CHAPTER 1

Commercial Code—General Provisions

Editor’s Note

Copyright © 2017 SOUTH CAROLINA SENATE. South Carolina Reporters’ Comments contained herein may not be reproduced in whole or in part in any form or for inclusion in any material which is offered for sale without the express written permission of the Clerk of the South Carolina Senate.

Official Comments of the Uniform Commercial Code © 2017 The American Law Institute and the National Conference of Commissioners on Uniform Laws ‑ Reproduced with permission.

2014 Act No. 213, Section 50, provides as follows:

“SECTION 50. The provisions of this act apply prospectively. To the extent that issues arise based upon rights or obligations that arise prior to the effective date of this act, prior law applies to resolve those issues. Transactions, documents of title, or bailment validly entered into before the effective date of this act and the rights, duties, and interests arising from them remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by any statute or other law amended or repealed by this act, as though the repeal or amendment had not occurred.”

Part 1

Short Title, Construction, Application and Subject Matter of the Act

**SECTION 36‑1‑101.** Short title.

 (1) This title shall be known and may be cited as the Uniform Commercial Code.

 (2) This chapter may be cited as Uniform Commercial Code‑General Provisions.

HISTORY: 1962 Code Section 10.1‑101; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑101.

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 (except Articles 10 and 11) 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, and 9‑101.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

Effect of Amendment

2014 Act No. 213, Section 1, rewrote the section.

**SECTION 36‑1‑102.** Scope of chapter.

 This chapter applies to a transaction to the extent that it is governed by another chapter of this title, known as the Uniform Commercial Code.

HISTORY: 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

Source: New.

1. This section is intended to resolve confusion that has occasionally arisen as to the applicability of the substantive rules in this article. This section makes clear what has always been the case‑the rules in Article 1 apply to transactions to the extent that those transactions are governed by one of the other articles of the Uniform Commercial Code. See also Comment 1 to Section 1‑301.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑103.** Construction of Uniform Commercial Code to promote its purposes and policies; supplementary general principles of law applicable.

 (a) This title 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;

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

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

HISTORY: 1962 Code Section 10.1‑102; 1962 Code Section 10.1‑103; 1966 (54) 2716; former 1976 Code Section 36‑1‑102; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑102 (1)‑(2); Former Section 1‑103.

Changes from former law: This section is derived from subsections (1) and (2) of former Section 1‑102 and from former Section 1‑103. 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. 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 it 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 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.

3. Application of subsection (b) to statutes. The primary focus of Section 1‑103 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, 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.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑104.** Construction against implicit repeal.

 The Uniform Commercial Code, being a general enactment of chapters under Title 36, intended as a unified coverage of its subject matter, no part of it shall be considered to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

HISTORY: 1962 Code Section 10.1‑104; 1966 (54) 2716; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑104.

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.

1. 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.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑105.** Severability.

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

HISTORY: 1962 Code Section 10.1‑108; 1966 (54) 2716; former 1976 Code Section 36‑1‑108; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑108.

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.

1. 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.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑106.** Use of singular and plural; gender.

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

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

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

HISTORY: 1962 Code Section 10.1‑102; 1966 (54) 2716; former 1976 Code Section 36‑1‑102; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑102(5). 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).

1. 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.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑107.** Section captions.

 Section captions are part of the Uniform Commercial Code, with the exception of the subsection headings of Chapter 9, Title 36, which are not part of the provisions. The Official Comments, prepared by the Uniform Law Commission with the intent of aiding the user in understanding the provisions of each chapter, are to be included by the Code Commissioner in the annotated versions of this title, but are not considered part of the provisions of this title and do not indicate legislative intent.

HISTORY: 1962 Code Section 10.1‑109; 1966 (54) 2716; former 1976 Code Section 36‑1‑109; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑109.

Changes from former law: None.

1. 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 Article 9. See Comment 3 to Section 9‑101 (“subsection headings are not a part of the official text itself and have not been approved by the sponsors.”).

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑108.** Relation to Electronic Signatures in Global and National Commerce Act.

 This title 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 title 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: 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

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.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑109.** Omitted by 2014 Act No. 213, Section 1, eff October 1, 2014.

Editor’s Note

Former Section 36‑1‑109 was titled Section captions and was derived from 1962 Code Section 10.1‑109; 1966 (54) 2716, see now Section 36‑1‑107.

Part 2

General Definitions and Principles of Interpretation

**SECTION 36‑1‑201.** General definitions.

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

 (b) Subject to definitions contained in other chapters of this title that apply to particular chapters 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 36‑1‑303.

 (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, a 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 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 the 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 2 may be a buyer in the 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 a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:

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

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

 (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 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 or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. 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.

