usage of trade. This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created,

performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

2. "Performance and enforcement" of contracts and duties within the Uniform Commercial Code include the exercise of rights created by the Uniform Commercial Code.

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 18, effective January 1, 2006, enacted a new 55-1-304 NMSA 1978 relating to obligation of good faith, which is almost identical to former 55-1-203 NMSA 1978 relating to obligation of good faith, repealed by Laws 2005, ch. 144, § 11. For repeal and reenactment of a law that is not a new enactment, *see* 12-2A-14 NMSA 1978 . For provisions of former 55-1-203 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

Reasonableness of guaranty contract. — An agreement by the guarantor of a note to waive any right to require the lending bank to proceed against the maker, exhaust any security, or pursue any other remedy, did not constitute waiver of the defenses of breach of duty of good faith and reasonableness. *Cadle Co. v. Wallach Concrete, Inc.*, 1995-NMSC-039, 120 N.M. 56, 897 P.2d 1104.

Duty imposed on creditor under Subsection (1)(b) encompasses the good faith obligation to exercise reasonable means to protect the rights of guarantors, including timely perfecting of the security interest. *American Bank of Commerce v. Covolo*, 1975-NMSC-053, 88 N.M. 405, 540 P.2d 1294 (decided under prior law).

Negligence not deemed bad faith. — Although its omissions were negligent, creditor bank was not shown to have acted in bad faith where it believed, though mistakenly, that the security interest in the liquor license had been properly perfected when it was filed with the alcoholic beverage control department. *American Bank of Commerce v. Covolo*, 1975-NMSC-053, 88 N.M. 405, 540 P.2d 1294.

When motivation behind cancelling contract immaterial. — The motivation of a party in cancelling a contract which by its terms is terminable at will by either party is immaterial. *Smith v. Price's Creameries*, 1982-NMSC-102, 98 N.M. 541, 650 P.2d 825.

55-1-305. Remedies to be liberally administered.

(a) The remedies provided by the Uniform Commercial Code [55-1-101 NMSA 1978] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in the Uniform Commercial Code or by other rule of law.

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

History: 1953 Comp., § 50A-1-106, enacted by Laws 1961, ch. 96, § 1-106; 1978 Comp. §55-1-106; recompiled by compiler as 1978 Comp. § 55-1-106; Laws 2005, ch. 144, § 19.

OFFICIAL COMMENTS

Source. — Former Section 1-106 [55-1-106 NMSA 1978].

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

1. Subsection (a) is intended to effect three propositions. The first is to negate the possibility of unduly narrow or technical interpretation of remedial provisions by providing that the remedies in the Uniform Commercial Code are to be liberally administered to the end stated in this section. The second is to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the Uniform Commercial Code elsewhere makes it clear that damages must be minimized. *Cf.* Sections 1-304, 2-706(1), and 2-712(2) [55-1-304, 55-2-706(1), and 55-2-712(2) NMSA 1978, respectively]. The third purpose of Subsection (a) is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more. *Cf.* Section 2-204(3) [55-2-204(3) NMSA 1978].

2. Under Subsection (b), any right or obligation described in the Uniform Commercial Code is enforceable by action, even though no remedy may be expressly provided, unless a particular provision specifies a different and limited effect. Whether specific performance or other equitable relief is available is determined not by this section but by specific provisions and by supplementary principles. *Cf.* Sections 1-103, 2-716 [55-1-103, 55-2-716 NMSA 1978].

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

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 19, effective January 1, 2006, enacted a new 55-1-305 NMSA 1978 relating to remedies to be liberally administered, which is almost identical to former 55-1-106 NMSA 1978 relating to remedies to be liberally administered, repealed by Laws 2005, ch. 144, § 6. For repeal and reenactment of a law that is not a new enactment, *see* 12-2A-14 NMSA 1978 . For provisions of former 55-1-106 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

55-1-306. 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 a signed record.

History: 1953 Comp., § 50A-1-107, enacted by Laws 1961, ch. 96, § 1-107, § 50A-1-107, enacted by Laws 1961, ch. 96, § 1-107; 1978 Comp. §55-1-107; recompiled by compiler as 1978 Comp. § 55-1-306; Laws 2005, ch. 144, § 20; 2023, ch. 142, § 4.

