NAHATA FOUNDATION, INC.

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To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at http://www.ascr.usda.gov/complaint_filing_cust.html and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by:

Mail: U.S. Department of Agriculture
Office of the Assistant Secretary for Civil Rights
1400 Independence Avenue, SW,
Washington, D.C. 20250-9410;

Fax: (833) 256-1665 | (202) 690-7442; or

Email: program.intake@usda.gov.

USDA Rural Development
U.S. DEPARTMENT OF AGRICULTURE

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This publication made possible through a grant from USDA Rural Development.

NAHATA FOUNDATION, INC.

Annotated Navajo Nation Business Regulatory Website Links

Business Regulatory – NN DED (navajoeconomy.org)

The Navajo Nation Business Regulatory site is where to start when registering your business within the Navajo Nation.

Certification & Registration Services – NN DED (navajoeconomy.org)

This link will take you to all required forms to register your business within the Navajo Nation. This includes various organizational structures of businesses, and compliance information.

Annotated Navajo Nation Legislation Website Links

Navajo Nation Code | Navajo Nation Office of Legislative Services (nnols.org)

This link will take you to Navajo Nation Code Titles 1 -26, which are current statutory laws of the Navajo Nation.

Code | 25th Navajo Nation Council

Navajo Nation Code with current amendments to tribal statutes. Links to amendments are helpful when researching laws related to business regulatory and corporation code changes. Changes in business regulatory are often published on the Navajo Nation Business Regulatory website, but entire revisions are listed under amendments on this page.

**Websites here listed are up-to-date and accurate as of March 2023, but are subject to change without notice as the Navajo Nation updates and amends forms when new or amending legislation for businesses are enacted.*

Please visit the link for updated forms. All webpages listed are public information.

NAVAJO Business Training

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Summer 2023
For more information, visit:
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Navajo Nation Present Day Economy

Navajo Nation Commerce

Navajo Society: Influence on Reservation Business

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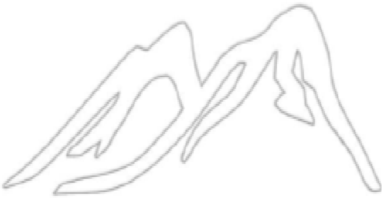
BUILDING COMMUNITIES BC ECONOMIC DEVELOPMENT

The Four Sacred Navajo Mountains

To the North sits **Mt. Hesperus (Dibeentsaa).** This mountain is represented in black as is the color of night. This is the time, when all life must rest. It also represents the elderly, the completion of the life circle, the Winter Season, and the mystical color of the jet stone. In the Navajo thought process, the north mountain represents Siihasin (hope and compassion). After thoughts, plans, and implementation of a project, the project is now well on its way to either progressing or failing; however, Navajos maintain hope that the project will be fruitful and develop into something great. During this phase, the family, clan, and tribe pray and sing in hope of a beneficial project. This is a phase of project maintenance.

To the West sits **The San Francisco Peaks (Doko'oosliid).** This mountain is represented in yellow as when the sun sets and the day begins to rest. This also reflects the adulthood of all living beings. This direction also represents Fall Season, and the warm color of the abalone stone. In the Navajo thought process, the west mountain is where Iina' (life/implementation) begins. All thoughts and plans are now implemented into the life of the project, it is viewed as an entity and will grow.



Mt. Blanca (Sisnaajini) sits to the East. This mountain is represented in white, and begins the natural way of life and the beginning of the hozh'o. This is the place where the sun rises and the day begins. This direction also represents Spring Season, the color of purity, and white shell stone. In the Navajo thought process, the east mountain is where Nitsa'hakees (thinking) begins. All initial action thoughts are pure and with positive energy; good thinking that will benefit the family, clan, and tribe.

Mt. Taylor (Tsodzil) sits to the South. This mountain is represented in turquoise and continues the day's journey at mid-day when the sky is blue. This direction also represents the Summer Season, and the beautiful shine of the Turquoise stone. In the Navajo thought process, the south mountain is where Nahat'a (planning) begins. Prior thoughts lead to a plan of action; acting on behalf of a project that will benefit the family, clan, and tribe.

Establishing A Business on the Navajo Nation

NAHATA FOUNDATION, INC.

You Dream It...

We'll help build it!

1. Discovering a Business Niche: Products and Services

2. Understanding the Navajo Nation Market: Data Sources

3. Navajo Nation Business Regulatory and Corporation Code: Establishing a form of Navajo Nation Business

4. Maintaining a Navajo Nation Business

5. Maintaining a Navajo Nation Business Person

BUILDING COMMUNITIES BC ECONOMIC DEVELOPMENT

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Product Based Business

Products are tangible items that a company offers to consumers. These may be items that a potential customers wants to acquire or consume. Examples of products include:

- Food and Drinks
- Clothing
- Cars
- Houses
- Toys
- Electronics
- Firewood/Coal
- Jewelry/Navajo Crafts

SERVICE BASED BUSINESSES

Services are intangible items that a company might offer to consumers. These are often experiences that benefit the customer through the output labor of at least one other individual. When someone preforms a service for another person, they may preform a job or handle a task. Pricing for services varies drastically depending on the type of service, the skill level of the person or people offering it and the demand for the service. Examples of services include:

1. **Healthcare**
2. **Home Repairs & Cleaning**
3. **Automotive Repairs & Detailing**
4. **Personal Care**
5. **Creative Services**
6. **Professional Services**

Middle Man Services (Consulting)

Hard Skills vs. Soft Skills

Hard Skills

- Bilingual or multilingual
- Database management
- Adobe software suite
- Network security
- SEO/SEM marketing
- Statistical analysis
- Data mining
- Mobile development
- User interface design
- Marketing campaign management
- Storage systems and management
- Programming languages

(such as Perl, Python, Java, and Ruby)

Soft Skills

- Integrity
- Dependability
- Effective communication
- Open-mindedness
- Teamwork
- Creativity
- Problem-solving
- Critical thinking
- Adaptability
- Organization
- Willingness to learn
- Empathy

Hard skills are technical knowledge or training that you have gained through any life experience, including in your career or education.

Soft skills are personal habits and traits that shape how you work, on your own and with others.

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept
(928) 871-7365
871-6714
Fax: (928) 871-7381
Website: www.navajobusiness.com

NAVAJO NATION CORPORATION CODE

APPLICATION FOR CERTIFICATE OF AUTHORITY

____
Exact Corporate Name (hereinafter "the Corporation")

TO: NAVAJO NATION
BUSINESS REGULATORY DEPARTMENT
DIVISION OF ECONOMIC DEVELOPMENT
P.O. Box 663
Window Rock, Arizona 86515

PURSUANT TO THE PROVISIONS OF THE NAVAJO NATION CORPORATION CODE, THE UNDERSIGNED CORPORATION HEREBY APPLIES FOR AUTHORITY TO TRANSACT BUSINESS IN THE NAVAJO NATION.

I. This application is: (Please check the applicable blank)

_____(1) An original application for Certificate of Authority pursuant to the Navajo Nation Corporation Code.

_____(2) An application for new authority resulting from:

_____(a) A change in the Corporation's name;
_____(b) A desire to pursue in this jurisdiction different or additional purposes than those set forth in the Corporation's prior Application for Authority as more fully described in the eighth paragraph herein.

_____(3) An amendment to the original application for a Certificate of Authority filed by this corporation based on changes in the information stated in paragraph(s)_________________.

II. The Name of the Corporation is: ____
____.

If the name of the Corporation does not contain the word "association", "bank", "corporation", "company", "incorporated" or "limited" or does not contain an abbreviation of one of such words, then the name of the Corporation with the word or abbreviation which it elects to add thereto for use in the Navajo Nation is:
____ .

Federal Employer ID Number (FEIN): ____.

III. The Corporation's fiscal year ends:____.

IV. It is incorporated under the laws of ____.

V. (1) The date of its incorporation is ____.

(2) The duration, if not perpetual, is ____________________________________.

VI. The address of its principal office in the jurisdiction in which it is incorporated is:

____

____

VII. The address of the proposed known place of business in Navajo Indian Country is:

____

____

VIII. The name and street address of the proposed registered agent within Navajo Indian Country is:

____

____

IX. A brief statement of the character of the business, which the corporation initially intends to conduct in Navajo Nation and the purpose for which the Corporation is organized, is:

____

____

____

____

and the transaction of all lawful business for which corporations may be incorporated under the Navajo Nation Corporation Code.

X. The names and respective addresses of the Corporation's directors and principal officers are (attach separate sheet if necessary):

____

____

____

____

____

____

____

____

IF ORGANIZED AS A NON-PROFIT CORPORATION, DISREGARD PARAGRAPHS XI, XII AND XIII:

XI. The aggregate number or shares which it is authorized to issue, itemized by class, par value of shares, shares without par value, and series, if any, within a class is:

Number of Shares	Class	Series	Par Value Per Share or Statement That Shares are Without Par Value

XII. The aggregate number of its issued shares, itemized by class, par value of shares, shares without par value, and series, if any, within a class is:

Number of Shares	Class	Series	Par Value Per Share Statement That Shares are Without Par Value

XIII. The amount of its stated capital, as defined in the Navajo Nation Corporation Code (Section 3102) is: $_________________________.

XIV. This application shall be accompanied by certified copies of the Corporation's Articles of Incorporation and all amendments thereto, duly authenticated by the proper officer of the jurisdiction under the laws of which it is incorporated.

XV. Has any person(s): (a) serving either by election or appointment as an officer, director, trustee, or incorporator of the Corporation, or (b) a shareholder controlling or holding 20% or more of the proprietary, beneficial or membership interest in the Corporation, served in any such capacity or held any such interest in any corporation which has been placed in bankruptcy or receivership or had its charter revoked? YES______; NO______.

If your answer to the above question is "YES", the applicant must attach the following information for each such corporation:

1. Name and address of the corporation.
2. Full name, including alias(es) and address(es) of each person(s) involved.
3. State(s) in which the corporation:
   (a) Was incorporated,
   (b) Has transacted business.
4. Dates of corporate operation.
5. A description of the bankruptcy, receivership or charter revocation, including the date, the court or agency involved, and the file or cause number of the case.

XVI. Under penalties of Navajo Nation law, I, ____________________ declare that I am authorized to execute this Application on behalf of the Corporation, that I have examined this application and have made reasonable efforts to verify the accuracy of the information contained herein, and I am informed and believe and thereon state that the information contained herein is true, correct and complete.

____
(CORPORATE NAME)

By:____________________________________
President

By:____________________________________
Secretary

ACKNOWLEDGEMENT:

STATE OF __________________________)
)
COUNTY OF_________________________)

The foregoing instrument was acknowledged before me this _____ day of _________________, _______.

____
(Notary Public)

My Commission Expires:___________________

ACKNOWLEDGEMENT OF THE REGISTERED AGENT

I, _________________________, having been designated to act as Registered Agent, hereby consent to act in that capacity until removed or until a resignation is submitted in accordance with the Navajo Nation Corporation Act.

____
(Signature of Registered Agent)

____

____

____
(Address of Registered Agent) Mailing address; And the address must be an exact street address. If there is no street address, a map must be included on exact location of Registered Agent.

STATE OF _____________________)

COUNTY OF ___________________)

The foregoing instrument was acknowledged before me this ______ day of ________________, _________.

____
(Notary Public)

My Commission Expires: ______________

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept
(928) 871-7365
871-6714
Fax: (928) 871-7381
Website: www.navajobusiness.com

NAVAJO NATION CORPORATION CODE

INFORMATION ON INCORPORATING A CLOSE CORPORATION (NNCC, CHAPTER 19)

A Corporation is formed in the Navajo Nation by filing Articles of Incorporation in duplicate originals, with this office, together with the appropriate filing fee. The following information may be of assistance to you.

YOU SHOULD NOT RELY SOLELY ON THIS INFORMATION SHEET. YOU SHOULD CONSULT LEGAL COUNSEL. SPECIAL REQUIREMENTS MAY APPLY TO THE TYPE OF CORPORATION YOU WISH TO ORGANIZE. FORMING A CORPORATION WILL HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES FOR YOU, WHICH SHOULD BE CAREFULLY CONSIDERED. THE INFORMATION PROVIDED HERE DOES NOT COVER THE COMPLEX LEGAL CONSEQUENCES OF OPERATING YOUR BUSINESS AS A CORPORATION. ONLY AFTER CONSULTATION WITH A KNOWLEDGEABLE ATTORNEY, ADVOCATE AND/OR ACCOUNTANT, WILL YOU BE ABLE TO DETERMINE IF A CORPORATION IS APPROPRIATE FOR YOU.

Upon filing of the Articles of Incorporation that must be in compliance with all applicable Navajo Nation laws, the Department will issue a Certificate of Incorporation.

1. The Articles of Incorporation of a close corporation must include the information contained in the sample Articles of the next page.

2. Pursuant to Section 3204 of the Corporation Code, the Articles of Incorporation may include a variety of optional provisions.

3. Duplicate originals must be filed - one typed original and one photocopy will suffice, so long as both contain original signatures.

4. In addition to the duplicate Articles of Incorporation, a filing fee of $10.00 by money order or business check payable to Navajo Nation Business Regulatory Department must be submitted with the Articles.

Other types of corporations allowed under the code (domestic profit corporations, foreign corporations, nonprofit corporations, and agricultural cooperatives) have different requirements. Separate information sheets are available for these types of corporations.

THIS INFORMATION SHEET IS SUPERSEDED BY THE CORPORATION CODE AND ANY APPROVED IMPLEMENTING REGULATIONS, TO THE EXTENT THEY ARE INCONSISTENT HEREWITH. AGAIN, IT IS ESSENTIAL THAT YOU CONSULT LEGAL COUNSEL.

The following format is generally used for Articles of Incorporation. The information in brackets indicates what should be included in each Article. The Articles need not appear in the order in which they appear here. The Articles should be drafted in complete sentences, for example:

ARTICLE I

The name of the Corporation is XYZ Corporation.

The Corporation Code sections referred to in this form contain relevant information in each of the Articles of Incorporation.

****

ARTICLES OF INCORPORATION

OF

________________________________ Close Corporation

The undersigned natural person(s), acting as incorporator(s) of a corporation under the Navajo Nation Corporation Code, hereby adopt(s) the following Articles of Incorporation for such Corporation.

ARTICLE I

[The name of the corporation, which must contain the words "Close Corporation" or an abbreviation therefor. (Chapter 19, Section 3203(a)(1), Chapter 19, Section 3105); and Federal Employer ID Number (FEIN)]

ARTICLE II

[The name and address of the manager or managers of the corporation. (Chapter 19, Section 3203 (a)(2), 3205)]

ARTICLE III

[The names, addresses and amount of initial contribution of capital units of each of the original investors. The number of original investors may not exceed thirty (30). (Chapter 19, Sections 3203(a)(3), 3209, 3210)]

ARTICLE IV

[The aggregate amount in dollars of the initial capital units is paid to the corporation. (Chapter 19, Section 3203(a)(4))]

ARTICLE V

[The name and address of the corporation's initial registered agent. (Chapter 19, Section 3203(a)(5)). By regulation, the address must be an exact street address, or if none is available, a map must be included.]

ARTICLE VI

[A provision stating that the corporation will agree to abide by all criminal, civil and regulatory laws of the Navajo Nation. (Chapter 19, Section 3107 (a)(10))]

ARTICLE VII

[Optional provisions which may be included are listed in Chapter 19, Section 3204. Other provisions, consistent with law may be included per Chapter 19, Section 3107(a)(6).]

____
(Incorporator)

____
(Incorporator)

ACKNOWLEDGMENT OF THE REGISTERED AGENT

I. ________________________, having been designated to act as Registered Agent, hereby consent to act in that capacity until a resignation is submitted in accordance with the Navajo Nation Corporation Act.

____
(Signature of Registered Agent)

____
(Mailing Address of Registered Agent

____
The address must be an exact street address. If there is no street address, a map must be included on exact location of Registered Agent. See Reg. § 1.1.2(B).)

STATE OF ______________________)
)SS
COUNTY OF___________________)

The foregoing instrument was acknowledged before me this ___________ day of ____________________, _______.

____
(Notary Public)

My Commission Expires: ____________________

"Attachment A"

SELECTED PROVISIONS OF NNCC FOR CLOSE CORPORATIONS

3203. MANDATORY PROVISIONS OF ARTICLES OF INCORPORATION

(a) The Articles of Incorporation of a close corporation shall set forth:

(1) The name of the corporation which shall contain the words "close corporation" or an abbreviation therefor;
(2) The name and address of the manager or managers of the corporation;
(3) The names, addresses and amount of initial contribution of capital units of each of the original investors. The number of original investors shall not exceed thirty (30);
(4) The aggregate amount in dollars of the initial capital units to be paid to the corporation; and
(5) The name and address of the corporation's initial registered agent.

(b) It shall not be necessary to set forth in the Articles of Incorporation any corporate powers or any corporate purposes.

3219. APPLICATION OF GENERAL CORPORATION LAW

Close corporations organized pursuant to this chapter are subject to the provisions of Chapter 1 except insofar as this chapter modifies or differs from such provisions, in which case this chapter prevails. This chapter shall be applicable to all close corporations except as otherwise provided. This chapter shall be construed to simplify the management, structure and operations of close corporations.

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept
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871-6714
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Website: www.navajobusiness.com

NAVAJO NATION CORPORATION CODE

INFORMATION ON INCORPORATING A DOMESTIC FOR PROFIT CORPORATION (NNCC, CHAPTER 19)

A Corporation is formed on the Navajo Nation by filing Articles of Incorporation in duplicate originals, with this office, together with the appropriate filing fee. The following information may be of assistance to you.

YOU SHOULD NOT RELY SOLELY ON THIS INFORMATION SHEET. YOU SHOULD CONSULT LEGAL COUNSEL. SPECIAL REQUIREMENTS MAY APPLY TO THE TYPE OF CORPORATION YOU WISH TO ORGANIZE. FORMING A CORPORATION WILL HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES FOR YOU, WHICH SHOULD BE CAREFULLY CONSIDERED. THE INFORMATION PROVIDED HERE DOES NOT COVER THE COMPLEX LEGAL CONSEQUENCES OF OPERATING YOUR BUSINESS AS A CORPORATION. ONLY AFTER CONSULTATION WITH A KNOWLEDGEABLE ATTORNEY, ADVOCATE AND/OR ACCOUNTANT, WILL YOU BE ABLE TO DETERMINE IF A CORPORATION IS APPROPRIATE FOR YOU.

Upon filing of the Articles of Incorporation that must be in compliance with all applicable Navajo Nation laws, the Department will issue a Certificate of Incorporation.

1. The Articles of Incorporation must include what is contained in the sample Articles of Incorporation on the next page.

2. The Articles of Incorporation may include additional provisions governing the corporation so long as they are consistent with the corporation code and other applicable laws.

3. Duplicate originals must be filed - one typed original and one photocopy will be sufficient, <u>so long as both</u> contain original signatures.

4. In addition to the duplicate Articles of Incorporation, a filing fee of $10.00 by money order or business check payable to the Navajo Nation Business Regulatory Department must be remitted with the Articles.

Other types of corporations allowed under the code (foreign corporations, close corporations, nonprofit corporations, and agricultural cooperatives) have different requirements. Separate information sheets are available for these types of corporations.

THIS INFORMATION SHEET IS SUPERSEDED BY THE CORPORATION CODE AND ANY APPROVED IMPLEMENTING REGULATIONS, TO THE EXTENT THEY ARE INCONSISTENT HEREWITH. AGAIN, IT IS ESSENTIAL THAT YOU CONSULT LEGAL COUNSEL.

The following format is generally used for Articles of Incorporation. The information in brackets indicates what should be included in each Article. The Articles need not appear in the order in which they appear here. The Articles should be drafted in complete sentences, for example:

ARTICLE I

The name of the Corporation is XYZ Corporation.

The Corporation Code sections referred to in this form contain relevant information in each of the Articles of Incorporation.

****

ARTICLE OF INCORPORATION

ARTICLES OF INCORPORATION
OF

____

The undersigned natural person(s), acting as incorporator(s) of a corporation under the Navajo Nation Corporation Code, hereby adopt(s) the following Articles of Incorporation for such Corporation.

ARTICLE I

[Name of Corporation. (See Chapter 19, Sections 3105, 3107 (A)(1))]

[Federal Employer ID Number (FEIN)]

ARTICLE II

[The period of duration, which may be perpetual. (Chapter 19, Section 3107 (A)(2))]

ARTICLE III

[The purpose or purposes for which the corporation is organized. (Chapter 19, Section 3107 (A)(3))]

ARTICLE IV

[A brief statement of the character of the business which the corporation initially intends to conduct. (Chapter 19, Section 3107 (A)(4))]

ARTICLE V

[The class and aggregate number of shares which the corporation shall have the authority to issue and the par value of each of said shares, or a statement that all of said shares are without par value. (Chapter 19, Section 3107 (A)(5))]

ARTICLE VI

[Any provision(s), not inconsistent with the law, which the incorporators elect to set forth in the Articles of Incorporation for the regulation of the internal affairs of the corporation. (Chapter 19, Section 3107 (A)(6))]

ARTICLE VII

[The address, including street and number, if any, of its principal office, and the name of its initial registered agent at such address. (Chapter 19, Section 3107 (A)(7)). If the principal office is outside Navajo Indian Country, a registered agent within Navajo Indian Country must be named (Reg. § 1.1.2(7)).]

ARTICLE VIII

[The number of directors constituting the initial board of directors and the names and addresses, including street and number, if any of the persons who are to serve as directors until the first annual meeting of the shareholders; or until their successors are elected and qualified. The minimum number of directors constituting the initial board shall be one. (Chapter 19, Section 3107 (A)(8))]

ARTICLE IX

[The name and address, including street and number, if any, of each incorporator. (Chapter 19, Section 3107 (A)(9))]

ARTICLE X

[A provision stating that the corporation will agree to abide by all criminal, civil and regulatory laws of the Navajo Nation. (Chapter 19, Section 3107 (A)(10))]

____
(Incorporator)

____
(Incorporator)

ACKNOWLEDGMENT OF THE REGISTERED AGENT

I.___________________________, having been designed to act as Registered Agent, hereby consent to act in that capacity until removed or until a resignation is submitted in accordance with the Navajo Nation Corporation Act.

____
(Signature of Registered Agent)

____
Mailing Address of Registered Agent

____
Street Address of Registered Agent -
Mailing Address and exact street address. If there is no street address, a map must be included on exact location of Registered Agent. See Reg. § 1.1.2(B).)

STATE OF _____________________)
) SS
COUNTY OF ___________________)

The foregoing instrument was acknowledged before me this _________ day of ____________________, ________.