 (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 5, 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 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 of a negotiable electronic document of title.

 (22) “Insolvency proceeding” includes an assignment for the benefit of creditors or other proceedings 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 a 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.

 (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, public corporation, or any other legal or commercial entity.

 (28) “Present value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

 (29) “Purchase” means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property.

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

 (31) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

 (33) “Representative” means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate.

 (34) “Right” includes remedy.

 (35) “Security interest” means an interest in personal property or fixtures, which secures payment or performance of an obligation. “Security interest” includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Chapter 9. “Security interest” does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 36‑2‑401, but a buyer also may acquire a “security interest” by complying with Chapter 9. Except as otherwise provided in Section 36‑2‑505, the right of a seller or lessor of goods under Chapter 2 or 2A to retain or acquire possession of the goods is not a “security interest”, but a seller or lessor also may acquire a “security interest” by complying with Chapter 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 36‑2‑401 is limited in effect to a reservation of a “security interest”. Whether a transaction in the form of a lease creates a “security interest” is determined pursuant to Section 36‑1‑203.

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

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

 (B) in any other way, to cause to be received any records or notice within the time it would have arrived if properly sent.

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

 (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.

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

HISTORY: 1962 Code Section 10.1‑201; 1966 (54) 2716; 1988 Act No. 494, Section 2; 1991 Act No. 161, Section 2(A); 2001 Act No. 67, Section 3; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑201.

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, 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) (defining “promise,” in relevant part, as “a written undertaking to pay money signed by the person undertaking to pay”) and 3‑303(a)(1) (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 have been reformulated as substantive provisions and have been moved to other sections. See Sections 1‑202 (explicating concepts of notice and knowledge formerly addressed in Sections 1‑201(25)‑(27)), 1‑204 (determining when a person gives value for rights, replacing the definition of “value” in former Section 1‑201(44)), and 1‑206 (addressing the meaning of presumptions, replacing the definitions of “presumption” and “presumed” in former Section 1‑201(31)). Similarly, the portion of the definition of “security interest” in former Section 1‑201(37) which explained the difference between a security interest and a lease has been relocated to Section 1‑203.

Two definitions in former Section 1‑201 have been deleted. The definition of “honor” in former Section 1‑201(21) has been moved to Section 2‑103(1)(b), 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) 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, 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, by the law of contracts.

4. “Bank.” Derived from Section 4A‑104.

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 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. 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. 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).

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.

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) 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) 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). 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). 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). 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 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) and Comment 4 to Section 3‑103.

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).

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).

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. 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. 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). 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.

SOUTH CAROLINA REPORTER’S COMMENTS

This section contains a number of general definitions applicable throughout the Code. Whenever necessary or appropriate, the South Carolina Reporter’s Comments will refer to these definitions under the sections to which they relate.

Notes to 1988 Amendment.

The only changes made in this section by the 1972 Text are in subsections (9) and (37). The new language in subsection (9) fits in with changes as to minerals in Section 9‑103 which are explained in the references to minerals in the Official Comments and South Carolina Reporter’s Notes to that section. The omission of the term “contract rights” in subsection (37) conforms to the elimination of that term from Article 9 in the 1972 Text. See the South Carolina Reporter’s Notes to Section 9‑106.

Comments to 1991 Amendment.

Subsections (5), (14) and (20) were amended in 1991 to distinguish securities represented by certificates (“certificated securities”) from those not so represented. See Section 36‑8‑102(a) and (b). Subsections (5), (14) and (20), each of which contemplates a physical act or a writing, apply only to certificated securities.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑202.** Notice; knowledge.

 (a) Subject to subsection (f), a person has “notice” of a fact if the person:

 (1) has actual knowledge of it;

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

 (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), 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: 1962 Code Section 10.1‑201; 1966 (54) 2716; 1988 Act No. 494, Section 2; 1991 Act No. 161, Section 2(A); 2001 Act No. 67, Section 3; former 1976 Code Section 36‑1‑201; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

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

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

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

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

3. Subsection (f) makes clear that notice, knowledge, or a notification, although “received,” for instance, by a clerk in Department A of an organization, is effective for a transaction conducted in Department B only from the time when it was or should have been communicated to the individual conducting that transaction.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑203.** 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: 1962 Code Section 10.1‑201; 1966 (54) 2716; 1988 Act No. 494, Section 2; 1991 Act No. 161, Section 2(A); 2001 Act No. 67, Section 3; former 1976 Code Section 36‑1‑201; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑201(37).

Changes from former law: This section is substantively identical to those portions of former Section 1‑201(37) that 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).