OFFICIAL COMMENTS

Source. — Former Section 1-107 [55-1-107 NMSA 1978].

Changes from former law. — Former Section 1-107, requiring the "delivery" of a "written waiver or renunciation" merged the separate concepts of the aggrieved party's agreement to forego rights and the manifestation of that agreement. This section separates those concepts, and explicitly requires agreement of the aggrieved party.

1. This section makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a contract where the agreement effecting such renunciation is memorialized in a record signed by the aggrieved party. Its provisions, however, must be read in conjunction with the section imposing an obligation of good faith. (Section 1-304 [55-1-304 NMSA 1978]).

2. Consistent with the revised definition of "sign" in Section 1-201 [55-1-201 NMSA 1978], the cognate term "signed" replaces the reference to "authenticated" in the pre-2022 text of this section.

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 20, effective January 1, 2006, enacted a new 55-1-306 NMSA 1978 relating to waiver or renunciation of claim or right after breach. The substance of former 55-1-107 NMSA 1978 relating to waiver or renunciation of claim or right after breach, has been enacted as a new 55-1-306 NMSA 1978 by Laws 2005, ch. 144, § 20. For repeal and reenactment of a law that is not a new enactment, *see* 12-2A-14 NMSA 1978. For provisions of former 55-1-107 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

The 2023 amendment, effective January 1, 2024, allowed an aggrieved party to discharge a claim or right arising out of an alleged breach by agreement in a signed record; and after "aggrieved party in", deleted "an authenticated" and added "a signed".

55-1-307. 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.

History: 1953 Comp., § 50A-1-202, enacted by Laws 1961, ch. 96, § 1-202; 1978 Comp §55-1-202; recompiled by compiler as 1978 Comp. § 55-1-307; Laws 2005, ch. 144, § 21.

OFFICIAL COMMENTS

Source. — Former Section 1-202 [55-1-202 NMSA 1978].

Changes from former law. — Except for minor stylistic changes, this Section is identical to former Section 1-202.

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

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

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

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

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 21, effective January 1, 2006, enacted a new 55-1-307 NMSA 1978 relating to prima facie evidence. Section 55-1-307 NMSA 1978 is almost identical to former 55-1-202 NMSA 1978 relating to prima facie evidence. For repeal and reenactment of a law that is not a new enactment, *see* 12-2A-14 NMSA 1978. For provisions of former 55-1-202 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

55-1-308. 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) of this section does not apply to an accord and satisfaction.

History: 1953 Comp., § 50A-1-207, enacted by Laws 1961, ch. 96, § 1-207; 1978 Comp. §55-1-207; recompiled by compiler as 1978 Comp. § 55-1-308; Laws 2005, ch. 144, § 22.

OFFICIAL COMMENTS

Source. — Former Section 1-207 [55-1-207 NMSA 1978].

Changes from former law. — This section is identical to former Section 1-207.

1. This section provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment "without prejudice," "under protest," "under reserve," "with reservation of all our rights," and the like. All of these phrases completely reserve all rights within the meaning of this section. The section therefore contemplates that limited as well as general reservations and acceptance by a party may be made "subject to satisfaction of our purchaser," "subject to acceptance by our customers," or the like.

2. This section does not add any new requirement of language of reservation where not already required by law, but merely provides a specific measure on which a party can rely as that party makes or concurs in any interim adjustment in the course of performance. It does not affect or impair the provisions of this Act such as those under which the buyer's remedies for defect survive acceptance without being expressly claimed if notice of the defects is given within a reasonable time. Nor does it disturb the policy of those cases which restrict the effect of a waiver of a defect to reasonable limits under the circumstances, even though no such reservation is expressed.

The section is not addressed to the creation or loss of remedies in the ordinary course of performance but rather to a method of procedure where one party is claiming as of right something which the other believes to be unwarranted.