____
(Notary Public)

My Commission Expires: __________________

"Attachment A"

3107. CONTENTS OF ARTICLES OF INCORPORATION

(A) The Articles of Incorporation shall set forth:

(1) The name of the Corporation;
(2) The period of duration, which may be perpetual;
(3) The purpose or purposes for which the corporation is organized;
(4) A brief statement of the character of the business which the corporation initially intends to conduct;
(5) The class and aggregate number of shares which the corporation shall have the authority to issue and the par value of each of said shares, or a statement that all of said shares are without par value;
(6) Any provision, not inconsistent with law, which the incorporators elect to set forth in the Articles of Incorporation for the regulation of the internal affairs of the corporation;
(7) The address, including street and number, if any, of its principal office, and the name of its initial registered agent at such address;
(8) The number of directors constituting the initial board of directors and the names and addresses, including street and number, if any, of the persons who are to serve as directors until the first annual meeting of shareholders; or until their successors are elected and qualified. The minimum number of directors constituting the initial board shall be one (1).
(9) The name and address, including street and number, if any, of each incorporator; and
(10) A provision stating that the corporation will agree to abide by all criminal, civil and regulatory laws of the Navajo Nation.

(B) It shall not be necessary to set forth in the Articles of Incorporation any of the corporate powers enumerated in this chapter. Whenever a provision of the Articles of Incorporation is inconsistent with a bylaw, the provision of the Articles of Incorporation shall be controlling.

(C) The Articles of Incorporation may provide for arbitration of any deadlock or dispute involving the internal affairs of the corporation.

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept
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871-6714
Fax: (928) 871-7381
Website: www.navajobusiness.com

NAVAJO NATION CORPORATION CODE

INFORMATION ON INCORPORATING A NONPROFIT CORPORATION (NNCC, CHAPTER 19)

A Corporation is formed on the Navajo Nation by filing Articles of Incorporation in DUPLICATE ORIGINALS, with this office, together with the appropriate filing fee. The following information may be of assistance to you.

YOU SHOULD NOT RELY SOLELY ON THIS INFORMATION SHEET. YOU SHOULD CONSULT LEGAL COUNSEL. SPECIAL REQUIREMENTS MAY APPLY TO THE TYPE OF CORPORATION YOU WISH TO ORGANIZE. FORMING A CORPORATION WILL HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES FOR YOU, WHICH SHOULD BE CAREFULLY CONSIDERED. THE INFORMATION PROVIDED HERE DOES NOT COVER THE COMPLEX LEGAL CONSEQUENCES OF OPERATING YOUR BUSINESS AS A CORPORATION. ONLY AFTER CONSULTATION WITH A KNOWLEDGEABLE ATTORNEY, ADVOCATE AND/OR ACCOUNTANT, WILL YOU BE ABLE TO DETERMINE IF A CORPORATION IS APPROPRIATE FOR YOU.

Upon filing of the Articles of Incorporation that must be in compliance with all applicable Navajo Nation laws, the Department will issue a Certificate of Incorporation.

1. The Articles of Incorporation of a nonprofit corporation must include the information contained in the sample Articles of Incorporation on the next page.

2. The Articles of Incorporation may include other provisions so long as they are consistent with the Corporation Code and other laws.

3. Duplicate originals must be filed - one typed original and one photocopy will suffice, <u>so long as both</u> contain original signatures.

4. In addition to the duplicate Articles of Incorporation, a filing fee of $10.00 by money order or business check payable to the Navajo Nation Business Regulatory Department must be remitted with the Articles.

Other types of corporations allowed under the code (domestic profit corporations, foreign corporations, close corporations, and agricultural cooperatives) have different requirements. Separate information sheets are available for these types of corporations.

THIS INFORMATION SHEET IS SUPERSEDED BY THE CORPORATION CODE AND ANY APPROVED IMPLEMENTING REGULATIONS, TO THE EXTENT THEY ARE INCONSISTENT HEREWITH. AGAIN, IT IS ESSENTIAL THAT YOU CONSULT LEGAL COUNSEL.

The following format is generally used for Articles of Incorporation. The information in brackets indicates what should be included in each Article. The Articles need not appear in the order in which they appear here. The Articles should be drafted in complete sentences, for example:

ARTICLE I

The name of the Corporation is XYZ Corporation.

The Corporation Code sections referred to in this form contain relevant information in each of the Articles of Incorporation.

****

ARTICLES OF INCORPORATION

OF

____

The undersigned natural person(s), acting as incorporator(s) of a corporation under the Navajo Nation Corporation Code, hereby adopt(s) the following Articles of Incorporation for such corporation.

ARTICLE I

[Name of corporation. (Sections 3323(a)(1); 3105,)]
[Federal Employer ID Number FEIN)]

ARTICLE II

[The period of duration, if less than perpetual. (Section 3323(a)(2))]

ARTICLE III

[The purpose or purposes for which the corporation is organized, which may be stated to include conducting any or all lawful affairs for which corporation may be incorporated of nonprofit organizations. (Section 3323(a)(3))]

ARTICLE IV

[A brief statement of the character of affairs which the corporation initially intends to actually conduct in the Navajo Nation. Such statement shall not limit the character of affairs which the corporation ultimately conducts. (Section 3323(a)(4))]

ARTICLE V

[The name and address of its initial Registered Agent. (Section 3323(a)(5)). By regulation, the address must be an exact street address, or if none is available, a map must be included.]

ARTICLE VI

[The number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual election of directors or until their successors are elected and qualified. (Section 3323(a)(6))];.

ARTICLE VII

[The name and address of each incorporator. (Section 3323(a)(7))]

ARTICLE VIII

[Any other provisions consistent with the law which the incorporators elect to set forth. (Section 3323(a)(8))]

ARTICLE IX

[A provision stating that the corporation will agree to abide by all criminal, civil and regulatory laws of the Navajo Nation. (Sections 3332, 3107(a)(10)).]

____
(Incorporator)

____
(Incorporator)

ACKNOWLEDGMENT OF THE REGISTERED AGENT

I.______________________________, having been designated to act as Registered Agent, hereby consent to act in that capacity until removed or until a resignation is submitted in accordance with the Navajo Nation Corporation Code.

____
(Signature of Registered Agent)

____
Mailing Address of Registered Agent

____
Street Address of Registered Agent - Mailing Address and the exact street address. If there is no street address, a map must be included on exact location of Registered Agent.)

STATE OF ____________________)

COUNTY OF __________________)

The foregoing instrument was acknowledged before me this _______ day of _________________, _______.

____
(Notary Public)

My Commission Expires: _________________

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept.
(928) 871-7365
871-6714
Fax: (928) 871-7381
Website: www.navajobusiness.com

NAVAJO NATION CORPORATION CODE

INFORMATION ON INCORPORATING AGRICULTURAL COOPERATIVES (NNCC, CHAPTER 19)

An Agricultural Cooperative is formed on the Navajo Nation by filing Articles of Incorporation in DUPLICATE ORIGINALS, with this office, together with the appropriate filing fee of $10.00. The following information may be of assistance to you.

YOU SHOULD NOT RELY SOLELY ON THIS INFORMATION SHEET. YOU SHOULD CONSULT LEGAL COUNSEL. SPECIAL REQUIREMENTS MAY APPLY TO THE TYPE OF CORPORATION YOU WISH TO ORGANIZE. FORMING A CORPORATION WILL HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES FOR YOU, WHICH SHOULD BE CAREFULLY CONSIDERED. THE INFORMATION PROVIDED HERE DOES NOT COVER THE COMPLEX LEGAL CONSEQUENCES OF OPERATING YOUR BUSINESS AS A CORPORATION. ONLY AFTER CONSULTATION WITH A KNOWLEDGEABLE ATTORNEY, ADVOCATE AND/OR ACCOUNTANT, WILL YOU BE ABLE TO DETERMINE IF A CORPORATION IS APPROPRIATE FOR YOU.

Upon filing of the Articles of Incorporation that must be in compliance with all applicable Navajo Nation laws, the Department will issue a Certificate of Incorporation.

1. The Articles of Incorporation of an agricultural cooperative must include the information contained in the sample Articles of Incorporation on the next page.

2. The Articles of Incorporation may contain other provisions so long as they are consistent with the Corporation Code and other applicable laws.

3. Duplicate originals must be filed - one typed original and one photocopy will be sufficed, so long as both contain original signatures.

4. In addition a filing fee of $10.00 in check payable to the Navajo Nation Business Regulatory Department must be remitted with the Articles.

Other types of corporations allowed under the code (foreign corporations, close corporations, and nonprofit corporations, domestic profit corporations,) have different requirements. Separate information sheets are available for these types of corporations.

THIS INFORMATION SHEET IS SUPERSEDED BY THE CORPORATION AND ANY APPROVED IMPLEMENTING REGULATIONS, TO THE EXTENT THEY ARE INCONSISTENT HEREWITH. AGAIN, IT IS ESSENTIAL THAT YOU CONSULT LEGAL COUNSEL.

The following format is generally used for Articles of Incorporation. The information in brackets indicates what should be included in each Article. The Articles need not appear in the order in which they appear here. The Articles should be drafted in complete sentences, for example:

****

ARTICLES OF INCORPORATION

OF

____

The undersigned natural person(s), acting as incorporator(s) of an agricultural association under the Navajo Nation Corporation Act, hereby adopt(s) the following Articles of Incorporation for such association:

ARTICLE I

[The name of the association. (Sections 3408(a), 3105)]

[Federal Employee ID Number (FEIN)]

ARTICLE II

[The purpose for which it is formed. (Section 3408(b))]

ARTICLE III

[The place where its principal business will be transacted. (Section 3408(c))]

ARTICLE IV

[The term for which it is to exist, which may be perpetual. (Section 3408(d)).]

ARTICLE V

[The number of directors thereof, which must not be less than five (5) and may be any number in excess thereof, and the term of office of such directors. (Section 3408(e))]

ARTICLE VI

[The provisions governing members' ownership rights and interests if the association is organized without capital stock (Section 3408(f)) or with capital stock (Section 3408(g))]

ARTICLE VII

[The association's initial Registered Agent including his or her mailing address and the exact street address or, if necessary, a map (Section 3152)]

ARTICLE VIII

[Other provisions consistent with law. (Section 3107(a)(6))]

ARTICLE IX

[A provision stating that the corporation will agree to abide by all criminals, civil and regulatory laws of the Navajo Nation. (Sections 3197(a)(10)).]

____
(Incorporator)

____
(Incorporator)

ACKNOWLEDGMENT OF THE REGISTERED AGENT

I.______________________________, having been designated to act as Registered Agent, hereby consent to act in that capacity until removed or until a resignation is submitted in accordance with the Navajo Nation Corporation Act.

____
(Signature of Registered Agent)

____
Mailing Address

____
(Address of Registered Agent –The address must be an exact street address. If there is no street address, a map must be included on exact location of Registered Agent. Reg. § 1.1.2(c).)

STATE OF ____________________)
)
COUNTY OF __________________)

The foregoing instrument was acknowledged before me this _______ day of __________________, _______.

____
(Notary Public)

My Commission Expires: _________________

ATTACHMENT "A"

SELECTED PROVISION OF NNCA FOR AGRICULTURAL COOPERATIVES

3408. ARTICLES OF INCORPORATION

Each association formed under this chapter must prepare and file Articles of Incorporation, setting forth:

(a) The name of the association;
(b) The purpose for which it is formed;
(c) The place where its principal business will be transacted;
(d) The term for which it is to exist, which may be perpetual;
(e) The number of directors thereof, which must not be less then five (5) and may be any number in excess thereof, and the term of office of such directors;
(f) If organized without capital stock, whether the property rights and interests of each member shall be equal or unequal; and if unequal, the property rights and interests of each member shall be set forth the general rule or rules applicable to all members by which the property rights and interest, respectively, of each member may and shall be determined and fixed; and the association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision of the Articles of Incorporation shall not be altered, amended or repealed except by the written consent or the vote of three-fourths of the members; and
(g) If organized with capital stock, the amount of such capital stock and the number of shares into which it is divided into preferred and common stock. If so divided, the Articles of Incorporation must contain a statement of the number of shares of stock to which preference is granted and the nature and extent of the preferences and privileges granted to each. The incorporators must sign and file in duplicate the articles in accordance with the provisions of the general nonprofit corporation law of the Navajo Nation; and when so filed the said Articles of Incorporation, or certified copies thereof, shall be received in the courts, and other places, as prima facie evidence of the facts contained therein, and of the incorporation of such association. No part of such capital stock shall be required to be subscribed and/or paid in as a prerequisite to the filing of such Articles of Incorporation; provided further that such associations may, from time to time, sell and issue to their member or stockholders, shares of capital stock in such manner as provided in the bylaws.

3425. APPLICATION OF GENERAL CORPORATION LAW

The provision of the general corporation laws of the Navajo Nation, and all powers, rights and duties thereunder shall apply to associations organized hereunder except when in conflict with the provisions of this chapter. Provided however, that any cooperative marketing association incorporated under the laws of the Navajo Nation may apply for and be granted a permit to do business as a foreign corporation under laws organized for a similar purpose. Provided further, that such foreign cooperative marketing associations shall not be required to have a paid-up capital or any portion of the capital paid-up in order to be entitled to such permit.

3107. <u>CONTENTS OF ARTICLES OF INCORPORATION</u>

(a) The Articles of Incorporation shall set forth:

(1) The name of the Corporation;
(2) The period of duration, which may be perpetual;
(3) The purpose or purposes for which the corporation is organized;
(4) A brief statement of the character of the business which the corporation initially intends to conduct;
(5) The class and aggregate number of shares which the corporation shall have the authority to issue and the par value of each of said shares, or a statement that all of said shares are without par value;
(6) Any provision, not inconsistent with the law, which the incorporators elect to set forth in the Articles of Incorporation for the regulation of the internal affairs of the corporation;
(7) The address, including street and number, if any, of its principal office, and the name of its initial registered agent at such address;
(8) The number of directors constituting the initial board of directors and the names and addresses, including street and number, if any, of the persons who are to serve as directors until the first annual meeting of shareholders; or until their successors are elected and qualified. The minimum number of directors constituting the initial board shall be one (1);
(9) The name and address, including street and number, if any, of each incorporator; and
(10) A provision stating that the corporation will agree to abide by all criminal, civil and regulatory laws of the Navajo Nation.

BUSINESS REQUIREMENTS FOR CERTIFICATION

APPLICATION TYPE:

☐ Application A: Construction Contracting

- ☐ General Contractor Lic.#____________________ Class:____________
- ☐ Special Trades Lic.#____________________
- ☐ Subcontractor

☐ Application B: Professional

- ☐ Supplier
- ☐ Professional Services

DOCUMENTATION:

☐ Proof of EIN or Social Security Number

☐ List of Past Projects/Work

☐ Duties & Responsibilities of Owner(s) or Highest Echelon

☐ Certificate of Indian Blood

PROCUREMENT ITEMS:

YES	NO	
☐	☐	Are you a Veteran?
☐	☐	Do you have a current Navajo Nation Business Site Lease?
☐	☐	Do you have an outstanding loan with the Navajo Nation?
☐	☐	Have you filed your Office of Navajo Tax Commission Form 100? (To complete form, visit: www.tax.navajo-nsn.gov)

UPDATED: 02.13.23

NAVAJO BUSINESS OPPORTUNITY ACT PRIORITY CERTIFICATION

PROFESSIONAL SERVICES
BUSINESS REGULATORY DEPARTMENT DISCLAIMER

The purpose of the Navajo Business Opportunity Act priority certification is to determine if an entity is eligible for priority preference and to allow those certified entities priority preference when submitting bids and/or proposals in the procurement of services and/or goods. Priority certification does not guarantee that the certified entities are deemed responsive and/or responsible to provide the particular services and/or goods required of/by the contract letting entity. Priority certification of an entity is limited to the activities listed as goods and/or services in section G.9.

The Business Regulatory Department, Navajo Nation does not warrant or assume any legal liability or responsibility for the accuracy, completeness, or usefulness of any information disclosed in this application.

_______________By initialing in the space provided, I understand and accept the Business Regulatory Department's Disclaimer Statement.

NAVAJO BUSINESS OPPORTUNITY ACT PRIORITY CERTIFICATION FOR PROFESSIONAL SERVICES

NOTE:
1. *Application must be typewritten or printed legibly.*
2. *Application and all attachments must be originals.*
3. *Any Incomplete application will be returned.*

PART A. GENERAL INFORMATION:

Today's Date: ______________________________

Legal Business Name: ______________________________
Legal Name of Business

Mailing Address: ______________________________
Street or P.O. Box

____
City *State* *Zip*

Principal Place Of Business: ______________________________
Physical Address

____
City *State* *Zip*

Contact Person:
(Owner(S) Or 51% Principals) ______________________________
First/Last

____
First/Last

E-Mail Address: ______________________________
Telephone Number: ______________________________
Cell Number: ______________________________
Fax: ______________________________

Applicant Intends to do business as:

- ☐ Sole Owner/Sole Proprietor ………………………………… Complete Part B
- ☐ Partnership (Limited or Uniform) ………………………… Complete Part C
- ☐ Corporation ………………………………………………… Complete Part D
- ☐ Limited Liability Company ………………………………… Complete Part E
- ☐ Joint Venture ……………………………………………… Complete Part F

All applicants must complete Parts G & H of application.

PART B. SOLE OWNERSHIP/SOLE PROPRIETOR:

B.1. Give the name and address of the SOLE OWNER of the FIRM and indicate whether he/she is Navajo Indian (N), or Other Indian (OI). If Other Indian, list name of Tribe.

	Name and Address	*Social Security # and/or EIN#*	*Enrollment Census No.*	*Status N/OI*
1.	______________	______________	______________	______________
	______________	*Tribal Affiliation:*	______________	
2.	______________	______________	______________	______________
		Tribal Affiliation:	______________	
3.	______________	______________	______________	______________
	______________	*Tribal Affiliation:*	______________	

(PLEASE ATTACH COPY or COPIES OF CERTIFICATE OF INDIAN BLOOD)

If additional space is required, please attach all information on a separate sheet and label as following:

B.1. Continuation
B.2. Attach any documents you may have that establish the ownership of your firm. (i.e., state license, city license, 8a certification)

PART C. **PARTNERSHIP:**
Limited Partnership 5 N.N.C. § 4100; Uniform Partnership 5 N.N.C. § 3800

C.1. In which state is your firm registered? ______________________

Date registered: ______________________

Please attach the Partnership Agreement (Limited) OR Partnership Statement (Uniform) and any amendments thereof, the Certificate of Limited Partnership (Limited) OR Statement of Partnership Authority (Uniform), By-Laws (optional) and Certificate of Good Standing.

C.2. Is the Partnership (Limited or Uniform) registered with the Navajo Nation? Yes ☐ No ☐
If YES, please attach the Partnership Agreement (Limited) OR Partnership Statement (Uniform) and any amendments thereof, the Certificate of Limited Partnership (Limited) OR Statement of Partnership Authority (Uniform), By-Laws (optional) and Certificate of Good Standing. If NO, please note that it is a requirement that a partnership must be registered with the Navajo Nation, 5 N.N.C. § 4100 (Limited) or 5 N.N.C. § 3800 (Uniform).

C.3. Provide the names and addresses of the PARTNERS of this FIRM and indicate whether they are Navajo Indian (N), Other Indian (OI), or Non-Indian (NI) in the spaces below. If Other Indian, list name of Tribe. Attach a copy of Certificate of Indian Blood for all Navajo/Other Indian Partners. To qualify for Priority Certification, firms applying as PARTNERSHIP status must be at least 51% Navajo or Other Indian owned and controlled.

1. ____

Name	*Title*	*Social Security #*	*Enrollment Census #*	*Status (N,OI,NI)*

Address	*Tribal Affiliation*	*% Ownership Control*

2. ____

Name	*Title*	*Social Security #*	*Enrollment Census #*	*Status (N,OI,NI)*

Address	*Tribal Affiliation*	*% Ownership Control*

If additional space is required, please attach all information on a separate sheet and label as following:

C.3. Continuation".
C.4. Required documents include Partnership Agreement.

THE NAVAJO NATION
DIVISION OF ECONOMIC DEVELOPMENT

PART D. **CORPORATION** (5 N.N.C §3100):

D.1. In which state is your firm incorporated? ______________________

Date Incorporated? ______________________

Please attach the Articles of Incorporation and any amendments thereof, the Certificate of Incorporation, By-Laws (optional) and Certificate of Good Standing.

D.2. Is the corporation registered with the Navajo Nation? Yes ☐ No ☐

If YES, please attach the Articles of Incorporation and any amendments thereof, the Certificate of Incorporation, By-Laws (optional) and Certificate of Good Standing. NO, please note that it is a requirement that a corporation must be registered with the Navajo Nation, 5 N.N.C. § 3100.

D.3. List the names and address of all DIRECTORS and OFFICERS of the CORPORATION. *Indicate if they are Navajo or Other Indian. Attach a copy of Certificate of Indian Blood for all Navajo/Other Indian Directors and Officers. To qualify for Priority Certification, 51% or more stocks/shares must be held by Navajos and/or Other Indians.*

Office:	*Name/Address*	*Tribal Affiliation:*	*% Ownership of Stock/Share:*
President			
Vice President			
Secretary			
Treasurer			
Director			
Director			
Director			

D.4. The number of shares/stocks authorized:

Common Stock/Share Issued: ______________

Preferred Stock/Share Issued: ______________

Unissued Stock/Share: ______________

TOTAL STOCK/SHARE AUTHORIZED: ______________

PART E. LIMITED LIABILITY COMPANY (LLC) (5 N.N.C. § 3600):

E.1. In which State is your firm registered? ______________________

Date registered: ______________________

Please attach the Articles of Organization and any amendments thereof, the Operating Agreement, Certificate of Good Standing and/or By-Laws (optional).

E.2. Is the LLC registered with the Navajo Nation? Yes ☐ No ☐

If YES, please attach the Articles of Organization and any amendments thereof, the Operating Agreement, Certificate of Good Standing, and/or By-Laws (optional). If NO, please note that it is a requirement that a LLC must be registered with the Navajo Nation, 5 N.N.C. § 3600.

E.3. List the names and address of all MANAGERS and MEMBERS of the LIMITED LIABILITY COMPANY (LLC).

Indicate if they are Navajo or Other Indian. Attach a copy of Certificate of Indian Blood for all Navajo/Other Indian Managers and Members. To qualify for Priority Certification, 51% or more interests must be held by Navajos and/or Other Indians.

Office:	*Name/Address*	*Tribal Affiliation:*	*% of Interest*
Manager's			
Manager's			
Manager's			
Manager's			
Member's			
Member's			
Member's			

E.4. Is the LLC manager managed OR member managed OR manager-member managed?

____

PART F. JOINT VENTURES:

To qualify for Priority Certification, firms applying as JOINT VENTURE status must be at least 51% Navajo or Other Indian owned and controlled. Attach a copy of Certificate of Indian Blood for all Navajo/Other Indian party.

F.1. Full disclosure is required of all Joint Ventures. Attach a certified copy of the complete Joint Venture Agreement, including any amendments thereof.