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). 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. 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). 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(35) 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.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑204.** Value.

 Except as otherwise provided in Chapters 3, 4, 4A, 5, and 6 of this title, a person gives value for rights if the person acquires them:

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

 (b) as security for, or in total or partial satisfaction of, a preexisting claim; or

 (c) by accepting delivery under a preexisting contract for purchase; or

 (d) in return for any consideration sufficient to support a simple contract.

HISTORY: 1962 Code Section 10.1‑201; 1966 (54) 2716; 1988 Act No. 494, Section 2; 1991 Act No. 161, Section 2(A); 2001 Act No. 67, Section 3; former 1976 Code Section 36‑1‑201; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑201(44).

Changes from former law: Unchanged from former Section 1‑201, 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. All the Uniform Acts in the commercial law field (except the Uniform Conditional Sales Act) have carried definitions of “value.” All 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, 4‑209, 3‑303. 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.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑205.** 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: 1962 Code Section 10.1‑204; 1966 (54) 2716; former 1976 Code Section 36‑1‑204; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑204(2)‑(3).

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

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) 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.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑206.** Presumptions.

 Whenever the provisions of this title create a “presumption” with respect to a fact, or provide 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: 1962 Code Section 10.1‑201; 1966 (54) 2716; 1988 Act No. 494, Section 2; 1991 Act No. 161, Section 2(A); 2001 Act No. 67, Section 3; former 1976 Code Section 36‑1‑201; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑201(31).

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

1. 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), indicates the effect of those provisions on the proof process.

Editor’s Note

Prior Laws: Former Section 36‑1‑206 was titled Statute of frauds for kinds of personal property not otherwise covered, and had the following history: 1962 Code Section 10.1‑206; 1966 (54) 2716; 1999 Act No. 42, Section 3; omitted by 2014 Act No. 213, Section 1.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑207.** Omitted by 2014 Act No. 213, Section 1, eff October 1, 2014.

Editor’s Note

Former Section 36‑1‑207 was titled Performance or acceptance under reservation of rights and was derived from 1962 Code Section 10.1‑207; 1966 (54) 2716, see now Section 36‑1‑308.

**SECTION 36‑1‑208.** Omitted by 2014 Act No. 213, Section 1, eff October 1, 2014.

Editor’s Note

Former Section 36‑1‑208 was titled Option to accelerate at will and was derived from 1962 Code Section 10.1‑208; 1966 (54) 2716, see now Section 36‑1‑309.

Part 3

Territorial Applicability and General Rules

**SECTION 36‑1‑301.** Territorial applicability; parties’ power to choose applicable law.

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

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

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

 (1) Section 36‑2‑402;

 (2) Sections 36‑2A‑105 and 36‑2A‑106;

 (3) Section 36‑4‑102;

 (4) Section 36‑4A‑507;

 (5) Section 36‑5‑116;

 (6) Section 36‑8‑110;

 (7) Sections 36‑9‑301 through 36‑9‑307.

HISTORY: 1962 Code Section 10.1‑105; 1966 (54) 2716; 1988 Act No. 494, Section 1; 1996 Act No. 221, Section 2; 2001 Act No. 67, Section 13; former 1976 Code Section 36‑1‑105; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENT

Source: Former Section 1‑105.

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 through 9‑307 should be consulted as to the rules for perfection of security interests and agricultural liens and the effect of perfection and nonperfection and priority.

6. This section is subject to Section 1‑102, 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.

Editor’s Note

“This act,” referred to in this section, means Act No. 1965 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑302.** Variation by agreement.

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

 (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: 1962 Code Sections 10.1‑102, 10.1‑204; 1966 (54) 2716; former 1976 Code Sections 36‑1‑102, 36‑1‑204; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

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

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

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

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

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

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

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑303.** 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), 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 Section 36‑2‑209, a course of performance is relevant to show a waive 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: 1962 Code Section 10.1‑205; 1966 (54) 2716; former 1976 Code Section 36‑1‑205; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

Source: Former Sections 1‑205, 2‑208, and Section 2A‑207.

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, 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). 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) 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 facia 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).

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.

SOUTH CAROLINA REPORTER’S COMMENTS (FORMER SECTION 36‑2‑208)

Section 2‑208(1) states a rule of construction of sales contracts which would be in accord with the principle expressed in Carter v American Fruit Growers, Inc., 130 SC 280, 125 SE 641 (1924) that course of dealings and prior dealings between the parties, not objected to, are relevant to show the intent of the parties. (See Commercial Code Section 2‑202(a) on the admissibility of such evidence.).