3. Subsection (b) states that this section does not apply to an accord and satisfaction. Section 3-311 [55-3-311 NMSA 1978] governs if an accord and satisfaction is attempted by tender of a negotiable instrument as stated in that section. If Section 3-311 does not apply, the issue of whether an accord and satisfaction has been effected is determined by the law of contract. Whether or not Section 3-311 applies, this section has no application to an accord and satisfaction.

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 22, effective January 1, 2006, enacted a new 55-1-308 NMSA 1978 relating to performance or acceptance under reservation of rights. With minor amendments, 55-1-207 NMSA 1978, relating to performance of acceptance under reservation of rights, has been enacted as a new 55-1-308 NMSA 1978 by Laws 2005, ch. 144, § 22. *See* 12-2A-14 NMSA 1978 for repeal and reenactment of a law that is not a new enactment. For provisions of former 55-1-207 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

55-1-309. 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.

History: 1953 Comp., § 50A-1-208, enacted by Laws 1961, ch. 96, § 1-208; 1978 Comp. §55-1-208; recompiled by compiler as 1978 Comp. § 55-1-309; Laws 2005, ch. 144, § 23.

OFFICIAL COMMENTS

Source. — Former Section 1-208 [55-1-208 NMSA 1978].

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

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

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

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 23, effective January 1, 2006, enacted a new 55-1-309 NMSA 1978 relating to option to accelerate at will. With minor revisions, this new section is the same as former 55-1-208 NMSA 1978, relating to option to accelerate at will. *See* 12-2A-14 NMSA 1978 for repeal and reenactment of a law that is not a new enactment. For provisions of former 55-1-208 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

55-1-310. 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.

History: 1953 Comp., § 50A-1-209, enacted by Laws 1961, ch. 96, § 1-209; 1978 Comp. §55-1-209; recompiled by compiler as 1978 Comp. § 55-1-310; Laws 2005, ch. 144, § 24.

OFFICIAL COMMENTS

Source. — Former Section 1-209 [55-1-209 NMSA 1978].

Changes from former law. — This section is substantively identical to former Section 1-209. The language in that section stating that it "shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it" has been deleted.

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

2. Subordination agreements are enforceable between the parties as contracts; and in the bankruptcy of the common debtor dividends otherwise payable to the subordinated creditor are turned over to the superior creditor. This "turn-over" practice has on occasion been explained in terms of "equitable lien," "equitable assignment," or "constructive trust," but whatever the label the practice is essentially an equitable remedy and does not mean that there is a transaction "that creates a security interest in personal property . . . by contract" or a "sale of accounts, chattel paper, payment intangibles, or promissory notes" within the meaning of Section 9-109 [55-9-109 NMSA 1978]. On the other hand, nothing in this section prevents one creditor from assigning his rights to another creditor of the same debtor in such a way as to create a security interest within Article 9, where the parties so intend.

3. The enforcement of subordination agreements is largely left to supplementary principles under Section 1-103 [55-1-103 NMSA 1978]. If the subordinated debt is evidenced by a certificated security, Section 8-202(a) [55-8-202(a) NMSA 1978] authorizes enforcement against purchasers on terms stated or referred to on the security certificate. If the fact of subordination is noted on a negotiable instrument, a holder under Sections 3-302 and 3-306 [55-3-302, 55-3-306 NMSA 1978] is subject to the term because notice precludes him from taking free of the subordination. Sections 3-302(3)(a), 3-306, and 8-317 [55-3-302(3)(a), 55-3-306, and 55-8-317 NMSA 1978, respectively] severely limit the rights of levying creditors of a subordinated creditor in such cases.

ANNOTATIONS

Compiler's notes. — Laws 2005, ch. 144, § 24, effective January 1, 2006, enacted a new 55-1-310 NMSA 1978 relating to subordinated obligations. With minor amendments, former 55-1-209 NMSA 1978 relating to subordinated obligations has been enacted as a new 55-1-310 NMSA 1978 by Laws 2005, ch. 144, § 24. *See* 12-2A-14 NMSA 1978 for repeal and reenactment of a law that is not a new enactment. For provisions of former 55-1-209 NMSA 1978, *see* the 2004 NMSA 1978 on *NMOneSource.com.*