F.2. Is the Navajo or Other Indian Party in the Joint Venture currently certified with the Business Regulatory Department? Yes No

If YES, provide the name of the Business and Certification Number:

F.3. Is the Non-Indian Party Registered as a Corporation, Limited Liability Company, Limited Partnership OR Uniform Partnership? Yes No

If YES, complete Part C, D OR E of the Application.

Name of Non-Indian Company: ______________________

Principal Officer: ______________________ *Telephone:* ______________________

Mailing Address: ______________________

F.4. Joint Venture Bonding Capability? Yes No

F.5. Attach notarized Financial Statements for all parties of the Joint Venture which must have been prepared three months prior to application date. This must be similar to the form attached to this application (Exhibit A).

F.6. Monetary allowance for Administration (recording, support staff, office facilities and equipment, etc.) Management:

Managing Party: ______________________ *Monetary Allowance (Percentage):* ______________________

F.7. Monetary allowance for Construction Management:

Managing Party: ______________________ *Monetary Allowance (Percentage):* ______________________

F.8. Attach a list of equipment to be furnished by each Joint Venture party and specify the allowance of the use of the equipment. Specify if the equipment is owned or leased.

THE NAVAJO NATION
DIVISION OF ECONOMIC DEVELOPMENT

PART G. ORGANIZATION INFORMATION
TO BE COMPLETED BY ALL APPLICANTS

G.1. Attach a brief Organizational Chart and indicate all upper level management positions with names, titles, and indicate if Navajo/Other Indian or Non-Indian and describe the functions of the branches of the organization.

G.2. List all Licensed Professional Staff within your organization and indicate if Navajo/Other Indian or Non-Indian:

Name:	*Title:*	*Tribal Affiliation:*

G.3. Employment Breakdown:

Number of Navajo Employees: ____________
Number of Other Indian Employees: ____________
Number of Non-Indian Employees: ____________
TOTAL WORKFORCE: ____________

G.4. Describe your method of recruiting human resources:

G.5. Describe the physical location of your business establishment/s.
i.e.: main office, warehouse/s, and inventory available at the site.

G.6. Attach a list of all projects for the last two (2) years and dollar amounts for each.
Use the attached form or similar form (Exhibit B).

G.7. Has your company ever filed for bankruptcy? *If yes, please explain.* Yes ☐ No ☐

G.8. Describe the type of goods and/or services your firm can provide to projects throughout the Navajo Nation with your own employees and equipment, rather than by subcontract.
NOTE: Priority Certification and Certificate Issuance will be limited to these activities listed as goods and/or services. (60 words or less)

PART H. CERTIFICATION

H.1. By signing below, I certify and attest that all information contained herein is complete, true and correct. I further understand that the Business Regulatory Department, Division of Economic Development must give its approval before this Navajo or Other Indian owned and controlled firm can be considered or accepted as a Certified Priority firm for project(s) within the exterior boundaries of the Navajo Nation.

I FURTHER UNDERSTAND THAT THE CERTIFICATION IS ONLY VALID FOR ONE (1) YEAR.

SIGNATURES OF
OWNERS, PARTNERS, OFFICERS, MEMBERS, MANAGERS OF THE BUSINESS

Date:	*Signature:*	*Title:*

(Exhibit B)

PAST PROJECTS

	PROJECTS	DATE & YEAR	NO. OF EMPLOYEES	OWNER OF PROJECT(S)	LOCATION	COST APPROXIMATE
1				Name: Address: PH.#		
2				Name: Address: PH.#		
3				Name: Address: PH.#		
4				Name: Address: PH.#		
5				Name: Address: PH.#		
6				Name: Address: PH.#		
7				Name: Address: PH.#		
8				Name: Address: PH.#		
9				Name: Address: PH #		

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept
(928) 871-7365
871-6714
Fax: (928) 871-7381

NAVAJO NATION CORPORATION CODE

Fee Schedule - to partially offset the expenses of administering and implementing the Navajo Nation Corporation Code.

All corporations organized or registered in accordance with the Navajo Nation Corporation Code shall remit a fee to process and maintain certain corporate documents on file according to the following fee schedule:

FILING FEE SCHEDULE

1. Filing of Articles of Incorporation.. $10.00
   (Domestic, Foreign or Cooperatives; Profit or Non/Profit)
2. Filing Annual Report $25.00
   (Domestic, Foreign or Cooperatives; Profit or non-Profit)
3. Registered Agent Filings - Change of address and/or $15.00
   Change of R.A; (no fee required for resignation of R/A)
4. Application for Amendment to Articles of Incorporation........... $15.00
5. Application for Articles of Merger... $25.00
6. Application for Articles of Consolidation $25.00
7. Transfer of Assets $25.00
8. Reproduction of Documents ....25 cents/page
9. Application for Reinstatement after Revocation $50.00
10. Certificate of Documents ....*$ 5.00
11. Certificate of Good Standing...$ 5.00
12. Certification of Statements ....$ 5.00
13. Statement of Intent to Dissolve $20.00
    (Domestic Corporation)
14. Application of Withdrawal of Corporation $20.00
    (Foreign Corporation)
15. Resubmission Fee (The Articles of Incorporation and...............$ 5.00
    Application for Certificate of Authority)
16. A Change of Registered Agent through the $15.00/ea
    Amendment Procedure shall constitute two (2) separate transactions.

*plus $.50 per page after five (5) pages.

All fees listed above will be non-refundable. **Money Orders ONLY** no personal checks and make payable to Navajo Nation, Business Regulatory Department. Corporation Filing Office is located in the Karigan Professional Office Complex, St. Michaels, Arizona.

Navajo Nation
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Website: www.navajobusiness.com

NAVAJO NATION CORPORATION CODE

ANNUAL REPORT

____
For Fiscal Year Ending

Pursuant to Navajo Nation Corporation Code, Article X, Section 3175, 3179, and Subchapter 4 Section 3418.

Directions: Answer all questions in each section of this Annual Report and return with your fee payable to:

NAVAJO NATION
Business Regulatory Department
Division of Economic Development
Post Office Box 663
Window Rock, Arizona 86515

A. CORPORATION INFORMATION

File No.:____________
(Office Use Only)

1. Corporation Name
   P.O. Box (if any)
   City, State, Zip Code

2. Federal Employer ID Number (FEIN): ______________________________

3. If Foreign Corporation, principal address in Navajo Indian Country
   (if different from above)

4. Type of Corporation:

5. Name of Navajo Nation Registered Agent (if new, must complete change of Registered Agent Form, include fee)
   Street Address (NOT P.O. BOX - if no street address, include map)

6. Fiscal Year Ends.

B. Brief statement of the character of Business in which the corporation is actually engaged in Navajo Indian Country. ____
____

C. Capitalization: Close Corporation - list capital units (not required for Nonprofit Corporation).

Numbers of Shares	Class	Series	Par Value Per Share or Statement That Shares are Without Par Value	Capital Units

D. Shareholders directions: Fill in name of shareholder of record holding more than 20% of any class of shares issued by the corporation. Including persons beneficially holding such shares through nominees. (If additional space is needed, attach a separate sheet. (IF NONE, SO STATE).

Shareholder Name	Shareholder Name

Shareholder Name	Shareholder Name

E. Foreign Corporation are reminded that any amendments to their Articles of Incorporation or changes of information in their Application for Certificate of Authority require filing of an amended application. (Contact Department for Form.)

F. CLOSE CORPORATION

Name of Manager		Date taking Office:
Street Address		Date term expires
P.O. Box		
City	State	Zip Code

NOTE: <u>ALL CORPORATIONS MUST LIST THEIR OFFICERS AND DIRECTORS</u>. Attach additional sheets if necessary. Dates taking office must be included.

G. OFFICERS	H. DIRECTORS
Name	**Name**
Street Address	Street Address
P.O. Box	P.O. Box
City, State, Zip Code	City, State, Zip Code
Date taking office	Date taking office
Date when term expires	Date when term expires

I. STATEMENT OF FINANCIAL CONDITION

BALANCE SHEET

The following form must be completed. If no business was conducted this fiscal year, then so state, form is required.

ASSETS	AMOUNT	TOTAL
Cash		
Trade notes and accounts receivable		
(a) Less allowance for bad debts		
Inventories		
Government Obligations:		
(a) U.S. and instrumentalities		
(b) State, subdivisions thereof, etc.		
Other current assets		
Loans to shareholders		
Mortgage and Real Estate loans		
Other investments		
Buildings/other fixed depreciable assets		
(a) Less accumulated depreciation		
Depletable assets		
(a) Less accumulated depletion		
Land (net of any amortization)		
Intangible assets (amortizable only)		
(a) Less accumulated amortization		
Other assets		
Total Assets -		
LIABILITIES AND CAPITAL		
Accounts payable		
Mtges.. Notes, bonds payable/1 yr. or less		
Other current liabilities		
Loans from Shareholders		
Mtges.. Notes, bonds payable/1 yr. or more		
Other liabilities		
Total Liabilities -		
Capital Stock: (a) Preferred Stock		
(b) Common Stock		
Paid-in-or capital surplus		
Retained earnings - Appropriated		
Retained earnings - Unappropriated		
Less cost of treasury stock		
Total Capital -		
Total Liabilities and Capital -		

J. AGRICULTURAL COOPERATIVES - per Subchapter 4, Section 3418. Annual Reports are required and should include the following:

1. Name of the Association
2. Principal place of business
3. General statement of its business operations during the fiscal year.
4. The amount of capital stock paid up
5. Number of members and amount of membership fee received.
6. If a non-stock association, the total expenses of operation
7. The amount of its indebtedness/liability, and its balance sheets.

K. Under penalties of Navajo Nation law, I, ______________________________ declare that I am authorized to execute this annual report on behalf of the Corporation, that I have examined this report and have made reasonable efforts to verify the accuracy of the information contained herein, and I am informed and believe thereon state that the information contained herein is true, correct and complete.

By: ____________________________

Title:____________________________

Date:____________________________

By: ____________________________

Title: ____________________________

Date: ____________________________

<u>REMINDER</u>: Form must be signed, a fee of $25.00 payable to Navajo Nation, Business Regulatory Department and the Financial Statement Completed.

Navajo Nation
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(928) 871-7365
871-6714
Fax: (928) 871-7381

NAVAJO NATION CORPORATION CODE

APPLICATION FOR AMENDMENT
TO
ARTICLES OF INCORPORATION

Pursuant to the provisions of Chapter 19, Section 3329, the Navajo Nation Corporation Code, the undersigned Corporation adopts the attached Articles of Amendment to its Articles of Incorporation:

I. The name of the Corporation is:____
____

II. The amendment(s) so adopted by the Board of Directors or voting members are:
____
____
____

III. The date of the adoption of the amendment is:
____

IV. The amendments were duly adopted by act of the members or the Board of Directors: Attach a resolution.
____

Dated :________________

By: ______________________________________
Title: ____________________________________

By: ______________________________________
Title: ____________________________________

NOTE: FOR PROFIT CORPORATIONS, COMPLY WITH ARTICLE VII, SECTIONS 3156 TO 3162, NAVAJO CORPORATION CODE (NO APPLICATION FORM AVAILABLE).

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept
(928) 871-7365
871-6714
Fax: (928) 871-7381

NAVAJO NATION CORPORATION CODE

CHANGE OF REGISTERED AGENT

Exact Name of Corporation: ____

Name and Address of Former Registered Agent:

____

Name and Exact Street Address of New Registered Agent:

____
(Name)

____
(Address)

NOTE: If no street address is available then you must attach a map showing the Registered Agent's exact location:

Date of when change shall take effect:______________________________________

Registered Agent change was authorized by:__________________________________

____
(Change should be authorized by resolution duly adopted by its Board of Directors or should be authorized by an Officer of the Corporation duly empowered to make such change).

ACKNOWLEDGEMENT OF NEW REGISTERED AGENT

I, ____________________, having been designated to act as Registered Agent, hereby consent to act in that capacity until removed or until a resignation is submitted in accordance with the Navajo Corporation Code.

____________________________________ ____________________
(Signature of Registered Agent) (Date)

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NAVAJO NATION CORPORATION CODE

CHANGE OF ADDRESS FOR REGISTERED AGENT

Name of Registered Agent: ____________________

Present address, including street and number of Registered Agent:

Name of the corporation(s) represented at this address:

New address, street and number of Registered Agent. If no street address, must include a map of exact location of Registered Agent's Office:

Date of when change shall take effect: ____________________

This statement shall be executed in duplicate by the Registered Agent, but if Registered Agent is a corporation, domestic or foreign, the statement shall be executed by the Corporation President or Vice-President. And if the Registered Agent represents more than one corporation, he/she must file an additional copy for such additional corporation.

Reminder: Filing fee of $15.00 should be made payable to Navajo Nation Business Regulatory Department.

NOTE: Resignations of Registered Agent, refer to Section 3153(d).

DIVISION OF ECONOMIC DEVELOPMENT
BUSINESS REGULATORY DEPARTMENT

NAVAJO BUSINESS OPPORTUNITY ACT

SOURCE LIST - CERTIFIED NAVAJO BUSINESSES

January 2023

The Navajo Nation Business Opportunity Source List is updated on a monthly basis, pursuant to Navajo Nation Council Resolution CAP-37-02 and the Navajo Nation Business Opportunity Act, Title 5, CH. 2 - Section 201 - 215. This Source List provides a listing of Persons, Firms, Enterprises, Organizations, and/or Other entities currently certified by the Business Regulatory Department as prioritized under Section 204 (A) (1) and (2) of the revised [Navajo Nation Business Opportunity] Act.

Preference Priorities
Section 204 (A)

(1) Priority #1:

Certification shall be granted to any 100% Navajo-owned and controlled business, having its principal place of business on or off the Navajo Nation.

(2) Priority #2:

Certification shall be granted to any 51% to 99% Navajo or 51% to 100% other Indian owned and controlled business or 100% Navajo Nation owned and controlled economic enterprise having its principal place of business on or off the Navajo Nation.

For further information, contact the Navajo Business Regulatory Department at the Division of Economic Development Building in St. Michaels, Arizona or contact by telephone (928) 871-6714. Also available at www.navajobusiness.com or contact me by e-mail: mkcheromiah@navajo-nsn.gov

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
2QT Consulting,LLC P.O. Box 2099 Page, AZ 86040 Phone: (928) 698-3418 Ownership: 51% FAX: None e-mail: 2qtinspectionsaz@gmail.com Contact Person: Calista Tsinnijinnie License No.:	2	10/6/2023	Consulting services, including owner representation, project and construction management services, planning, budget scheduling, construction inspection including steel, wood, masonry, concrete and grading, sub-contacting of professional services ranging from structural, geotechnical, civil, traffic and environmental engineering services.
Arviso Construction Company, Inc. PO Box 441 Ft. Wingate, NM 87316 Phone: (505) 905-5566 Ownership: 100% FAX: (505) 905-5570 e-mail: orville@arviso.com Contact Person: Orville Arviso License No.: NMGB98-53303 AZROC168369/KB01	1	4/16/2023	Earthwork, Roads & Walks, Site Improvements, Concrete, Masonry, Roofing, Doors, Windows, Glass, Drywall, Cabinets, Insulation, Lath & Plaster, Tile Work, Wood/Resilient Flooring, Specialties, Rough/Finish Carpentry, Demolition, Painting & Decorating, Design/Build
Arviso/Okland Construction/JV PO Box 441 Fort Wingate, NM 87316 Phone: (505) 905-5566 Ownership: 51% FAX: (505) 905-5570 e-mail: orville@arviso.com Contact Person: Orville Arviso License No.: NMGB98-34139 NM/GB98-84547	2	8/27/2023	Earthwork, Site Utilities/Improvements, Roads & Walks, Concrete, Masonry, Doors, Drywall, Appliances, Insulation, Tile Work, Acoustical, Flooring, Rough/Finish Carpentry, Demolition, Painting, Special Construction, Construction Management and Design Build
ASTA Roofing & Construction, LLC 1121 West Third Street Winslow, AZ 86047 Phone: (928) 289-1060 Ownership: 100% FAX: (928) 289-1059 e-mail: tim.young@astajv.com Contact Person: Tim Young License No.: AZ/KB1-273725	1	9/19/2023	We are company that specializes in the roofing aspect we apply all types of roofing systems, whether it be; metal, shingles, Duro-last, TPO,Tile.
Benally/Woodruff Construction LLC 2710 E. Lakin Dr. Flagstaff, AZ 87004 Phone: (928) 527-4138 Ownership: 51% FAX: (928) 527-4139 e-mail: Leondo@benally-woodruff.com Contact Person: Leondo Benally License No.: AZ/B1-096809;B-096802;A-263244;	2	6/8/2023	General Contracting, Construction Management, Design/Build Services, Construction Manager at Risk Pre-construction Services, Job Order Contracting, Residential & Commercial Construction, Tenant Improvement/Remodeling, Pre-Engineered Metal Building & Steel Erection, Cost Estimating Value Engineering, Site Improvements, Demolition, General Maintenance, Service Calls, Concrete Work, Rough/Finish Carpentry, Doors, Frames, & Hardware, Glazing, Painting, Drywall & Specialties.
Bitco Corporation 317 Commercial St NE Albuquerque, NM 87102 Phone: (505) 768-1000 Ownership: 100% FAX: (866) 255-0665 e-mail: jbitsui@bitcocorp.com Contact Person: Jeremiah Bitsui License No.: NM/GB98-51819	1	11/22/2023	Design Build Construction, Pre-Engineered Buildings, Modular(Portable & Permanent) Building Systems, Site Development, Site Utility (Civil) Construction, Earth Work (Civil Construction), Commercial Building Construction, Soil Stabilization, Certified DISA soil ablation contractor, Uranium
Blackrock Greenberg, LLC P.O. Box 4094 Tuba City , AZ 86045 Phone: (602) 956-0112 Ownership: 51 % FAX: None e-mail: andrew@blackrockmanagementllc.com Contact Person: Andrew Singer License No.:	2	4/4/2023	COMMERCIAL AND RESIDENTIAL GENERAL CONSTRUCTION, DESIGN-BUILD, AND CONSTRUCTION MANAGER AT RISK SERVICES.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Clawson Excavating, Inc. HC 13 Box 4191, 13375 N West Mountain Road Wales, UT 84667 Phone: (435) 436-8884 Ownership: 100% FAX: None e-mail: clawsonex@cut.net Contact Person: Elizabeth Clawson License No.: UT/GE-E100-99-373001-5501	1	6/27/2023	Water/Sewer Lines, Excavating, Footing, Excavating, Septic tanks; Hauling - Dump Truck Service; Surface Improvements, Basements, and Landscaping
Clear Water Construction Partners, Inc 1164 S. Second St. Gallup, NM 87301 Phone: (505) 722-0551 Ownership: 51% FAX: None e-mail: rwood@npfh.org Contact Person: Rollin Wood, President & CEO License No.:	2	10/3/2023	CWCP is a General Contractor building quality affordable homes in Native communities. CWCP also engages in full scale housing development as well as rehabilitation and renovation of existing homes. CWCP also develops mixed- use projects with multi-family residential, retail and commercial elements for Native communities.
Creative Native Construction PO Box 1442 St. Michaels, AZ 86511 Phone: (928) 380-9845 Ownership: 100% FAX: None e-mail: chrisahasteen@yahoo.com Contact Person: Christopher Ahasteen License No.: ROC-331613	1	5/19/2023	We provide new builds from residential homes, multi-family units, to small commercial (hotels). Renovations are also our specialty from additions to existing structures roof repair, interior and exterior finish, building repairing walls, concrete, and making modifications or reconstructing facilities to be ADA compliant.
Dine Modular Construction, LLC PO Box 1327 Haleyville, AL 35565 Phone: (205) 485-1267 Ownership: 100% FAX: (205) 486-2166 e-mail: sphillips@dineconstruction.com Contact Person: Pam Parrish License No.:	1	7/5/2023	General Contracting, Concrete Construction, Excavating, Modular Building, Prefabricated Buildings, Carpentry, Vertical and Horizontal, Project Management.
Dooley Construction Solutions, LLC 615 Lisbon Ave. SE Rio Rancho, NM 87124 Phone: (505) 506-6822 Ownership: 100% FAX: None e-mail: Contact Person: Anson Dooley License No.: 402843 / GB 98	1	8/4/2023	Construction Management-Concrete Work-Renovations-Maintenance Services- COVID 19- Sanitation services - Water Filtration Services - Engineering and Architectural Design services - Customer Risk Management - Water Testing - Welding Services- COVID 19 Barrier installation - Environmental services.** Other services not listed**
Ed Yazzie Construction, LLC PO Box 281 Rock Point, AZ 86545 Phone: (928) 659-4318 Ownership: 100% FAX: None e-mail: eandc_const@yahoo.com Contact Person: Ed Yazzie License No.: AZ/ROC278014	1	10/20/2023	Provide quality work in the areas of: New Construction & Renovation of Residential Homes. Services include demolition, design work, foundation, concrete, metal/wood framing, rough & finish carpentry, insulation, drywall, tape, texture, paint, roofing, ceramic tile, hardwood floor, acoustical ceiling installation. Other services : Installation of 5' K style Continuous seamless gutter system and Excavator digging for trenches & foundations, etc.
Erickson Kelly Chee dba CheeNorthstar Construction 120 Navajo Drive Winslow, AZ 86047 Phone: (928) 220-8670 Ownership: 100% FAX: None e-mail: eric@cheenorthstar.com Contact Person: Erickson Chee License No.:	1	8/22/2023	Earthmoving, grading, aggregate, site concrete, underground utilities, septic tank, water service install, paving, striping, site work, site preparation, site demolition, storm drain pipe and structure, box culverts, over excavation, building pads, site remediation , and SWPPP install/maintenance.