Section 2‑208(2) is similar to Commercial Code Section 1‑205(4) and such South Carolina cases as Fairly v Wappoo Mills, 44 SC 227, 22 SE 108 (1894) and Autrey v Bell, 114 SC 370, 103 SE 749 (1920), which subordinate course of dealing and usage of trade to inconsistent express terms of the agreement.

Section 2‑208(3) permitting a waiver of terms inconsistent with course of performance is consistent with the case law of South Carolina finding waiver of a contract right by conduct. Bond Bros. Cash & Delivery Grocery, Inc. v Claussen’s Bakeries, Inc., 184 SC 95, 191 SE 717 (1937); Franklin Sugar Refining Co. v Merchants Grocery Co., 133 SC 274, 130 SE 886 (1925) (failure to object to breach); L. D. Powell Co. v Levy, 136 SC 387, 134 SE 415 (1926); Southern Coal Co. v Rice, 122 SC 484, 115 SE 815 (1927) (failure to give notice of breach of warranty).

SOUTH CAROLINA REPORTER’S COMMENTS (FORMER SECTION 36‑2A‑207)

This section makes no change in existing South Carolina law. See Sections 36‑2‑208 and 36‑1‑205(4) and their South Carolina Reporter’s Comments. These statutory analogues are also generally consistent with pre‑UCC South Carolina common law. See, e.g., Coates & Sons v. Early, 46 S.C. 220, 24 S.E. 305 (1896); Kentucky Wagon Mfg. Co. v. People’s Supply Co., 77 S.C. 92, 57 S.E. 676 (1905); Autrey v. Bell, 114 S.C. 370, 103 S.E. 749 (1920). On the relevance of course of dealings between the parties, see Carter v. American Fruit Growers, Inc., 130 S.C. 280, 125 S.E. 641 (1924). Course of dealing and usage of trade are subordinate to the unambiguous express terms of the agreement. Fairly v. Wappoo Mills, 44 S.C. 227, 22 S.E. 108 (1894).

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑304.** Obligation of good faith.

 Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.

HISTORY: 1962 Code Section 10.1‑205; 1966 (54) 2716; former 1976 Code Section 36‑1‑203; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

Source: Former Section 1‑203.

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 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, are medial 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.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑305.** Remedies to be liberally administered.

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

 (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: 1962 Code Section 10.1‑106; 1966 (54) 2716; former 1976 Code Section 36‑1‑106; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.Section

OFFICIAL COMMENTS

Source: Former Section 1‑106.

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). 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).

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.

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.

Editor’s Note

“This act,” referred to in this section, means Act No. 1065 of the 1966 Acts and Joint Resolutions, originally codified as Titles 10.1 to 10.10 of the Code of Laws of South Carolina 1962, and now codified as Title 36 of the Code of Laws of South Carolina 1976.

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑306.** Waiver or renunciation of claim or right after breach.

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

HISTORY: 1962 Code Section 10.1‑107; 1966 (54) 2716; former 1976 Code Section 36‑1‑107; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

Source: Former Section 1‑107.

Changes from former law: This section changes former law in two respects. First, former Section 1‑107, requiring the “delivery” of a “written waiver or renunciation” merges 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. Second, the revised section reflects developments in electronic commerce by providing for memorialization in an authenticated record. In this context, a party may “authenticate” a record by (i) signing a record that is a writing or (ii) attaching to or logically associating with a record that is not a writing an electronic sound, symbol or process with the present intent to adopt or accept the record. See Sections 1‑201(b)(37) and 9‑102(a)(7).

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

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑307.** 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: 1962 Code Section 10.1‑202; 1966 (54) 2716; former 1976 Code Section 36‑1‑202; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

Source: Former Section 1‑202.

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.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑308.** Performance or acceptance under reservation of rights.

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

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

HISTORY: 1962 Code Section 10.1‑207; 1966 (54) 2716; former 1976 Code Section 36‑1‑207; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

Source: Former Section 1‑207.

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 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.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑309.** 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: 1962 Code Section 10.1‑208; 1966 (54) 2716; former 1976 Code Section 36‑1‑208; 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

Source: Former Section 1‑208.

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

1. 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.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”

**SECTION 36‑1‑310.** 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: 2014 Act No. 213 (S.343), Section 1, eff October 1, 2014.

OFFICIAL COMMENTS

Source: Former Section 1‑209.

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. 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. If the subordinated debt is evidenced by a certificated security, Section 8‑202(a) 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 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 severely limit the rights of levying creditors of a subordinated creditor in such cases.

Editor’s Note

2014 Act No. 213, Section 51, provides as follows:

“SECTION 51. This act becomes effective on October 1, 2014. It applies to transactions entered into and events occurring after that date.”