GENERAL CONTRACTORS

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Four Seasons Construction, LLC PO Box 1018 Ganado , AZ 86505 Phone: (928) 675-0586 Ownership: 100% FAX: (928) 675-0584 e-mail: o_areid@yahoo.com Contact Person: Albert Reid License No.: AZ-284988-KB-1/NM-381678/381677-GB98	1	4/29/2023	Remodeling, New Construction & Buildings,Roofing, Addition, Hogans, Interior & Exterior Renovations, Siding, Finish Carpentry, Framing, Painting, Tiling, Decks, Stucco, Concrete, Taping, Door & Window Installation, soffit, Asphalt, Fencing, Residential & Commercial Renovations, Carpet Tiling, Service Calls, Time & Material work, Turn-Key Projects, Single & Multi Family Homes, Welding Services, Office Renovations, Kitchen & Bathroom Upgrades & etc. Direct Insurance Repair on Mobile Homes; Asbestos Abatement.
H&B Service,LLC 7000 N. 16th Street Suite 120-287 Phoenix, AZ 85020 Phone: (480) 793-8266 Ownership: 100% FAX: None e-mail: Harrison@HBServices-info Contact Person: Harrison Begay License No.: ROC 339612	1	9/11/2023	General Contractor for both Commercial & Residential Construction in Arizona.
Harwood Construction Solutions, LLC 2808 Crescent Avenue Farmington, NM 87401 Phone: (505) 218-5353 Ownership: 100% FAX: None e-mail: Lharwood@harwoodcs.com Contact Person: Luke Harwood License No.:	1	8/30/2023	Construction Management, Estimating, General Contracting, Wood Framing, Concrete, Roofing.
Hogan Homepages PO Box 701 Many Farms, AZ 86538 Phone: (480) 616-3758 Ownership: 100% FAX: None e-mail: hoganhomepages@gmail.com Contact Person: Johnson Nez License No.:	1	3/28/2023	Target small business in the need of websites for their businesses and also within the system on the Navajo Nation. There small school on our nation that need attention and since pandemic started. Begin and end each customer with a contract.
iina' ba', Inc 1812 Schofield Lane Farmington, NM 87401 Phone: (505) 327-1072 Ownership: 100% FAX: (505) 327-1517 e-mail: daspaa@iinaba.com Contact Person: Duane M. Aspaas License No.: NM/GB98-382585	1	7/27/2023	Master Plan Infrastructure, Modular Community Infrastructure, New Facility, Renovation & Restoration, Parking Lot, All Concrete, Utilities, Storm Water Systems, Retaining Wall, Re-vegetation, Site Grading, General Excavation & Backfill, Site Reclamation, Lighting (Solar & Electric)Installation of Parking Lot Stripping, Asphalt & Concrete Recycling, Parking lot Signage, Demolition - Complete Site, General Abatement, General Uranium Clean-up, Lead, Asbestos & Special Waste
Keyah Construction Inc. PO Box 44435 Phoenix, AZ 85064 Phone: (602) 983-5175 Ownership: 100% FAX: (928) 585-1003 e-mail: HYSINGER@KEYAHINC.COM Contact Person: Harry Y. Singer License No.: AZ/B01-ROC182586 AZ/GEN-182585	1	6/28/2023	Design-Build Projects, Construction Management, Contract & Job Administration, Earthwork, Underground Utilities, Road Construction, Heavy Highway Work, Grading Earth moving, Site Development, Concrete, Welding & Fencing, Masonry, Carpentry, Parking Lot Construction, Framing, Gypsum Board & Drywall, Roofing, Renovations, Bldg Improvements & Modifications, Flooring, Misc. Metals, Pavement Markings, Doors & Hardware, Bldg Construction.
M.O.B. Construction, LLC P.O. Box 4079 Window Rock, AZ 86515 Phone: (505) 777-2463 Ownership: 100% FAX: (505) 777-2721 e-mail: mobco13@gmail.com Contact Person: Monty O. Bitloy License No.: NM/GB-98-382303	1	11/14/2023	Commercial & Residential (New & Remodel), Rough/Finish Carpentry, Electrical, Plumbing, HVAC, Drywall, Painting, Windows & Doors Installation, Insulation, Cabinets, Flooring, Fencing, Masonry, Concrete Work, Demolition & Disposal, Roofing, Construction Management & Estimating, Earthwork & Landscaping. Email: mobco13@gmail.com

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Mountain Cove Construction, LLC PO Box 298 Kirtland, NM 87417 Phone: (505) 553-9518 Ownership: 100% FAX: None e-mail: n.henry93@yahoo.com Contact Person: Norman Henry License No.: GB98-89783	1	10/16/2023	New Construction, Residential, Commercial, Remodels, Renovations, Earthwork, Concrete, Framing, Lathe, Stucco, Metal, Roofing, Structural, Demolition, Drywall, Painting, Cabinets, Flooring, Windows and� etc.
Native Paving, LLC P.O. Box 1097 Churchrock, AZ 87311 Phone: (505) 870-8565 Ownership: 100% FAX: None e-mail: nativepavement@yahoo.com Contact Person: Lester Harrison License No.: NM/GA98-376728	1	9/14/2023	Asphalt repair, pot holes, crack sealing, seal coating, striping, paving, concrete curbs, gutters, sidewalks, slabs, landscape gravel, prune trees, shrubs, interior remodel, floors, wall ceilings, plumbing, carpentry, painting, roof repairs.
Navajo Engineering & Construction Authority PO Box 969 Shiprock, NM 87420 Phone: (505) 368-5151 Ownership: 100% FAX: None e-mail: www.navajo.net Contact Person: Brett Grubbs License No.: NM:GA98/GF98/GB98-52289 & AZ: KA Dual Eng/326446,KB1 Dual Bldg/325412	1	9/26/2023	Design/Build Services, CMAR, General Contracting, Pre- Construction Services, Construction Management, Heavy Civil & Infrastructure Construction, Residential & Commercial Building Construction, Earthwork, Site Utilities, Concrete, Steel,Curb & Gutter, Sidewalk,Aggregate Surfacing, Asphaltic Concrete Paving,Steel & Concrete Pipe, Fencing, Water & Sewer, Tank Construction, Steel Water Rehabilitation, Reclamation, Demolition, Retaining Walls, Masonry, Insulation, Acoustical,Flooring, Rough/Finish Carpentry, Doors, Glazing,Drywall, Painting, Roofing,Special & Misc. Construction Items.
NEZ/FCI Native American, LLC 10922 W. Glenn Drive Glendale, AZ 85307 Phone: (623) 772-7400 Ownership: 51% FAX: (623) 877-3300 e-mail: mnez@fciol.com Contact Person: Marvin T. Nez License No.: AZ/GCC72062 B-1; NM/GC033831 B; CA/GC567226 B NV/GC28500; UT/GC245598-5501; WY/02856	2	7/14/2023	Alternative Delivery Methods: Design/Bid/Build, Design-Build, Hard Bid, and CM@Risk; Project Management; Phasing Strategies; Cost Estimating; True Value Engineering; Communications with Owners, Architects & subcontractors; Quality Control; Detailed Safety Plan for users, Staff & Construction Workers; Building Turnover/Training; Warranty Action Plan; Sustainable Building Design; Building Information Modeling
Rainier Construction, LLC PO Box 914 Farmington , NM 87499 Phone: (505)360-3231 Ownership: 100% FAX: ((505)390-8666) - e-mail: andrea@rainier.construction Contact Person: Andrea Yazzie License No.: NM/GB-98- & EE98-391575	1	11/21/2023	COMMERCIAL / RESIDENTIAL BUILDING CONSTRUCTION (New and Renovation), Rainier Construction, LLC, is capable of all phases of construction in General Building. We specialize in framing, metal building ADA modifications, roofing and drywall.
Ralph W. Miller, Inc. PO Box 2156 Farmington, NM 87499 Phone: (505) 325-3609 Ownership: 95% FAX: None e-mail: rwminc@rwminc.net Contact Person: Jennana E. Miller License No.: NM-GF08/09-002736	2	4/3/2023	Site Utilities/Improvements, Lawns & Planting, Pipeline & General Oil Field Construction Contract Oil/Gas Pumping, Oil/Gas Measurement Experience, Automation Installation & Maintenance, Calibration, Painting & Decorating.
Red Sun Builders, Inc. 3300 Iles Ave. Farmington , NM 87402 Phone: (505) 564-2809 Ownership: 100% FAX: (505) 326-6046 e-mail: rsbgary@frontiernet.net Contact Person: Gary R. Begay License No.: AZ/KB01-ROC214888	1	9/27/2023	Earthwork, Structural Concrete, Site Concrete, Grading, Landscaping, Framing, Remodel, Metal Building Erection, Home Construction, and Site Development

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Shiprock Construction Company PO Box 1875 Chinle, AZ 86503 Phone: (928) 674-3171 Ownership: 100% FAX: None e-mail: danielfelix54@gmail.com Contact Person: Dorothy Felix License No.: NM/367070	1	3/6/2023	Concrete, Roofing, Paint, Carpentry, Flooring, Stucco, Drywall, Steel Building, Demolition, Fencing, All Types of Masonry Block Work, Asphalt Pavement Repair, AC Unit Repair & Installation, and Plumbing
Souers Construction Inc. 1500-B Coors Blvd NW Albuquerque, NM 87121 Phone: (505) 836-4917 Ownership: 51% FAX: (505) 247-0733 e-mail: SWILKIE@SOUERS-CONST.COM Contact Person: Steven M. Wilkie License No.: NM/GB98-59718 NM/GB98-CQ071670	2	9/23/2023	Roads/Walks, Concrete, Masonry, Metals, Roofing, Doors, Drywall, Cabinets,Appliance, Waterproofing, Insulation, Sheet Metal, Lath & Plaster, Tile work, Acoustical Flooring, Specialties, HVAC, Rough and Finish Carpentry, Demolition, Painting/Finishes, Plumbing.
Strongbow Strategies, LLC 2418 E. Hwy 66 PMB #544 Gallup, NM 87301 Phone: (202) 294-2987 Ownership: 55% FAX: None e-mail: cpratte@strongbowstrategies.com Contact Person: Clara Pratte License No.:	2	5/23/2023	Company provides responsive, agile and customer focused solutions to enable our government, tribal and commercial clients to meet their management and technical challenges. We provide strategic planning, policy and development advisement, IT solutions, and staff augmentation.
The Sparrow Group, Inc. 2420 Comanche Rd. NE, Suite H-6 Albuquerque, NM 87107 Phone: (505) 814-8083 Ownership: 100% FAX: None e-mail: thesparrowgroupnm.com Contact Person: David Wiegand License No.: NM/GB98-382959	2	7/19/2023	Construction Management, Pre-construction, Estimating, Carpentry, and design/build Services
TJC Construction, LLC 2700 San Pedro Dr. NE Albuquerque, NM 87110 Phone: (505) 314-5501 Ownership: 100% FAX: None e-mail: tchavez@keresnm.com Contact Person: Timothy J. Chavez License No.:	2	12/7/2023	TJC Construction, LLC (TJC) is a residential and commercial renovation and construction company, providing services including foundation, demolition, onsite earth work, excavation, trenching, manonsary, framing, roofing, and interior finishing services to support projects in Indian Country. TJC was established to provide high quality construction services guided by values of integrity, honestly, and responsibility.
WCA Construction, LLC PO Box 17 Towaoc, CO 81334 Phone: (970) 564-4528 Ownership: 100% FAX: None e-mail: jmelvin@wcaconstruction.com Contact Person: James Melvin License No.: 10796366-5501 / B100, E100	2	5/23/2023	WCA typically self performs heavy civi, structural fill and fine grading earthwork. Structural, flatwork and side work Concrete. Wet and dry utility installation. Engineered steel building erection, wood structure framing framing. Bridge erection and construction. Wetlands and river habitat rehabilitation. Custom aggregate crushing screening. Pipeline construction including steel, ductile iron pipe. HDPE. Reinforced concrete box culvert installation.
Zohnnie Construction Industries, Inc. PO Box 748 Farmington, NM 87499 Phone: (505) 860-0077 Ownership: 100% FAX: (505) 326-9177 e-mail: Zohngirl@aol.com Contact Person: Harrietta Zohnnie License No.: NM/GB98-90008	1	8/23/2023	Carpentry, Framing, Finishing/Cemason, Excavation, Form Setting, Landscaping, Drywall & Taper, Trim Work, Metal Building, Concrete, Dirt Hauling, Equipment Operating, Roofing, Labor, Insulating, Ironwork/Rodbusting, Masonry, Painting, Tile, Sheet Metal, Asphalt, Concrete & Gravel Driveway, Welding. Plumbing, Planning, Community Development, Architectural & Engineering Services & Installation.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
4 Directions Home Care P.O. Box 358 Pinon, AZ 86510 Phone: (928) 890-9310 Ownership: 100% FAX: None e-mail: ryansimson900@yahoo.com Contact Person: Ryan Simonson License No.:	1	8/8/2023	Taking care of elders and disable people in my community and surrounding. Mopping, cleaning dishes, sweeping, cooking and help them with personal hygiene. Manage their medication on work days. Helping our clients exercise every morning would help if they have arthritis and some clients that take blood thinner pills.
Abeegha Solutions, LLC PO Box 342 Miller Place, NY 11764 - 0342 Phone: (800) 342-8935 - x101 x102 Ownership: 100% FAX: None e-mail: laureen@abeeghasolutions.com/ ceta@abeeghasolutions.com Contact Person: Laureen Rusek or Wilceta Carrol License No.:	1	11/2/2023	Abeegha Solutions, LLC provides graphic designing & high-quality printing services for marketing, promotional, large format & packaging purposes such as business cards, letteheads, envelopes,presentation folders, postcards, brochures,mugs, T-shirts, mousepads, books (soft & hardcovers) & catalogs, decals,labels & more. If you have questions, please do not hesitate to contact us by phone at 800-342-8935 or info@abeeghasolutions.com.
Advertising Ideas, Inc. 2012 San Juan Blvd Farmington, NM 87401 Phone: (505) 326-5002 Ownership: 100% FAX: (505) 326-3754 e-mail: sales2@advertisingideas.com Contact Person: Sherry A. Foutz License No.:	2	12/5/2023	Computerized Embroidery, Screen Printing on Jackets, Caps, T-shirts & Uniforms; Seamstress Capabilities for Banners, Patches, & Tackle Twill. Police Uniforms & tactical gear for first responders
AG Solutions, LLC 2101 Zuni Dr. Farmington, NM 87401 Phone: (832) 338-7226 Ownership: 100% FAX: None e-mail: GSudjadi@gmail.com Contact Person: Glenn Sudjadi License No.:	1	6/17/2023	Electrical, Instrumentation, Construction and Maintenance. AG Solutions also does commercial trucking LTL and FTL for 53 foot dry Van and Refrigerated trailers.
ALLCHEMAX, LLC PO Box 246 Window Rock, AZ 86515 Phone: (928) 514-4411 Ownership: 100% FAX: (928) 514-4411 e-mail: allchemaxllc@gmail.com Contact Person: Max Allen License No.:	1	4/27/2023	Integrated vegetation mgmt: Sage Abatement, control/removal, of non-indigenous plants, noxious or invasive vegetation (weeds), Right of Way, Transfer Stations, Power Lines, Water/Gas Lines, Residential/Commercial, Industrial vegetation maintenance, Reclamation: Seeding/planting practices, riparian, range land restoration. Integrated Pest Mgmt: Control/removal of general pests in & around Residential/Commercial, & Industrial Structures not including mold, fungus, & wood boring insects such as carpenter ants & termites.
Alpine Medical Services, - RES, LLC 141 W. Thorton Showlow, AZ 85901 Phone: (928) 660-9410 Ownership: 51% FAX: None e-mail: rayjr@alpinemedservices.com Contact Person: Raymond John. Jr License No.:	2	8/8/2023	Disposal of Medical supply medical Personal Protective Equipment (PPE)
American First Solutions, LLC 980 E. Cherrywood Pl Chandler, AZ 85249 Phone: (480) 577-6580 Ownership: 100% FAX: None e-mail: myazzie@american-1st.org Contact Person: McResha D. Yazzie License No.: KB-1 ROC 332564	1	6/14/2023	General Contracting, construction Management, Design / Build Services, CMAR Services, Job Ordering Contracting, IDIQ Contracting, Commercial & Residential, Gaming, Healthcare, & Tenant Improvement Construction, Pre-Construction services, cost Estimating, Renovations, civil, Environmental, and Infrastructure Construction.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
American Native Medical Transport PO Box 673 Periodot, AZ 85542 Phone: (505) 371-5790 Ownership: 100% FAX: (505) 351-5551 e-mail: anmt1990@yahoo.com Contact Person: Ross Dia License No.:	2	4/19/2023	Emergent and Non-Emergent Ground Medical Transport
American Signs, LLC 1824 E. Mojave St. Farmington, NM 87401 Phone: 505-325-7889 Ownership: 51% FAX: None e-mail: info@americansignsnm.com Contact Person: Brenna Reddy License No.:	2	12/01/2023	American Signs:Offer Interior / Exterior Signs, Banners, Decals, Stickers and Apparel & Promotional Products.
Ancient Wayves River and Hiking Adventures P.O. Box 943 Montezuma Creek, Utah 84534 Phone: (505) 850-4920 Ownership: 100% FAX: None e-mail: louisdwilliams22@gmail.com Contact Person: Louis Williams License No.:	1	3/3/2023	Our company provides guided river trips and back packing adventures. The locations where we provide our services is along the San Juan River and associated canyons.
Aquila Cubed Consulting, LLC 3 Inverness Drive East - Suite 100-B Englewood, CO 80112-5501 Phone: (833) 278-4523 Ownership: 51% FAX: None e-mail: www.Aquila3.com Contact Person: Michelle Holiday License No.:	2	8/31/2023	Telecommunication System Design/Build, RF Engineering, Boardband Wireless System Design Microwave Radios (Cambium and Radwin); Voice Radio SCDA RADIO, Communications Trailer (Solar) FCC Licensing
Arizona Canyon Jeep Tours PO Box 2206 Chinle, AZ 86503 Phone: (928) 781-2113 Ownership: 100% FAX: None e-mail: info@canyonjeeptours.com Contact Person: Skikanita Thompson License No.:	1	12/20/2023	Jeep Tours of Canyon De Chelly, Overnight Camping, Story-telling, Provide Information on Navajo Culture/History, Petroglyph/Picographs of the Canyon
Arrow Tek, LLC P.O Box 542 Farmington , AZ 87401 Phone: (505) 258-1440 Ownership: 100% FAX: None e-mail: tyler.frazier@arrowtek-consulting.com Contact Person: Adelbert Frazier License No.:	1	8/9/2023	Project Management services- scheduling. Due diligence reviews, full project management services(start to finish), due diligence studies. projects justification: Engineering Services-Electrical Engineering. design, evaluations & studies. IT-Services-Web design, Physical Security Design & Evaluations. Fiber Optic. Date Center/DT/Telecom install, Leadership Consulting-Business advising. Process Improvement, leadership coaching,business development, economic development.
Associated Technologies, Inc. PO Box 12905 Albuquerque, NM 87195 Phone: (505) 873-8172 Ownership: 100% FAX: ((505)) 873-7146 e-mail: tkesslerati@gmail.com Contact Person: Todd Kessler License No.:	2	10/16/2023	Geo-technical Engineering, Construction Materials Testing Construction Monitoring/Observation Environmental Investigations and Remediation.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Aztec Painting Solutions, Inc 6202 S. Maple # 130 Tempe, AZ 85283 Phone: (480) 775-1121 Ownership: 51% FAX: None e-mail: gala@aztecprintingsolutions.com Contact Person: Catarino Becerra License No.:	2	3/6/2023	Our capabilities are; 4 color process printing-Digital Large format, Copying Services, Promotional Items, Graphic Designs.
Bar N Septic Pumping Services, LLC PO Box 514 Kykotsmovi, AZ 86039 Phone: (928) 386-0704 Ownership: 100% FAX: None e-mail: barnseptic@gmail.com Contact Person: John Nez License No.:	1	10/2/2023	Household Septic Waste Pumping and Portable Restroom Rental.
Bazhnibah Photography PO Box 1922 Window Rock, AZ 86515 Phone: (928) 206-9401 Ownership: 100% FAX: None e-mail: NavajoWomenProjectPhotoshoot Contact Person: Ruth Kawano License No.:	1	7/17/2023	Photography services for various events such as traditional, fashion shows, business summits, conferences, wedding, outdoor portraits, sports, etc.
Beauty Way Jeep Tours PO Box 1428 Chinle , AZ 86503 Phone: (928)674-3772 Ownership: 100% FAX: None e-mail: dechellytours@frontier.com Contact Person: Leander Staley License No.:	1	4/13/2023	Guide Tours into Canyon De Chelly for Historical and Cultural Information
Beedeetiih Engineering 301 S. Valley View Rd. Gallup, NM 87301 Phone: (505) 870-6566 Ownership: 100% FAX: None e-mail: beedeetiih@gmail.com Contact Person: Colleen Yazzie License No.:	1	12/20/2023	Civil Engineering Design and Construction Plan for Water/Wastewater System and Small Buildings, Project Management Including Scheduling, Cost Engineers and Utility in Water/Waste Water
Begay-Taylor Archaeological Survey 2931 W. Avenida De Las Flores Tucson, AZ 85746 Phone: (520) 990-9626 Ownership: 100% FAX: (520) 779-8489 e-mail: jbegay@email.arizona.edu,jbegay@gmail.com Contact Person: Judy Ann- Begay -Taylor	1	4/3/2023	Begay - Taylor Archaeological Survey is a Dine' (Navajo) Women- owned Cultural Resource Management business offering culture resources compliance services for projects management undertaking. We are bilingual in Navajo and English. Types of services we offer are archeological investigation (archeological survey), archeological inventories, ethnography, Archeological Testing, and Data Recovery.
Biddi Baby Foods 3624 Zia Dr. Gallup, NM 87301 Phone: (505) 860-2962 Ownership: 100% FAX: None e-mail: bidiibabyfoods@gmail.com Contact Person: Zachanah Ben License No.:	1	4/13/2023	Traditional crops produced including Neeshjhizhii, Squash, melons, beans, Value added traditional baby food items.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
BIDI Home Care PO Box 1340 Pinon, AZ 86510 Phone: (928) 241-0457 Ownership: 100% FAX: None e-mail: Rangerpinon@yahoo.com Contact Person: Connie Ranger License No.:	1	2/27/2023	Provide Assistance to clients with reliable and sincerity home care, community based services to individuals and families with elders and individuals with disabilities throughout the Navajo Nation.
Bitco Corporation 317 Commercial St NE Albuquerque, NM 87109 Phone: (505) 897-5909 Ownership: 100% FAX: (866) 255-0665 e-mail: jbitsui@bitcocorp.com Contact Person: Jeremiah Bitsui License No.:	1	11/22/2023	Project & Program Management: Civil & Commercial Construction, Construction Management at Risk (CMaR); Soil Stabilization: Distributor, Installer, Reseller; Uranium Remediation (Soil Ablation): planning, aerial drone surveying, studies & engineering; Pre-Engineering Services: planning, organizing, & managing resources; Pre-construction services for master scheduling, budgeting, land withdrawal, survey & Geotech; Radiation Surveys, work plan, scope documents for uranium contaminated sites, remedial investigation & feasibility studies; Engineering Evaluation Cost Analysis, cover design, geotechnical
Black Mesa Fuels, LLC P.O. Box 1678 Window Rock, AZ 86515 Phone: 505-722-5031 Ownership: 100% FAX: None e-mail: blackmesafuels@gmail.com Contact Person: Hubert Dayzie License No.:	1	1/5/2024	The supplies of petroleum products, i.e. diesel fuels, gasoline, oil, antifreeze heavy equipment, parts, and tires. Services include the transportation of uranium mining and milling waste, domestic waste water management,as well as transportation of clean water, UST removal, installation of fuel tanks, remediation, and reclamation of mining sites.
Blackstone Oilfield Services, LLC P.O Box 689 Farmington, NM 87499 Phone: (505) 716-1283 Ownership: 100% FAX: None e-mail: officebos65@gmail.com Contact Person: Delbert Dee License No.:	1	4/28/2023	Blackstone intends to provide services to the oil and gas industry in the form of well services. These services include workover, drilling, trucking, roustabout, night watch, water trucks, earthwork including but limited to preparation of drilling locations, roadwork, and storm water mitigation.
Bowguard Consulting, LLC PO Box 926 Jamestown, NM 87347 Phone: 970-903-7707 Ownership: 100% FAX: None e-mail: dj_slick84@yahoo.com Contact Person: Derrick Slick License No.:	1	01/5/2024	An Ecosystem Restoration & Land Management Firm Specializing in Culturally Appropriate Methods Services Including Geographic Information System (GIS) Mapping, Environmental Fields Sampling, Biological Assessment, Ecological Research, & Monitoring, Construction, Repair & Inspections.
Bric, LLC 8901 Adams Street NE Suite B Albuquerque, NM 87113 Phone: (717) 262-9746 Ownership: 100% FAX: None e-mail: oscencio.tom@bric-dine.com Contact Person: Oscencio Tom License No.:	1	8/23/2023	BRIC is a Navajo Nation Tribal enterprise that provides environmental consulting expertise in natural resources, cultural resources, Clean Water Act permits, wetland delineations, environmental assessments, forestry, rangeland, GIS, and management plans. Clients include tribal, federal, state, and private sector entities.
Buffalo Design LLC 10899 Montgomery Blvd. NE Albuquerque, NM 87111 Phone: (505) 492-0405 Ownership: 51% FAX: None e-mail: jtansey@bd-llc.com Contact Person: John Tansey License No.:	2	5/26/2023	Buffalo Design provides Nah' ata' professional Planning, architecture, interior design, and sustainable design services foe new construction and modernization existing facilities.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Building Nations, LLC PO Box 2434 Window Rock, AZ 86515 Phone: 505-371-5620 Ownership: 100% FAX: None e-mail: fredhwhite@icloud.com Contact Person: Frederick H. White License No.:	1	11/20/2023	Provide Community - Based Strategic Planning, Project Development capitalizing on Natural Resources, Energy, Economic and Tourism Development Opportunities; Assist Small Business and Cottage Industry Development; Fund Development and Financial Management; Events Planning, Production and Operation including Large Fairs and Festivals, Conference; Marketing, Public Relation and Tribal Liaison Services".
Business,Law & Policy Advisors, LLC PO Box 926 Jamestown, NM 87347 Phone: (888) 640-0090 Ownership: 100% FAX: None e-mail: fadams@iamthebiz.com Contact Person: Felisha Adams License No.:	1	8/23/2023	Legal Counsel and Consultation in Business Law and policy.
C.O.B.R.A Self Defense Navajo Nation PO Box 7 Ganado, AZ 86505 Phone: 928-410-9339 Ownership: 100% FAX: None e-mail: leroyw962@gmail.com Contact Person: Leroy Wilson License No.:	1	11/09/2023	Types of goods and services will be self-defense training which will be hands on training in which potential clients will be shown techniques to help them become safe in real life scenarios where they might get attacked.
Caddo Design, LLC 790 Umatilla St. Suite 200 Denver , CO 80204 Phone: (303) 534-3252 Ownership: 100% FAX: None e-mail: dkelin@caddodesign.com Contact Person: Don Kelin License No.:	2	1/27/2023	Provided for your office, school,healthcare facilities nationwide. As your solution provider, we have competitive PRICING, customer SERVICE,& cutting-edge TECHNOLOGY. We completed against the office product' giant by offering 24 to 48 hour nationwide shipping from over 40 warehouses. We compete against the national furniture companies by offering custom solutions. In addition to providing to your facility, we provide security solutions W/ our Predict. Prevent Portfolio These security solutions are comprehensive, affordable, & safety solutions for any facility. Custom solutions for the public safety environment.
Canyon De Chelly Tours (CDCT) P.O. Box 976 Chinle, AZ 86503 Phone: (480) 297-7860 Ownership: 100% FAX: None e-mail: hozhoni01@yahoo.com Contact Person: Tanya Yazzie License No.:	1	7/18/2023	Provide guided tours to visitors, providing them with information and history on the Navajo and Puebloan peoples, including oral histories and archaeology.
Canyon Tours P.O. Box 1913 Chinle, AZ 86503 Phone: (928) 674-6413 Ownership: 100% FAX: None e-mail: canyontours01@gmail.com Contact Person: Lisa Teller License No.:	1	3/17/2023	Provide Professional Tours through out and within Canyon De Chelly History and Basic Navajo Education Philosophy and Teachings provided to visitors.
Carrizo Mountain Environmental & Herbarium, Inc. 180 E. 12TH St. Suite #5 Durango, CO 81301 Phone: (505) 793-1140 Ownership: 51% FAX: None e-mail: carrizoenvironmental@gmail.com Contact Person: Arnold Clifford/Maria Adkins License No.:	2	4/12/2023	Biological Assessment, Reclamation Plans, Wetlands Delineation, Major facility Permits, Environmental Assessment (EA), NPDES Permits, Storm Water Plans, Air Emission Analysis, Soil Sampling, Land Surveying.

PROFESSIONAL SERVICES

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Chee Trucking, Inc. P.O Box 100209 Aneth, UT 84510 Phone: (435) 444-0178 / 435-444-0177 Ownership: 100% FAX: None e-mail: Cheetruckinginc@yahoo.com Contact Person: Lemuel Chee License No.:	1	8/18/2023	Transport Services, Oil Field Heavy Hauling, Oil Rig Equipment Transport, Pipe Hauling, General Oil field Services - Roustabout, Tank Separator, Pumping Unit Set Ups.
Chinle Heavy Equipment Training Program PO Box 2563 Chinle, AZ 86503 Phone: (928) 674-3718 Ownership: 100% FAX: (928) 674-2957 e-mail: jerrisonjumbo@yahoo.com Contact Person: Jerrison Jumbo License No.:	1	4/20/2023	Provide Training and Refresher Courses for Heavy Equipment Operators (Loaders, Motor Grader, Back hoe, Dozers, Compactors, Scrapers, Dump Truck, & other Construction Equipment, Excavators), Flagger Instructor, and Traffic Control Instructor
CJ Equipment and Service, LLC PO Box 925 Fruitland, NM 87416 Phone: (505) 960-9549 Ownership: 100% FAX: None e-mail: millerron250@gmail.com Contact Person: Ronald Miller License No.:	1	6/29/2023	Equipment Maintenance, Back hoes, Truck, Trailers, Electrical Repairs, Welding, Fabrication, Service Safety, Consultation Service, Training, Inspections, Remodeling Service, General Construction, Drywall, Painting.
Clean Sweep Services, LLC 2100 River Road, Suite A Farmington, NM 87401 Phone: (505) 325-2111 Ownership: 51% FAX: (505) 325-8755 e-mail: cleansweepservices@outlook.com Contact Person: Johnson Smith Jr. License No.:	2	10/27/2023	Provide janitorial services to other businesses.
CLINTON JIM PO Box 158 Crownpoint , NM 87313 Phone: (505) 786-5075 928-309-8923 Ownership: 100% FAX: None e-mail: cjim7026@gmail.com Contact Person: Clinton Jim License No.:	1	6/2/2023	Right - of - way Clearances, Homesite Lease clearances, Agriculture consultants.
Dine Resources, LLC PO Box 208 Bluff, UT 84512 Phone: 505-354-9754 / 970-560-7991 Ownership: 100% FAX: None e-mail: dineresources@hotmail.com Contact Person: Larena A. Benn License No.:	1	11/17/2023	Fiber Optic Installation, Utility Line Locating,HVAC Services, Plumbing, Back hoe Services, Carpentry, Heavy Equipment Maintenance, Janitorial, Road Maintenance, Concrete finishing, Pressure Washing, Fencing, Hot Shot Services, Truck Washing, Trenching, Location upgrades, Environs. Clean up, Tank Washing, Welding, remediation, Belly Dump, Strategic planning, Project Management, Roustabout, New Construction, Dump trailer, Painting, Grease trap cleaning, Security, New home building, renovation, demolition. Digital Board Installation and Wiring. Low Voltage Wiring.
Dineland Protection Services, Inc. PO Box 2222 Fruitland, NM 87416 Phone: (505) 793-5525 Ownership: 100% FAX: None e-mail: verda_blkgt_4468@q.com Contact Person: Verda Blackgoat License No.:	1	5/20/2023	Provide independent security services for mining companies.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Dinetahdoo Cultural Resource Management PO Box 2012 Farmington, NM 87499 Phone: (505) 960-9478 Ownership: 100% FAX: (505) 960-9749 e-mail: dinetahdoo@yahoo.com Contact Person: Rena Martin License No.:	1	3/6/2023	Sections 106 & 110 Evaluations/Cultural Resources Inventories (Archaeological Surveys); Ethnographic and Archival Research, Cultural Landscape Studies, NEPA related Biological Inventories, and Environmental Assessments
Dyron Murphy Architects, P.C. 4505 Montbel Place, NE Albuquerque, NM 87107 Phone: (505) 830-0203 Ownership: 100% FAX: (505) 830-0237 e-mail: dmurphy@dm-architects.com Contact Person: Dyron V. Murphy License No.:	1	4/18/2023	Architectural & Engineering Services; Community Planning/Feasibility Studies; Educational Specifications; Medical Facility Planning & Design; Construction Management Services; Design-Build Services; Architectural Programing; Architectural Drafting Services; Revit/BIM Modeling Services; & Space Planning Services; Photo Realistic Modeling and Rendering; Existing Facility Laser Scanning.
Eagle Flight Development P.O. Box 2192 Fort Defiance, AZ 86504 Phone: (505) 593-2049 Ownership: 100% FAX: None e-mail: pmartinez@eagleflightdev.com Contact Person: Patrick Matinez License No.:	1	01/05/2024	Construction Management, Project Management, Consulting, On-Call Engineering Services, Inspections Services, Management.
Eggshell Tours, LLC PO Box 1964 Kaibeto, AZ 86053 Phone: (928) 679-5562 Ownership: 100% FAX: None e-mail: lyronot@gmail.com Contact Person: Lyrono Tsinnijinnie License No.:	1	7/13/2023	Provide Guided Jeep & Hiking Tours to Eggshell Arch and Surrounding sites. Provide Hogan Rentals, Overnight Camping, and Mountain Biking hear scenic sites. Provided= information on Navajo Culture and History to visitors.
Elite Laundry Company, Inc. PO Box 640 Gallup, NM 87301 Phone: (505) 863-9543 Ownership: 100% FAX: None e-mail: Contact Person: Andrew R. Christensen Jr. License No.:	1	11/8/2023	Personal Laundry and Dry Cleaning, Services to IHS hospitals, bia schools, and local individuals.
Encompass Native Develop Design Construct,LLC 2510 E. 15th Street Suite 201 Tulsa, OK 74104 Phone: (539) 777-4120 Ownership: 51% FAX: None e-mail: cprovince@playerperformancegroup.com Contact Person: Christopher Sean Province License No.:	2	7/11/2023	Professional Consulting Services, Including: Feasibility Studies, Operations, Facility and Staffing, Assessments, Planning, Programming & Conceptual Design, Budgeting, Scheduling, Procurement of Third Party Goods & Services, Owners Representative, Project/Construction Management. Professional Architectural Services, Cost Estimating, Professional Development Services, Marketing, Performance & Analytic.
Etcitty Law, PLLC PO Box 2303 Flafstaff, AZ 86003 Phone: (505) 862-3132 Ownership: 100% FAX: None e-mail: retcitty@gmail.com Contact Person: Raymond C. Etcitty License No.:	1	7/7/2023	Provide legal services (federal Indian Law, Navajo law, Navajo Government, taxation, business,employment, Arizona or New Mexico law, financing, insurance, policies and procedures,leases, permits, right-of-away, Indian gaming, contracts, grants, board of directors, management, Navajo Nation - owned entities, construction law, real property, etc.) to clients within the Navajo Nation.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
ETD, Inc. 2101 N. Fourth St, Suite 201 Flagstaff, AZ 86004 Phone: (928) 779-6032 Ownership: 100% FAX: (928) 779-9115 e-mail: eunicet@etd-inc.com Contact Person: Eunice L. Tso License No.:	1	3/28/2023	Environmental Consulting, Phase 1 Site Assessments, Categorical Exclusions, Level 1 Floodplain Analysis, Archaeological Data Recovery, Biological Resources Studies, Noise Assessments, Project/Construction Management, Owners Representation, Pre-Development, A/E Contracting & Procurement, Rural Land Use Planning, Strategic Planning, Community Assessments, Community Values Surveys, Socio-economic/Demographic Profiles, GIS Mapping, Public Relations, Community Outreach, Social Media Management, Website Design, Newsletters, and Press Releases.
Forrest Randall Plastering / Stucco PO Box 51 Many Farms, AZ 86538 Phone: 970-570-3792 Ownership: 100% FAX: None e-mail: forrest_randall@yahoo.com Contact Person: Forrest Randall License No.:	1	1/4/2024	Provide exterior installation and finishes to new house, Existing House, add-ons, remodel and commercial projects, Provides Employment Opportunities & Transportation.
Fourth World Design Group, LLC 3324 E. Ray Road # 171 Higley, AZ 85236 Phone: (480) 454-4713 Ownership: 100% FAX: None e-mail: kkanuho@fourthworlddg.com Contact Person: Kim Kanuho License No.:	1	3/31/2023	Community & Regional Planning, Land Use Planning, Master Planning, Economic Development Planning, Economic Feasibility Studies, Comprehensive Economic Development Strategies (CEDS), Community Engagement, Technical Assistance, Project / Management and Design.
Generation Blockchain Management DAO, LLC PO Box 3393 Shiprock, NM 87420 Phone: (605) 515-3774 Ownership: 100% FAX: None e-mail: dineh_benally@msn.com Contact Person: Dineh Benally License No.:	1	3/16/2023	Blockchain development and management company. Data Centers
Goldtooth Precision Solutions, Inc. PO Box 640 Tuba City, AZ 86045 Phone: (928) 283-4652 Ownership: 100% FAX: None e-mail: halbert@goldtoothsurveying.com Contact Person: Halbert Goldtooth License No.:	1	5/23/2023	CAD Drafting, Land Surveying, Mapping, Topography Surveys, Land Title Research, Construction Staking, Volume Calculations, and Survey/Civil Design Software
Greenstone Ag Consulting 301 Fahrion Farmington, NM 87413 Phone: (505) 516-7167 Ownership: 100% FAX: None e-mail: tsolewis@yahoo.com Contact Person: Lena & Tsosie John Lewis License No.:	1	3/6/2023	Irrigation Sprinkler System; Export of Forage; Business & Strategic Plan for agriculture development; agricultural seed; heavy equipment for land cultivation; agronomic field inspection; advise on Natural Beef; management recommendation to Farms & livestock operation; Biotech Farming. Consultation to large corporate farm.
Helping Hand PO Box 3480 Window Rock, AZ 86515 Phone: (505) 974-7128 Ownership: 100% FAX: None e-mail: helpinghand-inc@hotmail.com Contact Person: Phil Begay License No.:	1	8/15/2023	Picking up trash along Highways, Remote Areas, Household Trash and at Tribal Fairs, Rodeos and Other Events, Beautification projects for groups and individuals, with camping and lodging.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Henry Haven PO Box 4312 Window Rock, AZ 86515 Phone: (928) 206-7733 Ownership: 100% FAX: None e-mail: hhavenjr@hotmail.com Contact Person: Henry Haven License No.:	1	10/2/2023	Provide geological technical reviews /report generated on petroleum release to the soil and groundwater, review soil groundwater samples, provided cleanup and closure recommendations.
High Desert Technical Rescue PO Box 3041 Kirtland, NM 87417 Phone: (505) 330-5691 Ownership: 100% FAX: None e-mail: gpolacca@yahoo.com Contact Person: Gerald Polacca License No.:	1	10/2/2023	Provide rope rescue, confine space rescue, industrial rescue, and "fall-at-heights" training. Also, sell rescue and safety equipment in compliance with OSHA, ANSI, and NFPA standards. Additionally can teach and train CPR and First Aid under American Safety & Health Institute (ASAI).
HN4 Solution, LLC P.O. Box 3022 Fort Defiance, AZ 86504 Phone: (928) 814-1190 Ownership: 100% FAX: None e-mail: swwillie@iclould.com Contact Person: Spencer W. Willie / Cheryl J. Willie License No.:	1	1/27/2023	Provide professional consulting services with such activities as government and public relations, Government Affairs, public policy development , grant writing, strategic planning, organizational development, crisis management ,emergency planning, business process analysis and information technology. Reseller of software products and technical support / customer support for software. Food services and catering.
Hodishooh Specialty Maintenance Inc. PO Box 2221 Bloomfield, NM 87413 Phone: (800) 987-0463 Ownership: 100% FAX: (800) 987-0463 e-mail: hodishood@outlook.com Contact Person: Abeigail B. Yazzie License No.:	1	7/26/2023	Facility Management, Disinfection Services, Custodial Services, Hard Floor Maintenance, Carpet Cleaning Services,Hard Floor Maintenance, Carpet Cleaning Services, Plumbing Services, Landscape Maintenance, and Welding Service.
Hoof Print Express, LLC PO Box 649 Window Rock, AZ 86515 Phone: (928) 810-3069 Ownership: 100% FAX: None e-mail: hpebenny@gmail.com Contact Person: Constance Damon License No.:	1	3/29/2023	Transportation Services; Hauling Agriculture Products, Grain, Hay, Livestock Gravel, Road Material and Water.
HOZHO DMD, INC 704 Rio Vista Drive NE Rio Rancho, New Mexico 87144 Phone: (505) 892-3124 Ownership: 60% FAX: None e-mail: hozhodmd@gmail.com Contact Person: Darlene A. Sorrell License No.:	2	7/26/2023	To provide dental consulting, training, services, procedures and supervision to dental clinics on the Navajo Nation and to all private and public dental practices.
I Am the Biz, Inc. PO Box 926 Jamestown, AZ 87347 Phone: (888) 640-0090 Ownership: 100% FAX: None e-mail: fadams@iamthebiz.com Contact Person: Felisha Adams License No.:	1	8/23/2023	Business Management & Economic Development. Services include: Marketing, design, business planning, staff development, strategic development, feasibility studies,economic Research, analysis, & drafting, to everything business related.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Ii'ni Marketplace LTD, Co. 311 Cora Lee Dr. Gallup, NM 87301 Phone: (505) 870-3487 Ownership: 100% FAX: None e-mail: lrmanuelito@iinimarketplace.com Contact Person: Laris Manuelito License No.:	1	10/3/2023	Gen. Merch., Grocery, basic household items.
iina'ba', Inc 1812 Schofield Lane Farmington, NM 87401 Phone: (505) 327-1072 Ownership: 100% FAX: (505) 327-1517 e-mail: daspaas@iinaba.com Contact Person: Duane M. Aspaas License No.:	1	7/27/2023	All NEPA Compliance: EAs EISs, Bio, Arch, T&E, Phase I/II/III, ESAs; hydro Investigations Soil & Ground Water Remediation; Hazardous Mat. Management; Wetland; ACOE 401/404 Permits; SPCC Plans, SWP3; H&S Plans, Haz. Mat. Spill Response & Assessment; USTs (Uranium/UMTRA); Soil/Water Sampling; Asbestos/Lead Sampling, Analytical Lab Services, Water Treatment; Wastewater; Sewer Sys/Airport/Hwy Design; Subdivision, Site Grading & Drainage, Surveying Topo & Boundary Surveys, Drainage Analysis; Land Surveying, Construction Staking, Civil Engineering, Surveying/Drafting, IT Services and A/E Services
Indigenous Design Studio & Architecture, LLC 8008 Pennsylvania Circle NE Albuquerque, NM 87110 Phone: (505) 226-2565 Ownership: 100% FAX: (505) 226-2566 e-mail: tbegay@ids-a.com Contact Person: Tamarah R. Begay License No.:	1	4/27/2023	Architecture, Master Planning, facility assessments, design build, feasibility studies, land use planning, cultural consulting, programming, building information modeling, economic development training, and community participatory facilitation,sustainable and LEED design, and interior design.
Javelin, LLC 4601 Atlantic St. Farmington, NM 87401 Phone: (917) 880-9641 Ownership: 100% FAX: None e-mail: curtis.padilla@javelinllco.com Contact Person: Curtis Padilla License No.:	1	4/13/2023	Javelin, LLC plans to offer mobile maintenance services to include power washing, preventive maintenance of vehicles and equipment.
Johnson Smitthipong & Rosamond Associates, Inc.-OK 5210 E Williams, Cir, Ste 600 Tucson, AZ 85711 Phone: (520) 547-7904 Ownership: 100% FAX: (520) 547-7905 e-mail: bdraper@srarchinc.com Contact Person: William H. Draper, AIA License No.:	1	7/14/2023	Architecture, Master Planning, Strategic Planning, Programming, and Interiors
Kenew,LLC 17505 N. 79th Ave. Suite 205-C Glendale, AZ 85308 Phone: (480) 710-2360/ 623-225-3321 Ownership: 51% FAX: None e-mail: Bobt@kenewllc.com/ chadh@kenewllc.com Contact Person: Bob Terry III / Chad Hafstrom License No.:	2	7/7/2023	Kenew, LLC is a full- Service Construction Management firm focusing on Tribal Owners and Projects Located on Native Nations. The owner of Kenew brings over 40 years of Construction Experience and can assist in all phases of Construction; from initial project conception to final completion.
Kentfield, LLC 1104 Boggio Dr. Gallup, NM 87301 Phone: (505) 870-5628 Ownership: 100% FAX: None e-mail: kentfieldLLC@outlook.com Contact Person: Patrick Harjo License No.:	1	10/9/2023	Kentfield, LLC is dedicated to conducting cultural resources management, GIS & drone services. Kentfield LLC inventory currently contains a high accuracy GPS unit for survey grade precision, latest ESRI software for conducting GIS workflows, & mapping software that compliments two drones for capturing aerial & video imagery.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Keres Consulting, Inc. 2700 San Pedro Dr. NE, Albuquerque, NM 87110 Phone: (505) 837-2104 Ownership: 100% FAX: (505) 837-0575 e-mail: tchavez@keresnm.com Contact Person: Timothy Chavez License No.:	2	8/31/2023	Keres consulting, Inc. (Keres) is a general consulting firm with specialized expertise in environmental and engineering services, real property asset management, and communications.
Kermie's Sandwiches and Salads PO Box 1137 Pinon, AZ 86510 Phone: 928-814-0375 Ownership: 100% FAX: None e-mail: kermitt_az69@icloud.com Contact Person: Kermit Yazzie License No.:	1	1/23/2024	Deli Shop provides a variety of Sandwiches, Salads, other deli items that can be picked up or eaten inside the Deli Shop, and provide catering for small functions.
L5, LLC PO Box 220 Church Rock, NM 87311 Phone: (928) 401-0971 Ownership: 51% FAX: None e-mail: info@theplankhelper.com Contact Person: Darlene & George LaFrance License No.:	2	9/28/2023	L5, LLC is selling workout equipment, workout programs, workout apparel, consulting, and guest speaker.
Lajasta Wauneka Navajo Artist 2901 McBride Circle Gallup, NM 87301 Phone: (505) 409-5796 Ownership: 100% FAX: None e-mail: info@navajo-artist.com Contact Person: Lajasta Wauneka License No.:	1	5/22/2023	I provide supply service of merchandise items as drink ware, office supplies, and accessories (wallets, coin purses... etc) with custom art work. I imprint these items with art work provided by the customer or myself on these products.
LD Creative Design PO Box 183 Tonalea, AZ 86044 Phone: (505) 793-0597 Ownership: 100% FAX: None e-mail: pricisslim@gmail.com Contact Person: Prisciss J. Slim License No.:	1	8/30/2023	Creating creative beadwork items that are sold to individual customers, art & craft merchants. Have sold beadwork at Kayenta, AZ Page, AZ Shiprock, AZ, and Gallup, NM, at Flea Markets.
Lone Pine Enterprise, LLC P.O. Box 392 Window Rock, AZ 86515 Phone: (928) 288-5993 Ownership: 100% FAX: None e-mail: derrickwatchman@lonepineenterprise.com Contact Person: Derrick Watchman License No.:	1	3/6/2023	Retail business development; Professional Services consultation; Supply chain management; and investment management.
Manuelito Towing & Recovery Services PO Box 94 St. Michaels, AZ 86511 Phone: (505) 371-5599 Ownership: 100% FAX: None e-mail: manuelito.towing@yahoo.com Contact Person: Arthur Manuelito License No.:	1	5/10/2023	Manuelito Towing, LLC is a Navajo - owned & locally owned company. We offer light and medium duty towing services, lockouts, tire change, and fuel delivery, 24/7 - 365 days a year. Our staff are fully trained Navajo members of our community.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Marco Arviso Jewelry PO Box 563 St. Michaels, AZ 86511 Phone: (928) 349-2277 Ownership: 100% FAX: None e-mail: marcoarviso@gmail.com Contact Person: Marco Arviso License No.:	1	6/7/2023	We can provide handmade, Navajo made jewelry and accessories for boutiques, gifts shops, and any retail environment.
Martha L. King, P.C. PO Box 70201 Albuquerque, NM 87197 Phone: (505) 304-1033 Ownership: 100% FAX: None e-mail: martha@marthakinglaw.com Contact Person: Martha L. King License No.:	2	2/3/2023	Provide legal services to projects throughout the Navajo Nation.
Mette Associates LLC dba Tallsalt Advisors P.O. Box 28334 Scottsdale, AZ 85255 Phone: (480)433-9760 Ownership: 100% FAX: (480) 699-9607 e-mail: steve.gundersen@tallsalt.com Contact Person: Steven Gundersen License No.:	1	8/25/2023	Investment Advisory Services, Investment Consulting, Corporate Financial Advice.
Michael P. Upshaw, Attorney at Law 5635 North Scottsdale Road. Ste 170 Scottsdale, AZ 85250 Phone: (480) 729-6215 Ownership: 100% FAX: (480) 994-2008 e-mail: mupshaw@mpulaw.com Contact Person: Michael P. Upshaw License No.:	1	4/3/2023	Attorney at Law, Legal Services and Representation involving Business Transactions and Contracts, Business Formations, School Law, Construction Law, Employment Law, Government Law and Federal Indian Law and Litigation
MJX Safety P.O. Box 5262 Window Rock, AZ 86515 Phone: (505) 728-5081 Ownership: 100% FAX: None e-mail: melyoung5532@yahoo.com Contact Person: Melvin Young License No.:	1	3/28/2023	Our purpose is to provide COVID-19/ Monkeypox disinfected services for all commercial, private buildings, residential, and all vehicles throughout the Navajo Nation and beyond. For cleaner and safer Navajo Nation for all life, to assist in returning back to our natural way of life. ADDITION: Asbestos and lead abatement cleanup and removal.
Montezuma Well Service, Inc. PO Box 540 Montezuma Creek, UT 84534 Phone: (435) 651-3469 Ownership: 100% FAX: (435) 651-3409 e-mail: mc47654@gmail.com Contact Person: Earl Martinez License No.:	1	6/8/2023	Trucking (Vacuum/Water Truck, Winch Trucks, Belly Dump), Hot Oil Service, Roustabout Service Drilling and Well Service, Workover Rigs, Fluids Management Services, Fishing and Rental, TXX Co-Rod Service.
Nasbah Technologies LLC PO Box 1388 Ft Defiance, AZ 86504 Phone: (928) 729-5930 Ownership: 100% FAX: None e-mail: elrenamitchell@gmail.com Contact Person: Elrena Mitchell License No.:	1	7/17/2023	Civil and Structural Engineering Service.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Native Innovation, Inc P.O. Box 2548 Flagstaff, AZ 86003 Phone: (877) 511-2342 Ownership: 100% FAX: None e-mail: jerome@nativeinnovation.com Contact Person: Jerome L. Tsosie License No.:	1	7/17/2023	Native Innovation, Inc., provides professional IT services, reseller of IT equipment (lenovo, HP, Cisco, Promethean, Dell Smartboards, Verkada cameras, Cloud solutions), Professional Education Technologies Teacher Development, IT Conferences, websites, and IT Manage Services.
Native Resource Development Co Inc. 2418 E. Highway 66, PMB 302 Gallup, NM 87301 Phone: (505) 726-8481 Ownership: 100% FAX: (888) 317-5195 e-mail: penny@nrdci.com Contact Person: Elvina (Penny) Emerson License No.:	1	10/26/2023	Commercial Janitorial Cleaning Services; Construction clean up; Carpet & Upholstery cleaning; Hard Floor Maintenance; Building / Facility Maintenance; Property Management; Landscape Maintenance; Health Program Management; and Food Service Consulting Service.
Navajo Agricultural Products Industry PO Drawer 1318 Farmington, NM 87499 Phone: (505) 566-2600 Ownership: 100% FAX: (505) 960-9458 e-mail: DZeller@navajopride.com Contact Person: Dave Zeller License No.:	2	11/3/2023	Major crops grown at NAPI are alfalfa, no. 2 corn, small grains, potatoes, beans, and in 2017 an introduction of growing organic products. Each crop is grown to the meet the highest quality under the "Navajo Pride" brand. The Bean Plant and Fresh Pack are Global CAP certified. Civil Engineering, Agricultural Engineering, Electrical Service, Construction Services, Financial Services, and IT Services.
Navajo Sanitation PO Box 237 Window Rock, AZ 86515 Phone: (928) 871-4395 Ownership: 100% FAX: None e-mail: nsbfwdl@frontiernet.net Contact Person: Benjamin Damon, Jr. License No.:	1	10/14/2023	Solid Waste Disposal (Residential, Commercial and Government), Transfer Station, Open-top Roll-off/Compactor Containers, Recycling, Metal Recycling/Handling and Hauling
Navajo Technology Services, Inc P.O. Box 576 Window Rock, AZ 86515 Phone: (928) 551-5555 Ownership: 100% FAX: None e-mail: vl@navajo-msp.com Contact Person: Vernon Livingston License No.:	1	9/30/2023	Manage Service Provider(MSP) for technology. NTS can provide MSP Services in the areas of Health, Transportation, Information, & Telecommunication Technology. As a MSP NTS can design build, install & RESELL, the needed hardware Computers, Printers, Servers, Towers, Fiber, Network, Equipment, PPE (Mask, Gowns, etc.) Industrial tool and equipment.
Navajo Tribal Utility Authority PO Box 170 Fort Defiance, AZ 86504 Phone: (928) 729-5721 Ownership: 100% FAX: None e-mail: walter@ntua.com Contact Person: Walter W. Haase License No.:	2	8/22/2023	NTUA Supplies electric, communication, natural gas, water,waste water, renewable energy generation and photovoltaic,(solar power) services to residents throughout the 27,000 square line Navajo Nation.
Navamill Lumber & Logging Company PO Box 441 Ft. Defiance, AZ 86504 Phone: (505) 713-8767 Ownership: 100% FAX: None e-mail: navaMILL@yahoo.com Contact Person: Aaron D. Sam License No.:	1	9/7/2023	Lumber and Logging sales, Forest Management, Forest Thinning, Log Harvesting. Log Hogan and Cabin Construction.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Neil Johns P.O. Box 2281 Window Rock, AZ 86515 Phone: (505) 593986 Ownership: 100% FAX: None e-mail: nlsnjohns@yahoo.com Contact Person: Neil Johns License No.:	1	3/25/2023	Construction Management Services: Pre- planning / Design; Design development; construction/ contracts administration; Cost proposal; Budgetary estimates; LEED / commissioning; Inspections; completion / transfers; close-out activities; consultant / Technical services. Maintenance implementations. Project Management services: Feasibility Studies; Environmental Mitigation / Remediations: Building Conditions Assessments: Regulatory compliance Analysis: Land with drawls : FF&E Procurement / Installation.
NTUA Wireless, LLC P.O. Box 1947 Chinle, AZ 86503 Phone: (928) 674-3840 Ownership: 51% FAX: None e-mail: Contact Person: Velena Tsosie License No.:	2	7/19/2023	NTUA Wireless provided Broadband Services and Cell Phone Services to the people of the Navajo Nation.
PDI Pest Control Company PO Box 519 Casa Blanca, NM 87007 Phone: (505) 552-6979 Ownership: 100% FAX: (505) 552-6754 e-mail: llehooper@earthlink.net Contact Person: Lucille E. Hooper License No.:	2	6/28/2023	General Pest Control Services for Residential, Commercial and Industrial Facilities, Rodent Control, Tree and Yard Spray, Bed Bug Infestation Services, and Pre and Post Construction Termite Control.
PJ Handyman, LLC PO Box 1321 Sanders, AZ 86512 Phone: (928) 606-2359 Ownership: 100% FAX: None e-mail: jamesphilbert700@gmail.com Contact Person: Philbert James License No.:	1	10/3/2023	Renovation Repair on building both residential and commercial. Small additions to existing buildings.
Purposed Focused Alternative Learning PO Box 286 Lupton, AZ 86508 Phone: (928) 640-6110 Ownership: 100% FAX: None e-mail: joann@purposedfocused.org Contact Person: Raymond Yellowman License No.:	2	5/10/2023	Alternative Education Advancing Clean Technology Deployment on Navajos for Navajos. Technologies the support the locally trained workforce capable of working in the green energy economy.
Q-SPEC, LLC 9550 San Mateo Blvd. NE, Suite G Albuquerque, NM 87113 Phone: (505) 344-4234 Ownership: 51% FAX: None e-mail: kquintana@qspeceng.com Contact Person: Kevin Quintana License No.:	2	12/4/2023	Professional Engineering & Surveying Company, Layout, right-of-way Procurement, Contract Preparation, Bidding, Project Management Services; High Voltage (2400 Volts & 345,00 Volts), Transmission Lines, Distribution Lines, Substations for Rural Electric Cooperatives & Utilities, Planning, Sectionalizing, Load Studies for Clients (Rural Utility Service & NESC Standards).
Red Ridge Trucking, LLC PO Box 209 Tonalea, AZ 86044 Phone: (928) 660-8819 Ownership: 100% FAX: None e-mail: hsucco@yahoo.com Contact Person: Henry Succo License No.:	1	9/5/2023	My Current Service: Haul and deliver hay, hay broker and dealer, haul metals, lumber, pipes, cinder blocks, building materials, Farm equipment and heavy equipment.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Redhorse PM, LLC P.O Box 926 Window Rock, AZ 86515 Phone: (928) 551-3197 Ownership: 100% FAX: None e-mail: redhorsepmllc@hotmail.com Contact Person: Marvin Redhorse License No.:	1	9/21/2023	Construction Management, Project Management, Planner, Resident Engineer, Construction Inspection, Estimating, Value Engineering, Furnishing & Assessment, Plan Reviews & Building Officials.
Rez-Dog Power Wash PO Box 388 Tonalea , AZ 86044 Phone: (928) 283-8253 Ownership: 100% FAX: None e-mail: slimj1948@gmail.com Contact Person: Joe Slim License No.:	1	3/28/2023	Mobile power wash / cleaning business, cleaning parking lots. at Bashas stores, fast food restaurants, school / grounds, - plus cleaning solar panels possibly with NTUA.
Rezilient Healing, LLC PO Box 7633 Chandler, AZ 85246 Phone: (480) 453-6489 Ownership: 100% FAX: None e-mail: dkeyonnielcsrv@rezilienthealing.org Contact Person: Durina Keyonnie License No.:	1	9/18/2023	Rezilient Healing, LLC is owned & operated by a Licensed Clinical Social Worker (LCSW) & Services included; trauma based therapy, individual therapy addressing anxiety, depression, and PTSD for young adults and adults.
Riley Engineering, LLC 3275 West Ina Road, Suite #160 Tucson , AZ 85741 Phone: 520-505-4651 Ownership: 100% FAX: None e-mail: ronson@riley-eng.com Contact Person: Ronson R. Chee License No.:	1	01/09/2024	Rileys Engineering provides professional civil engineering design and water resources engineering services including but not limited to: site civil infrastructures designed; site grading and drainage; surface water hydrology studies; open channel hydraulics analysis; flood surface modeling and mapping; water distribution system design; wastewater and storm drain collection system design; and Auto CAD AND GIS support.
Rooster Grill and Catering P.O. Box 113 Brimhall, NM 87310 Phone: (505) 870-9463 Ownership: 100% FAX: None e-mail: paulettayazzie@yahoo.com Contact Person: Pauletta - Benny Yazzie Jr. License No.:	1	7/7/2023	The Grill provides Dine' food catering / concession at the highest level of Navajo OEH & national ANSI requirements. Our meals are prepared fresh & on-site by utilizing a self contain trailer equipped with a refridgerator, freezer, stove, chafing warmer & grill/burners (table, chairs, & party tent available if needed). NM state inspected approved.
Saanii Bi Fine Arts PO Box 4363 Shiprock, NM 87420 Phone: (505) 258-0546 Ownership: 100% FAX: None e-mail: bjmgoodluck@gmail.com Contact Person: Barbara Morgan License No.:	1	10/17/2023	Handmade Dine' Dolls, historical fiction books, sterling silver jewelry. Workshops to schools on how to teach Navajo Language and culture.
Sacred Mountain Medical Service, Inc. PO Box 2290 Tuba City, AZ 86045 Phone: (928) 283-8243 Ownership: 100% FAX: (928) 283-8300 e-mail: dannybarney@sacredmountainmedical.com Contact Person: Danny/Karen Barney License No.:	1	3/9/2023	Provide Emergency/Non-Emergency Ground Ambulance Services to the Nation and Back-up 911 Services

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Sagebrush Hill Group, LLC P.O. Box 4169 Window Rock, AZ 86515 Phone: (505) 870-6328 Ownership: 100% FAX: None e-mail: dwatchman@sagebrushhillgroup.net Contact Person: Derrick Watchman License No.:	1	8/10/2023	Professional consulting, advisory services and investment in economic development, contract management, supply chain development/sourcing, management, finance, gaming, insurance, tribal affairs, tax, energy, federal contracting, and lobbying. Company also develops/invests in revenue generating assets.
San Juan Services, LLC PO Box 1273 Farmington, NM 87499 Phone: (505) 592-9712 Ownership: 100% FAX: None e-mail: sanjuanboxservices@gmail.com Contact Person: Matthew Devore License No.:	1	7/27/2023	SOLID WASTE HAULING, GENERAL HAULING, CONSTRUCTION, DEMO DEBRI, DELIVERY OF GOODS
Shelly Trucking & Excavating, LLC RD 371-Builing 66 Thoreau, NM 87323 Phone: (505) 236-5876 Ownership: 100% FAX: None e-mail: ShellyTrucking@gmail.com Contact Person: Ben Shelly License No.:	1	10/20/2023	Asphalt and Gravel, Heavy Road Construction and Maintenance
Shiprock Subway, Inc P.O. Box 3900 Shiprock, NM 87420 Phone: (505) 368-4333 Ownership: 100% FAX: None e-mail: vatallbull@yahoo.com Contact Person: Viviene Tallbull License No.:	1	10/19/2023	Quick service restaurant providing restaurant facilities and services, to include but not limited to providing catering services, on-line or telephone and on-site seating capacity for food orders.
Sovereign Finance, Inc 3930 E. Ray Road Ste 170 Phoenix, AZ 85044 Phone: (480) 385-2840 Ownership: 100% FAX: None e-mail: jeffrey.lamb@soveregnfinance.com Contact Person: Jeffrey Lamb License No.:	2	9/6/2023	Sovereign Finance provides financial consulting services to assist Native American clients with analytical modeling, debt capacity analysis, project phasing recommendations, debt RFP management, debt structuring, document negotiation, efficient closing of financings and refinancing transactions. Establish a credit rating with rating agencies. Also provides Investment. Advisory Services including permanent funds, minors trust. 401k plan, etc.
Speedy Septic Services dba: Speedy Sales & Services P.O. Box 2203 Chinle, AZ 86503 Phone: (928) 674-5405 Ownership: 100% FAX: (928) 674-3638 e-mail: jeff@speedysalesandservices.com Contact Person: Lorraine Terrell License No.:	1	3/6/2023	Septic Tank Pumping, Grease trap Pumping, Lint/Sand trap Pumping, Lift Station Pumping, Porta-Potty Rental and Cleaning Services, Complete Septic Tank/water Cistern Installation, Water Line/Sewer Line Repair, Line Repair and Installation, Back hoe, Skid steer, Playground Installation and Fencing Install, Sales, security Lighting: High and Low Bay, Flood and Area, Poles (Street Light/Parking Light/Canopy and Parking), Exit/Emergency/Egress Specialty, Landscape, Indirect, Troffer and Surface, Recessed and Track, Mechanical Repairs, and Residential/Commercial Painting.
Star Pest Control PO Box 2098 Window Rock, AZ 86515 Phone: 505-870-2833 Ownership: 100% FAX: None e-mail: fritzroanhorse@yahoo.com Contact Person: Fritz Roanhorse License No.:	1	01/09/2024	Structural Pest Control; Industrial / Institutional, Ornamentals/ Turf, Right - of - way,, Residentials , Schools, & Agricultural Pest Control.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Sundance Consulting, Inc 305 N. 3rd Ave. Suite B Pocateello, ID 83201 Phone: (208) 576-4961 Ownership: 100% FAX: (208) 478-2032 e-mail: smyres@sundance-inc.net Contact Person: September Myres License No.:	2	8/24/2023	Sundance offers a wide range of specialized environmental consulting services for the Navajo, including: Natural & Culture Resources (Grazing & Agricultural Plans, NEPA, Biological Surveys, Forestry Management & Fuels, Watershed/Rangeland, Archaeological Class I & III surveys, ect), site Characterization (Phase I & II Assessments) & Environmental Remediation, Risk Assessments/Toxicology,Audits/Training, Public Involvement/Tribal Liaison, and Environmental Engineering & Consulting.
The Sparrow Group, Inc. 2420 Comanche Rd. NE, Suite H-6 Albuquerque, NM 87107 Phone: (505) 814-8083 Ownership: 100% FAX: None e-mail: thesparrowgroupnm.com Contact Person: David Wiegand License No.:	1	7/19/2023	Construction Management, Pre-construction, Estimating, Carpentry, and design/build services.
Tiis Ya' Toh, Inc. PO Box 360 La Plata, NM 87418 Phone: (505) 793-4994 Ownership: 100% FAX: (505) 326-5213 e-mail: lavina.lamone@tiisyatoh.com Contact Person: Lavina Lamone License No.:	1	8/22/2023	Environmental Consulting: Certified Asbestos Inspector, Contractor Supervisor, Abatement Management, Lead Sampling and Risk Assessment, Hazardous Materials, Spill Response, Soil and Groundwater Remediation, SPCC, SWPPP, NEPA Environmental Assessments and ASTM Phase I, II, and III, (Environmental Site Assessments).
TLS Janitorial & Maintenance PO Box 424 Vanderwagon, NM 87326 Phone: (505)979-3964 Ownership: 100% FAX: None e-mail: raine3964@gmail.com Contact Person: Lorraine H. Smith License No.:	1	7/18/2023	Full Service Commercial, Government, Residential, Janitorial Service, Landscaping, Grounds Maintenance, Minor Building Repair (interior & exterior), Parking Lot Maintenance - Parking and Handicap Painting, Tree and Shrub Trimming and Removal. Construction clean up.
TP Enterprises P.O. Box 4792 Gallup, NM 87305 Phone: 505-905-1208 Ownership: 100% FAX: None e-mail: tpenterprises09@gmail.com Contact Person: Genevieve Peter License No.:	1	12/5/2023	Trucking - transport Agricultural Product, construction materials. Electrical lining, overhead underground Excavating.
Trula Breuninger PO Box 249 San Monica, CA 90406 Phone: (480) 239-0896 Ownership: 100% FAX: None e-mail: TRULAANNB@ME.COM Contact Person: Trula Breuninger License No.:	1	9/11/2023	Remote Location, Office in Home Space, Computer Hardware and Software Applications, Office Supplies, Printer, Cell/Mobile Phone, Virtual Fax.
Tselani Professional Business Consulting Services, LLC PO Box 2171 Chinle, AZ 86503 Phone: (480) 980-0211 Ownership: 100% FAX: None e-mail: ljbegay@tpbcs.com Contact Person: Dr. Lorenzo J. Begay License No.:	1	12/4/2023	Professional Business & Management Consulting Services in areas of Strategic Planning; Non-Profit Development, Grant Writing, Feasibility and Business Plan Development; Policy Development; Adjudication and Background (HR) Services; LGA/Chapter Governance Services; Tribal Project Development; Small Business Assistance and Financial/Funding Assistance (www.TPBCS.com)

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Victoria's Pizza PO Box 1 Crownpoint, NM 87313 Phone: (505) 870-1816 Ownership: 100% FAX: None e-mail: victorialargo63@gmail.com Contact Person: Victoria Largo License No.:	1	3/16/2023	Victoria's Pizza will be catering to the Navajo people. We are located in Crownpoint, NM. Our community will have a Navajo Owned pizzeria locally. We also have delivery services locally. We have fed our front liner's during this pandemic. We also follow NDOH safety regulations.
Visionaire Conceptual Innovation PO Box 3741 Yatahey, NM 87375 Phone: 505/240-5937 Ownership: 100% FAX: None e-mail: johnny.johnson6922@gmail.com Contact Person: Johnny Johnson License No.:	1	11/3/2023	Will provide innovative pedagogy approaches to teaching methods to increase human and work performance in the workforce and societies.
VRM Environmental LLC PO Box 939 Window Rock, AZ 86515 Phone: (928) 810-4430 Ownership: 100% FAX: None e-mail: vrm_environmental@yahoo.com Contact Person: Verna Tsosie License No.:	1	8/19/2023	Asbestos, mold, lead based paint inspection & sampling, third party air monitor, abatement project over site, Environmental Assessment - NEPA Process (new or existing development or linear projects), Biological Assessment, Phase I & II Environmental Site Assessment, and Archaeological Assessment.
Williams Pro-Clean PO Box 2413 Ft. Defiance, AZ 86504 Phone: (928) 729-5272 Ownership: 100% FAX: None e-mail: wrwms@frontiernet.net Contact Person: Wade Williams License No.:	1	6/22/2023	Custodial cleaning service, carpet cleaning, upholstery cleaning, post construction clean up, disinfectant cleaning, emergency clean up services, floor care services- strip, seal, wax, polish floors, for commercial customers.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Al's Electrical Solutions, LLC P.O. Box 812 Chinle, AZ 86503 Phone: (505) 419-2934 Ownership: 100% FAX: None e-mail: trcconstruction005@gmail.com Contact Person: Allison Tsedah License No.: 368016 NM	1	7/27/2023	I Operate projects accordingly to regulatory standards & guidelines, review blueprints & understand the projects. I develop a plan & layout of the electrical systems in accordance with industry safety rules & codes. I oversee & select qualified, experienced professionals as team members & workers to meet required abilities, skills, who are well-versed with to install, assemble, perform conduit work, devices, fixtures, electrical circuits & equipment. I test, diagnose, trouble-shoot malfunctioning systems, electrical circuits, equipment, & electrical components.
All Nations Environmental, Inc PO Box 38 Fort Defiance, AZ 86504 Phone: (928) 729-2802 Ownership: 100% FAX: (928) 729-2927 e-mail: allnationsenv@yahoo.com Contact Person: Elaine Stewart License No.: AZ/L57-257681	1	6/8/2023	Demolition, Remediation (Asbestos, mold, lead), building Inspection, Illegal Dumpsites, Hazardous Cleanup, UST, AST, Hanta Virus Cleanup, Community Development, AHEAR Project Management planner/design (OMP). EA's Recycling (Tire & Plastic).
ASTA Roofing & Construction, LLC 1121 West Third Street Winslow, AZ 86047 Phone: (928) 289-1060 Ownership: 100% FAX: (928) 289-1059 e-mail: tim.young@astajv.com Contact Person: Tim Young License No.: AZ/K42-273726	1	9/19/2023	We are company that specializes in the roofing aspect we apply all types of roofing systems, whether it be; metal, shingles, Duro-last, TPO, Tile.
Carrillo Painting, Inc 405 Dee Ann Ave. Gallup, NM 87301 Phone: (505) 722-0827 Ownership: 100% FAX: (505) 722-4563 e-mail: mc@carrillopainting.com Contact Person: Manuel Carrillo License No.: NM GS-29 89162 / AZ K-34 ROC179824	2	10/6/2023	Painting of Commercial, Residential, New Construction, Repainting, Drywall Repair, Drywall Texture, Exterior Synthetic Coating, Parking Lot Stripping, and Asphalt Seal Coating
CNL, Inc 8468 S. Calle Tomi Guadalupe, AZ 85283 Phone: (602) 812-0867 Ownership: 100% FAX: None e-mail: ccharley1126@yahoo.com Contact Person: Carnell Charley License No.: 330956	1	3/28/2023	My firm can directly provide services for projects that include electrical solar, environmental lighting, septic tanks/bathroom editions, painting, drywall, framing,residential and commercial utility, mechaincal, low voltage fire alarm security, control systems, electrical services, and plumbing.
Dooley Construction Solutions, LLC 615 Lisbon Ave. Rio Rancho, NM 87124 Phone: (505) 506-6822 Ownership: 100% FAX: None e-mail: dooley.anson@yahoo.com Contact Person: Anson Dooley License No.: 402843 / EE98	1	8/4/2023	Commercial and Residential Wiring - Access Control - LED Lighting conversion - Renewable Energy Services - Site Power and IT - Equipment Replacement - LED Street Lighting - ** Other services not listed **
Eagle Eye Network Cabling and Surveillance Systems PO Box 772 St. Michaels, AZ 86511 Phone: (928) 730-2677 Ownership: 100% FAX: None e-mail: brad0067@hotmail.com Contact Person: Bradley P. John License No.:	1	8/17/2023	Eagle Eye Network Cabling and Surveillance System (EENCSS) team primarily specializes in network cabling and termination, network continuity testing, cross connection termination, patch panel/66 block and MDF/IDF construction, fiber optic installation, indoor and outdoor WIFI hot spot installation, PBX voice/data infrastructure cabling systems, commercial, and industrial alarm systems. And security camera Installation.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Gilbert Sons Electric, LLC P.O. Box 3208 Flagstaff, AZ 86003 Phone: (480) 650-1507 Ownership: 100% FAX: None e-mail: gilbert@gilbertsonselectric.com Contact Person: Gilbert Yellowhair Jr. License No.: AZ/K11-ROC199314	1	8/22/2023	Professional Electric Service: Commercial Residential, Industrial, New Construction, Service Maintenance to schools, and Office Buildings etc.
Innovation Electric, LLC P.O. Box 1575 Kirkland, NM 87417 Phone: (505) 918-0208 Ownership: 100% FAX: None e-mail: innovativeelectricllc@gmail.com Contact Person: Alfred Ration License No.:	1	4/27/2023	UV LIGHTS, SOLAR, FIRE ALARM, SCADA, LOW VOLTAGE PANEL UP GRADE, NEW CONSTRUCTION, RE-MODEL SECURITY CAMERA - Heating Ventilation Air Conditioning Electric Control (HVAC) - Utility excavations.
Kayenta Builders, LLC PO Box 1173 Kayenta, AZ 86033 Phone: (480) 635-2352 Ownership: 100% FAX: None e-mail: cheehiker1@gmail.com Contact Person: Austin Hall License No.:	1	7/6/2023	Plan to build homes for Navajo's by Navajo's. Also build Public and Private buildings for Navajo's on Navajo Land utilizing Navajo Craftsmen.
LCR Roofing, Inc 2501 N. 4th Street, Suite 23 Flagstaff, AZ 86004 Phone: (928) 606-8406 Ownership: 100% FAX: None e-mail: LCRRoofinginc@gmail.com Contact Person: Evelyn Kerley Little License No.:	1	7/5/2023	We provide roofing goods and services for all types/slopes of residential and commercial structures. We provide seamless aluminum gutter for residential and commercial buildings.
Mariano's Plumbing & Construction PO Box 863 Crownpoint, NM 87313 Phone: (505) 879-0306 Ownership: 100% FAX: None e-mail: clifmariano95@icloud.com Contact Person: Clifford Mariano License No.: NM-MM01-033311	1	12/26/2023	Plumbing and Heating
Nations Gas Technologies, Inc. PO Box 783 Navajo, NM 87328 Phone: (505) 777-2542 Ownership: 100% FAX: None e-mail: www.nationsGasTech.com Contact Person: Aaron Rosetta License No.: NM/MM02-80276 & NM-36105 AZ/LK37-146461 & AZ-A12 -165100	1	4/4/2023	All Residential/Commercial Propane Fuel, Sale & Services, Natural/Propane Gas Construction and Utilities Services, Required Gas Line Leakage Survey, Inspection and Deficiency Correction to comply with Federal/State/Local Safety Regulations, contractor licensed in AZ & NM.
Navajo Electric PO Box 4902 Window Rock, AZ 86515 Phone: (928) 225-6068 Ownership: 100% FAX: (928) 674-3384 e-mail: navajoelectric@hotmail.com Contact Person: Michael Smiley License No.: NM/EE98-354993	1	10/3/2023	COMMERCIAL, RESIDENTIAL, SERVICES CALLS, SIGNS, MOBILE HOME HOOK UP, NEW CONSTRUCTION, RE-MODEL, UPGRADE ELECTRICAL SERVICES, LED PARKING LOT LIGHTING, SOLAR LED LIGHTS INSTALLATION WITH LIGHT POLE BASE.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Nelson Low Voltage, LLC 10619 Celle Merida NW Albuquerque, NM 87114 Phone: (505) 974-9551 Ownership: 100% FAX: None e-mail: nelsonlowvoltage@gmail.com Contact Person: Jeremy Nelson License No.: 382636	1	6/20/2023	Nelson Low Voltage, LLC. Installs low voltage structured cabling systems using the latest technology, including data infrastructure systems, fire alarms systems, surveillance, audio/video systems and access control. Our goal is to install an efficient, safety-certified, and affordable system, which will meet the changing needs of your business.
Rainier Construction, LLC PO Box 914 Farmington, NM 87499 Phone: 505-360-3231 Ownership: 100% FAX: None e-mail: andrea@rainier.construction Contact Person: Andrea Yazzie License No.: NM/GB98 & EE98-391575	1	11/23/2023	COMMERCIAL / RESIDENTIAL ELECTRICAL (New and Renovation), Rainier Construction, LLC, is capable of all phases of Residential and commercial wiring. This includes low-voltage special systems and telephone communication systems.

SUBCONTRACTORS

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Begaye's Production Services PO Box 602 Montezuma Creek, Utah 84534 Phone: (435) 680-0993 Ownership: 100% FAX: None e-mail: bpserv@hotmail.com Contact Person: Jonathan Begaye License No.:	1	5/8/2023	We offer a pumping Service for oil companies. We monitor and maintain oil and gas production and maintenance on field equipment. General roustabout and down hole services.
Burning Sage Integrity Services, LLC 339B CR 7100 Bloomfield, NM 87413 Phone: 505-860-1083 Ownership: 100% FAX: None e-mail: cjmiller09@burningsageintegrifty.com Contact Person: Carrie Miller License No.:	1	1/22/2024	BSIS offers a variety of inspection services in in the Oil and Gas Industry involving new/existing construction in pipeline & facilities. Our certification are accredited through, AWS (Welding inspections), NACE (Coating Inspections) & OSHA (Safety Inspections). BSIS provides welding Procedures Qualification, Welding Procedure Specifications & Welder Performance Qualification as needed for welding projects. We also offer welding services.
Cove Mountain Construction Company PO Box 202 Rock Point, AZ 86545 Phone: (928) 349-4638 Ownership: 100% FAX: (928) 659-4250 e-mail: joneslee@navajotech.edu Contact Person: Jones A. Lee License No.:	1	5/12/2023	Provide highest quality remodeling, Renovation repair and construction Services.
Dickson Preferred Services, LLC PO Box 229 Fort Defiance, AZ 86504 Phone: (602) 565-9520 Ownership: 100% FAX: None e-mail: rmdickson_dps@yahoo.com Contact Person: Rudy M. Dickson License No.:	1	4/28/2023	Commercial: Electrical, Plumbing, Gazebo Development, Office Renovations, Metal Partition Framing, Fence Building, Grading, and Drainage Systems.
H.D. Williams Electrical Services PO Box 1456 St. Michaels, AZ 86511 Phone: 928-797-9987 Ownership: 100% FAX: None e-mail: hdwilliamsee98@gmail.com Contact Person: Harrison D. Williams License No.: NM/EE98J-10468	1	12/1/2023	Residential, Commercial wiring (new or old project) Application rough carpentry, sheetrock, tape, HVAC-residential & Commercial meter loop, 100-1600 AMP, 1 phase, 3 phase, 480 volt, 120V/240V System, Trouble shooting Electrical, relays, Systems.
Harold McNeal, LLC- All Phases Construction 5000 Bellflower Circle Farmington, NM 87401 Phone: (505) 444-3476 Ownership: 100% FAX: None e-mail: haroldmcneal45@gmail.com Contact Person: Harold McNeal License No.:	1	6/28/2023	New Construction, Pre Construction, Construction management Estimating, Carpentry, Building Commercial and Residential with excellent craftmanship, Carpentry, Framing, Form setting, Dry wall, Roofing Demolition / Renovation, trim work, hiring local labors with the opportunity to become skilled Labors or trade men, hiring skilled carpenters and equipment operators.
Harrison Construction 13440 N. 44th Street Phoenix, AZ 85032 Phone: (602) 320-4544 Ownership: 100% FAX: None e-mail: harrisoncontract2021@gmail.com Contact Person: Franklin Harrison License No.:	1	9/21/2023	Residential & Commercial New Construction - Remodeling Interior finish work framing, trusses exterior- Drywall, Finishing, Demolition, Roofing, Painting, Metal, Framing, Windows, Flooring, Welding, Landscaping, Construction Site clean up.

SUBCONTRACTORS

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
iina'ba', Inc 4801 N. Bulter Ave., Suite 1101 Farmington, NM 87401 Phone: (505) 327-1072 Ownership: 100% FAX: (505) 327-1517 e-mail: daspaas@iinaba.com Contact Person: Duane M. Aspaas License No.:	1	7/27/2023	Asphalt Material, Insulated Concrete Forms, Septic Tanks, Aggregates/Top Soil/Concrete. Hauling (sand/gravel/asphalt/water), Demolition, Asphalt Paving & Overlay, Seal Coating, Asbestos/Lead Based Paint Abatement.
JR Construction Roustabout, Inc. PO Box 798 Montezuma Creek, UT 84534 Phone: 970-560-3221 Ownership: 100% FAX: (435) 651-3220 e-mail: jr_constr@frontiernet.net Contact Person: Jackson Lee License No.:	1	11/01/2023	Site work: Earthwork, Site Utilities, Roads & Walks, Site Improvements, Roustabout Oilfield Services, Welding Services; Structures: Metals, Roofing, Doors, Windows, Glass, Drywall, Cabinets, Waterproofing, Insulation, Sheet Metal, Tile Work, Acoustic.
Kitsilli Construction, Inc 164 Navajo Dr. Winslow, AZ 86047 Phone: (928) 313-2815 Ownership: 100% FAX: None e-mail: marcofaber@yahoo.com Contact Person: Marco Faber License No.:	1	5/4/2023	We will provide Building Foundation, Fencing, Landscaping, Construction Management, Professional Services, Master Planning, Housing, Rehabilitation, and concrete Sidewalks.
Little Mountain Builders PO Box 2667 Window Rock, AZ 86515 Phone: (928) 729-2127 Ownership: 100% FAX: (928) 729-2127 e-mail: lorenzo.nelson21@yahoo.com Contact Person: Lorenzo Nelson License No.:	1	4/7/2023	Site Surveying, Excavations, Concrete, Framing (wood & metal), Roofing - Insulation, Drywall (tape & texture) Painting - Finish Carpentry - Flooring, Masonry - Lathe Stucco, HVAC, Electrical - Plumbing - Fencing (wood/ & chain link)
M.R. Chee Construction PO Box 74 Lukachukai, AZ 86507 Phone: (505) 701-5300 Ownership: 100% FAX: None e-mail: oldynevardyes007@yahoo.com Contact Person: Michael R. Chee License No.:	1	10/25/2023	Concrete Work & Finish, Framing (wood/metal), Complete Drywall, Painting, Lath & Stucco, Tile/Floor Work, Electrical, Mechanical, Plumbing, Roofing, Renovation, Design & Build, Earthwork, Metal Building, Fencing, Handicapped Capabilities, Residential and Commercial
Mariano's Plumbing & Construction PO Box 863 Crownpoint, NM 87313 Phone: (505) 979-1056 Ownership: 100% FAX: None e-mail: clifmariano95@icloud.com Contact Person: Clifford Mariano License No.:	1	12/26/2023	Dirt Work, Leveling, Trench for Footing, Waterline, Sewer etc., Back hoe Service, Carpentry, Framing, Decking & Roofing, Building Insulation, Sheet rock, Tap & Texture, Floor Tiles, Baseboard, Doors & Window Casting, Welding, Bucking & Roping Chutes, Hold.
Nations Building Services dba Merrill Fence Company PO Box 843 Gallup, NM 87301 Phone: (505) 722-3079 Ownership: 100% FAX: None e-mail: administration@nationsbuildingservices.com Contact Person: Aaron Rosetta License No.:	1	3/9/2023	Nations Building Services, dba Merrill Fence Company offers building maintenance and home improvement along with fencing solutions. Maintenance include: Handyman fix-it services, light construction, renovation, landscaping, trenching, Products include: Industrial & Residential Chain Link Fencing, Wrought Iron Fencing, Pipe Horse Corrals, Rental Fencing, Barbed Wire Fencing, Cedar Fences, Field Fencing and Fencing Supplies.

SUBCONTRACTORS

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Native Solution, LLC PO Box 25 Many Farms, AZ 86538 Phone: (928) 587-1102 Ownership: 100% FAX: None e-mail: nativesolution.harold@gmail.com Contact Person: Harold Wilson License No.:	1	8/22/2023	Residential / Commercial Construction, Specializing in Electrical & Plumbing, - Other Construction Services; Earth Work, Septic, Waterline, - Infrastructure: Sewage, Water, Electrical.
Navajo Agricultural Products Industry PO Drawer 1318 Farmington, NM 87499 Phone: (505) 566-2600 Ownership: 100% FAX: (505) 960-9458 e-mail: DZeller@navajopride.com Contact Person: Dave Zeller License No.:	2	11/3/2023	Heavy Equipment Operators, Excavations, Pipe Fitting, Welding, Waterline Insulation, Electrical Line Insulation, Electrical, Land Leveling, Earth Moving, and Irrigation/Draining Canals.
Navi Rez Builders P.O Box 794 Gamerco, NM 87317 Phone: (505) 488-2125 Ownership: 100% FAX: None e-mail: navirezbuilders@gmail.com Contact Person: Rose Robinson License No.:	1	7/5/2023	Specialize in all phases of Residential and light commercial from design to owner occupying the project. Survey, Excavation, Footing & Foundation, Flat Work Concrete, Plumbing, HVAC, Electrical, Low Voltage, Framing, Insulation, Roofing, Windows, Drywall, Paint, Finishing Trim, Flooring, Cabinets, Counter Tops, Valve Engineering and Consulting.
PM & Sons PO Box 501 Bluff, UT 84512 Phone: (928) 245-1829 Ownership: 100% FAX: None e-mail: pmaryboy@gmail.com Contact Person: Perry Maryboy License No.:	1	4/29/2023	Maintain, Maintenance, Calibrate, Programmable Controllers, repair-upgrade electrical equipment such as motor controllers, starters, switches, motors in industrial locations, oil fields, power plants, and coal mines, focusing on Native American reservation operations. Residential, commercial and industrial construction services.
Summit Construction, Inc P.O. Box 1678 Window Rock, AZ 86515 Phone: (505) 713-2195 Ownership: 100% FAX: None e-mail: hedazie@gmail.com Contact Person: Hubert Dayzie License No.:	1	3/9/2023	Road site leveling , Earth Dam & , Earthen Tanks Water Lines, Gravel Pits, Borrow pit, Sand and Gravel hauling, Earth work, Fuels tank removal, Heavy Construction and rental, Reclamation Land, Water Hauling Fabrication of Modular Buildings and Medal Buildings including transport. Excavating and Improving access and/or pioneer roads."
The Other Guy's Construction Services PO Box 1152 St. Michael, AZ 86511 Phone: (928) 206-3325 Ownership: 100% FAX: None e-mail: Buildinghooghans@gmail.com Contact Person: Austin Yazzie License No.:	1	7/17/2023	Concrete Work, Drywall Texture, Interior/Exterior Painting, Fabricate Home Additions, Welding, Metal Fabricating, Roofing Repair, Carpentry Work, Wall Framing, Cabinet Installations, Shower Fixtures, Commode & Sink Installation, Building Traditional Hogans, Home Remodeling.
Toh Den Nas Shai Electric-Plumbing PO Box 1256 Kayenta, AZ 86033 Phone: (928) 697-4744 Ownership: 100% FAX: None e-mail: curtisambrose66@yahoo.com Contact Person: Curtis H. Ambrose License No.: 253560527370 253560527350	1	9/16/2023	Residential/Commercial wiring, Electrical wiring, . Installations of all HVAC and Plumbing equipment, both residential and commercial Recovery, Recharging of Refrigeration system and Equipment.

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
Abeita Oil Company, LLC 1705 W. Hwy 66 Gallup, NM 87301 Phone: (505) 722-8877 Ownership: 100% FAX: (505) 722-9280 e-mail: Abeitaoil@yahoo.com Contact Person: Ernie Abeita License No.:	2	9/15/2023	Unleaded fuel and Diesel fuels
Advertising Ideas, Inc. 2012 San Juan Blvd Farmington, NM 87401 Phone: (505) 326-5002 Ownership: 100% FAX: (505) 326-3754 e-mail: sales2@advertisingideas.com Contact Person: Sherry A. Foutz License No.:	2	12/5/2023	Jackets, Caps, T-Shirts, Uniforms & Sportswear; Advertising Specialty: Pens, Pencils, Calendars, Mugs, Key Chains, Frisbees, Visors, Police Uniforms , & tactical gear for first responders, ETC
Celebrations Party Store and More, Inc 419 E. Broadway Farmington, NM 87401 Phone: (505) 436-2054 Ownership: 100% FAX: None e-mail: tammy@celebrations.concastbiz.net Contact Person: Tamberlee Simpson License No.:	1	2/6/2023	Celebrations Party Store is stocked with tableware, decorations, party accessories, helium, helium tank rentals, balloons of every type, along with the necessary skills to make each event a total success. We also offer special-item ordering and balloon decor (bouquets, arches, columns, unique arrangements, etc.) for any occasion. Celebrations is fully equipped to arrange and deliver large orders, if necessary.
Eagle Feather Minerals PO Box 2851 Page, AZ 86040 Phone: (928) 640-7218 Ownership: 100% FAX: None e-mail: eaglefeatherminerals@gmail.com Contact Person: Michael Etcitty License No.:	1	8/30/2023	Nano Trace Minerals & Nutrients - Fertilizer & Soil Remediation for all areas of Agriculture
Ernie's Supply Company, LLC 1705 W. Hwy. 66 Gallup, NM 87301 Phone: (505) 722-8877 Ownership: 100% FAX: (505) 722-9280 e-mail: erniesupplyllc@gmail.com Contact Person: Ernie Abeita License No.:	2	9/15/2023	Supply and service first aid suppliers, fire extinguishers, servicing fire extinguishers , kitchen hood systems, fire systems, tires, auto glass, janitorial supplies, and office supplies. We have been priority 2 with the Navajo Nation Regulatory Department for over 40 years. Roofing Supplies,filters, electrical supplies, Tin building, Land Scaping, PPE supplies, plumbing supplies, interior / exterior doors.
H&B Services,LLC 7000 N 16th Street Suite 120-287 Phoenix, AZ 85020 Phone: (480) 793-8266 Ownership: 100% FAX: None e-mail: Harrison@HBServices-info Contact Person: Harrison Begay License No.:	1	9/13/2023	Supply Medical and Health Related Items to the Navajo Nation.
Magic Gz Home Furnishing HC-63 Box 6247 Winslow, AZ 86047 Phone: (505) 879-8643 Ownership: 100% FAX: None e-mail: magicgz@yahoo.com Contact Person: Gina Betoney License No.:	1	8/4/2023	Tires. Wheels. Woodstoves. Hearth Pads. Mattresses. In/outdoor Furniture. Southwest Blankets. Lenin. Appliances. Woodstoves. Hearth Pads. Metal Roofing/Labor & MORE!

SUPPLIERS

COMPANY NAME	PRIORITY	EXP. DATE	TYPE OF WORK OR SERVICE PROVIDED
NativeVet Materiel, LLC 2700 San Pedro Dr. NE, Albuquerque, NM 87110 Phone: (800) 832-9154 Ownership: 100% FAX: (505) 837-0575 e-mail: tchavez@nativevet.com Contact Person: Timothy Chavez License No.:	2	9/28/2023	Supplier Business – Offers Supplies and Products in the following Categories: Medical & Lab Products, Office/ School Supplies & Furniture, Janitorial/ Sanitation, Computer Software, Equipment & Accessories, Maintenance, Repairs & Operations Supplies, and Operations Supplies & Equipment, Various Tools, Heavy Equipment & Trailers, Wild land Fire Supplies & Equipment and Fencing Material.
Navajo Technology Services, Inc PO Box 594 Window Rock, AZ 86515 Phone: (928) 871-2871 Ownership: 100% FAX: None e-mail: www.navajotechnologyservices.com Contact Person: Vernon Livingston License No.:	1	9/25/2023	Navajo Technology Services Supplies & Resells computers, printers, tools, office/job supplies, Network / Telecommunication,. Vehicle & other Technology Peripheral, Devices, Industrial products, & related items.
Shundiin Shine Lighting and Electrical S PO Box 4902 Window Rock, AZ 86515 Phone: (928) 714-8161 Ownership: 100% FAX: (928) 871-1110 e-mail: shundiinshine@gmail.com Contact Person: Jennifer Smiley License No.:	1	10/25/2023	Solar LED Street Lights for Commercial and Residential, Electrical Supplies for Mobile Home hook up, LED Lighting, Wall pack lights, Solar wall pack lights, LED Parking lot lights- retrofit & new installation, Solar LED Street Lights, Lighting Design - IES Drawing.

THE NAVAJO NATION
DIVISION OF ECONOMIC DEVELOPMENT

Legal Business Name: ____

Contact Person: Telephone No: ____________________

NAVAJO BUSINESS OPPORTUNITY ACT

REQUIREMENTS FOR RE-CERTIFICATION

____________ 1. UPDATED APPLICATION

A. Application Must Be Updated if there are Any Significant Changes in the Business OR
   1. Change in Ownership
   2. List Duties & Responsibilities of New Owners
   3. Updated Organizational Chart reflecting Changes
   4. Business Plan

B. If Certification Expired More Than Three (3) Months OR

C. If Application is More Than Two (2) Years Old

____________ 2. PROJECTS

A. List of Projects for the Past Year with Certification

B. Type of Projects

C. Location of Projects

D. Estimated Dollar Amount for each Project

____________ 3. CHANGES/MODIFICATIONS

A. Business Plan

B. Contact Information

C. Changes in Activities

(Exhibit B)

PAST PROJECTS

	PROJECTS	DATE & YEAR	NO. OF EMPLOYEES	OWNER OF PROJECT(S)	LOCATION	COST APPROXIMATE
1				Name: Address: PH.# ( )		
2				Name: Address: PH.# ( )		
3				Name: Address: PH.# ( )		
4				Name: Address: PH.# ( )		
5				Name: Address: PH.# ( )		
6				Name: Address: PH.# ( )		
7				Name: Address: PH.# ( )		
8				Name: Address: PH.# ( )		
9				Name: Address: PH # ( )		

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept
(928) 871-7365
871-6714
Fax: (928) 871-7381

NAVAJO NATION LIMITED LIABILITY COMPANY ACT

APPLICATION FOR REGISTRATION OF A FOREIGN LIMITED LIABILITY COMPANY

1. The name of the foreign limited liability company is:

____

1.a. If the exact name of the foreign limited liability company is not available for use in the Navajo Nation, then the fictitious name adopted for use by the limited liability company in the Navajo Nation is:

____

2. The company is organized under the laws of the State of ______________________.

3. The date of the company's formation is: ______________________

4. The purpose of the company or the general character of business it proposes to transact in the Navajo Nation is:

____

____

____

5. The name, street address and mailing address of the statutory agent for the foreign limited liability company within the Navajo Nation is:

Name ____

Address ____

City ______________________ State______________ Zip ______________

Street Address ____

ACCEPTANCE OF APPOINTMENT BY STATUTORY AGENT

I, ______________________________, having been designated to act as statutory agent,
(Print Name)
hereby consent to act in that capacity until removed or resignation is submitted in accordance with the Navajo Nation Limited Liability Company Act.

Signature: ____

____
If signing on behalf of a company, please print company name here.

6. Management Structure (select option A or B):

A. ☐ Management of the limited liability company is vested in a manager or managers. The names and addresses of each person who is a manager AND each member who owns a twenty percent or greater interest in the capital or profits of the limited liability company are:

Name: ______________________________ ☐ member ☐ manager
Address: ____________________________
____
City, State, Zip:______________________

Name: ______________________________ ☐ member ☐ manager
Address: ____________________________
____
City, State, Zip: ______________________

Name: ______________________________ ☐ member ☐ manager
Address: ____________________________
____
City, State, Zip:______________________

Name: ______________________________ ☐ member ☐ manager
Address: ____________________________
____
City, State, Zip: ______________________

B. ☐ Management of the limited liability company is reserved to the members. The names and addresses of each person who is a member are:

Name: ______________________________
Address: ____________________________
____
City, State, Zip:______________________

Name: ______________________________
Address: ____________________________
____
City, State, Zip: ______________________

Name: ______________________________
Address: ____________________________
____
City, State, Zip: ______________________

Name: ______________________________
Address: ____________________________
____
City, State, Zip: ______________________

7. The address of the office required to be maintained in the jurisdiction under the laws of which the company is organized, if required; or, if not required, the address of the principal office of the company is:

____
____
____

Executed this __________ day of ______________________________________, ____________

____
Signature

____
Print Name (Check One) ☐Member ☐Manager ☐Authorized Agent

Federal Employer ID Number (FEIN): ____________________________________

Phone: __________________________________ Fax: ____________________________________

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NAVAJO NATION LIMITED LIABILITY COMPANY ACT

INFORMATION ON REGISTERING A LIMITED LIABILITY COMPANY AS A DOMESTIC (NNLLCA, CHAPTER 21)

A Limited Liability Company is formed on the Navajo Nation by filing an Articles of Organization in duplicate originals, with this office, together with the appropriate filing fee. The following information may be of assistance to you.

YOU SHOULD NOT RELY SOLELY ON THIS INFORMATION SHEET. YOU SHOULD CONSULT LEGAL COUNSEL. SPECIAL REQUIREMENTS MAY APPLY TO THE TYPE OF LIMITED LIABILITY COMPANY WILL HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES FOR YOU, WHICH SHOULD BE CAREFULLY CONSIDERED. THE INFORMATION PROVIDED HERE DOES NOT COVER THE COMPLEX LEGAL CONSEQUENCES OF OPERATING YOUR BUSINESS AS A LIMITED LIABILITY COMPANY. ONLY AFTER CONSULTATION WITH A KNOWLEDGEABLE ATTORNEY, ADVOCATE AND/OR ACCOUNTANT, WILL YOU BE ABLE TO DETERMINE IF A LIMITED LIABILITY COMPANY IS APPROPRIATE FOR YOU.

Upon filing of the Articles of Organization that must be in compliance with all applicable Navajo Nation laws, the Department will issue a Certificate of Organization.

1. The Articles of Organization must include what is contained in the sample Articles of Organization on the next page.

2. The Articles of Organization may include additional provisions governing the organization so long as they are consistent with the organization act and other applicable laws.

3. Duplicate originals must be filed – one typed original and photocopy will be sufficient, so long as both contain original signatures.

4. In addition to the duplicate Articles of Organization, a filing fee of $10.00 by money order or business check payable to the Navajo Nation must be remitted with the Articles.

Other types of organizations allowed under the act (foreign Limited Liability Company, Limited Partnership, Uniform Partnership, and L3C) have different requirements.

The following format is generally used for Articles of Organization. The Articles need not appear in the order in which they appear here. The Articles should be drafted in complete sentences, for example:

ARTICLE I

The name of the Organization is XYZ, Limited Liability Company.

The Limited Liability Company Act sections referred to in this form contain relevant information in each of the Articles of Organization.

ARTICLES OF ORGANIZATION
OF
____

The undersigned natural person, acting as organizer of a limited liability company under the Navajo Nation Limited Liability Company Act, hereby adopts this Articles of Organization for such company.

ARTICLE I

Name of the limited liability company;

ARTICLE II

Street and mailing address, and phone number of the initial designated office;

ARTICLE III

Name, street and mailing address of the initial agent for service of process;

ARTICLE IV

Name, street and mailing address of each organizer;

ARTICLE V

Whether the company is to be a term company and, if so, the term specified;

ARTICLE VI

Whether the company is to be manager-managed and, if so, the name, street and mailing address and phone number of each initial manager;

ARTICLE VII

Whether one or more of the members of the company are to be liable for its debts and obligations under Section 3642(C).

ARTICLE VIII

A provision stating that the company will agreed to abide by all applicable criminal, civil and regulatory laws of the Navajo Nation.

(Organizer

(Organizer)

ACKNOWLEDGMENT OF THE REGISTERED AGENT

I, _______________________, having been designed to act as Registered Agent, hereby consent to act in that capacity until removed or until a resignation is submitted in accordance with the Navajo Nation Limited Liability Company Act.

____
(Signature of Registered Agent)

____

____
Mailing Address of Registered Agent

____
Street Address of Registered Agent-
Exact street address. If there is no street address, a map must be included on exact location of Registered Agent.

Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515

Business Regulatory Dept
(928) 871-7365
871-6714
Fax: (928) 871-7381

NAVAJO NATION LIMITED LIABILITY COMPANY ACT

ARTICLES OF TERMINATION
Pursuant to 5 NNC § 3704

1. The name of the limited liability company is: ______________________________

   ____

2. Date of Dissolution: ____

3. That all debts, obligations and liabilities have been paid and discharged or that adequate provisions have been made for them.

4. All known properties and assets of the limited liability company have been applied and distributed in accordance with 5 NNC § 3600 *et.seq* .

5. That there are no suits pending against the company in any court or that adequate provisions have been made for the satisfaction of any judgment, order or decree that may be entered against it in any pending suit.

6. That the company's business has been wound up and the legal existence of the company has been terminated.

Dated this __________ day of ____________________________, ____________

Signature: ____

Print Name: ____

(Check one) ☐ Member ☐ Manager

The articles of termination must be executed by a manager, if management of the limited liability company is vested in a manager or by a member if management is reserved to the member(s).

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871-6714
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www.navajobusiness.com

NAVAJO NATION LIMITED LIABILITY COMPANY ACT

ANNUAL REPORT (5 NNC § 3630)

____
For Fiscal Year Ending

All information must be completed and the required fee submitted, or this document will not be accepted for filing.

File No.:____________
(Office Use Only)

1. LLC's Name: ____

____
(Name must match the name on file with the Navajo Nation)

2. Street and Mailing address of the LLC's designated office:

____
Address

____
City State Zip

3. Name of the LLC's Agent for Service:______________________________

4. Street and Mailing address of the LLC's Agent for Service:

____

____

5. Names of the Manager/Members:

____

____

____

____

6. Street and mailing address of the manager:

____

7. Phone Number: ____

8. Federal Employer ID Number (FEIN): ______________________________

I declare under penalty of perjury pursuant to the laws of the Navajo Nation that the foregoing is true and correct and that I have remitted the required fee. **(Do not leave blank.)**

______________________________________ ______________________________
Signature Check One ☐Manager ☐Member Date: (month, day, year)

____
Print Name

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NAVAJO NATION UNIFORM COMMERCIAL CODE

FILING FEE SCHEDULE

Fee Schedule - to partially offset the expense of administering the Navajo Uniform Commercial Code. All documents filed by individual entities under this Code shall be accompanied by a fee schedule to process and maintain certain records according to the following schedule:

UCC Form #1	$ 4.00
UCC Form #1 w/Assignee	$ 5.00
UCC Form #2	$ 4.50
UCC Form #2 w/Assignee (Amendments, Extensions, etc.)	$ 5.50
UCC Form #3 (Terminations)	$ 5.00
Security Agreement	$ 7.00
Security Agreement (If more than 5 pages)	$ 7.00 plus $.50 per/page
Security Agreement, Amendments	$ .50 per/page
Search Fee	$ .50 per/pg.

All fees listed above will be non-refundable. <u>Money Orders ONLY</u>, no personal checks and make payable to <u>Navajo Nation, Business Regulatory Department</u>.

NAHATA FOUNDATION, INC.

MAINTAINING A NAVAJO NATION BUSINESS

1. General Compliance
2. Meeting Deadlines For Regulatory Filings
3. Records And Record Keeping
4. Policies And Procedures: Development And Filings
5. Taxes
6. Closing Out A Fiscal Year
7. Selling Or Closing A Business

NAHATA FOUNDATION, INC.

Annotated Navajo Nation Business Regulatory Website Links

Business Regulatory – NN DED (navajoeconomy.org)

The Navajo Nation Business Regulatory site is where to start when registering your business within the Navajo Nation.

Certification & Registration Services – NN DED (navajoeconomy.org)

This link will take you to all required forms to register your business within the Navajo Nation. This includes various organizational structures of businesses, and compliance information.

Annotated Navajo Nation Legislation Website Links

Navajo Nation Code | Navajo Nation Office of Legislative Services (nnols.org)

This link will take you to Navajo Nation Code Titles 1 -26, which are current statutory laws of the Navajo Nation.

Code | 25th Navajo Nation Council

Navajo Nation Code with current amendments to tribal statutes. Links to amendments are helpful when researching laws related to business regulatory and corporation code changes. Changes in business regulatory are often published on the Navajo Nation Business Regulatory website, but entire revisions are listed under amendments on this page.

**Websites here listed are up-to-date and accurate as of March 2023, but are subject to change without notice as the Navajo Nation updates and amends forms when new or amending legislation for businesses are enacted.*

Please visit the link for updated forms.

amended CM-32-56, § 1, 1956, Res. p. 166, May 22, 1956, app. by General Superintendent, June 1, 1956.

Amendments 1962. CD-74-62, § 9, December 6, 1962, amended this Section and §§ 3002 and 3003 of this Title by substituting "Navajo Parks Commission" for "Chairman of the Navajo Tribal Council", wherever the words appeared. CF-31-57, February 16, 1957, which had amended the Section to substitute "Navajo Park Commission" for "Chairman of the Navajo Tribal Council" was repealed by CD-74-62, § 10.

Amendments 1957. CM-32-56 was amended by CF-31-57, § 7, which substituted words "Navajo Tribal Park Commission" for words "Chairman of the Navajo Tribal Council" wherever they appeared.

Cross References

Navajo Tribal Parks Commission generally, see 19 N.N.C. § 201 *et seq*.

§ 3002. Issuance of license; term; fees

The Navajo Parks Commission may issue a license to any person of good moral character and of adequate finances to act as a guide for tourists on Navajo Nation lands. Such license shall be for a term not to exceed five years and shall provide for the payment to the Navajo Nation of ten percent (10%) of the receipts of such person on account of acting as a guide or conductor of tourists on Navajo Nation lands. A minimum advance fee of one hundred dollars ($100.00), which shall be credited against the percentage fees, shall be collected before any such license shall be issued.

History

CD-74-62, §§ 9 and 10, December 6, 1962 and CF-31-57, § 7, February 16, 1957 amended CM-32-56, § 1, 1956, Res. p. 166, May 22, 1956, app. by General Superintendent, June 1, 1956.

Amendment 1962. See Note under § 3001 of this title.

Amendment 1957. See Note under § 3001 of this title.

§ 3003. Rules and regulations; authority to adopt

The Navajo Parks Commission is authorized to adopt rules and regulations and do all things necessary to implement or supplement the provisions of this Chapter.

History

CD-74-62, §§ 9 and 10, December 6, 1962 and CF-31-57, § 7, February 16, 1957 amended CM-32-56, § 1, 1956, Res. p. 166, May 22, 1956, app. by General Superintendent, June 1, 1956.

Chapter 19. Navajo Nation Corporation Code

Subchapter 1. General Corporation Law

§ 3100. Policy and purpose

The Navajo Nation Corporation Code is hereby enacted:

A. The purpose of this Code is to permit the formation of various corporate entities and require registration of foreign corporations; and to regulate such entities so as to promote economic growth and further the exercise of tribal sovereignty in the governance of its territory and citizens.

B. This Code is based upon the American Bar Association's Model Business Corporation Act, the Model Close Corporation Act and the Model Code, and the various agricultural cooperative acts of several states. The interpretation of this Code shall be based on Navajo Nation Court interpretation and such interpretation shall give the utmost respect in deciding the meaning and purpose of this Code to the unique traditions and customs of the Navajo people. General decisional law interpreting similar provisions of the above Model Acts and state agricultural cooperative acts may be used as guidance.

C. Unless otherwise expressly provided by law, the sovereign immunity of the Navajo Nation shall not extend to corporate entities organized under this Code, nor shall such entities be considered a subdivision, entity or enterprise of the Navajo Nation, nor shall the Navajo Nation be liable for the debts or obligations of any kind of such entities.

D. The provisions of this Code shall be fully implemented within 180 days of the date of its adoption by the Navajo Nation Council; provided however, the issuance of certificates of incorporation shall be issued on the date of adoption. The Division of Economic Development through its Business Regulatory Department shall administer the provisions of this Code. The Division of Economic Development is directed to prepare an appropriate supplemental budget for carrying out its responsibilities under this Code.

History

CJA-2-86, January 30, 1986.

Annotations

1. Construction and application

"The Navajo Nation Council adopted the concept of corporations from *Bilagáana* law. Like other jurisdictions, the Navajo Nation provides the opportunity to incorporate, that is, to create a legal entity called a corporation. See 5 N.N.C. §§ 3100 *et seq*. (2005)." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 10 (Nav. Sup. Ct. August 7, 2006).

2. Corporation as a person

"The decision to incorporate renders a corporate entity a separate 'person' from its officers and staff for purposes of the unauthorized practice of law. One primary motivation to incorporate is to separate the personal liability of officers, staff, and shareholders from that of the corporate entity, so that when the entity is sued for actions taken by those natural persons, the judgment is satisfied by the corporation's funds." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 11 (Nav. Sup. Ct. August 7, 2006).

"While the resulting corporation is treated as a 'person' for various purposes, the Court holds it has a separate legal existence from its officers and staff and is therefore a separate 'person' for purposes of the prohibition against the unauthorized practice of law. The choice to incorporate carries benefits but also, importantly, consequences. Among the consequences of incorporation is the inability of its agents to represent the corporate entity 'pro se'." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 11 (Nav. Sup. Ct. August 7, 2006).

Article 1. Title; Definitions; Purposes

§ 3101. Short title

This Chapter shall be known and may be cited as the "Navajo Nation Corporation Act."

History

CJA-2-86, January 30, 1986.

§ 3102. Definitions

A. "Articles of Incorporation" include the original articles of incorporation, articles of merger or consolidation and all amendments thereto.

B. "Attorney General" means the Attorney General of the Navajo Nation.

C. "Authorized shares" means the aggregate number of shares, whether with or without par value, which the corporation is authorized to issue.

D. "Capital surplus" means the entire surplus of a corporation other than its earned surplus.

E. "Corporation" or "domestic corporation" means a for profit or non-profit corporation subject to the provisions of this Chapter, except a foreign corporation.

F. "Court", except where otherwise specified, means the Navajo Nation District Court having jurisdiction over civil actions.

G. "Department" means the Department of Commerce within the Division of Economic Development or its designated successor.

H. "Earned surplus" means the portion of the surplus of a corporation equal to the balance of its net profits, income, gains and losses from the date of incorporation, or from the latest date when a deficit was eliminated by an application of its capital surplus or stated capital or otherwise, after deducting subsequent distributions to shareholders and transfers to stated capital, and capital surplus to the extent such distribution and transfers are made out of earned surplus. Earned surplus shall also include any portion of surplus allocated to earned surplus in mergers, consolidations or acquisitions of all or substantially all of the outstanding shares or of the property and assets of another corporation, domestic or foreign.

I. "Foreign corporation" means a corporation for profit or not for profit organized under laws other than the laws of the Navajo Nation.

J. "Incorporator" means a signer of the original articles of incorporation.

K. "Insolvent" means that the total liabilities of the corporation exceed a fair valuation of its total assets.

L. "Navajo Indian Country" has the same meaning as in 7 N.N.C. § 254.

M. "Non-profit corporation" means a corporation, no part of the income or profit of which is distributable to its members, directors or officers, except this Chapter shall not be construed as prohibiting the payment of reasonable compensation for services rendered or a distribution upon dissolution or liquidation as permitted by Subchapter 2.

N. "Person" means both natural persons, either Navajo or non-Navajo, and foreign and domestic corporations and tribal governments and their political subdivisions.

O. "Registered office" means that office maintained by the corporation within Navajo Indian Country, the address of which is on file with the department.

P. "Shareholder" means one who is a holder of record of shares in a corporation.

Q. "Shares" are the units into which the shareholders' right to participate in the control of the corporation, in its surplus or profits, or in the distribution of its assets, are divided.

R. "Stated capital" means, at any particular time, the sum of:

1. The par value of all shares of the corporation having a par value that have been issued;

2. The amount of the consideration received by the corporation for all shares of the corporation without par value that have been issued, except such part of the consideration therefor as may have been allocated to capital surplus in a manner permitted by law; and

3. Such amounts not included in subdivisions 1 and 2 of this Paragraph as have been transferred to stated capital of the corporation, whether upon the issue of shares as a share dividend or otherwise, minus all reductions from such sum as has been effected in a manner permitted by law.

4. Irrespective of the manner of designation thereof by the laws under which a foreign corporation is organized, the stated capital of a for profit foreign corporation shall be determined on the same basis and in the same manner as stated capital of a domestic corporation, for the purpose of computing fees and other charges imposed by this Chapter.

S. "Subscriber" means one who subscribes for shares in a corporation, whether before or after incorporation.

T. "Treasury shares" means shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation, and have not, either by reason of the acquisition or thereafter, been cancelled or restored to the status of authorized but unissued shares. Treasury shares shall be deemed to be "issued" shares but not "outstanding" shares.

History

CJA-2-86, January 30, 1986.

Annotations

1. Non-profit

"NHA formed Cabinets as a subsidiary of NHA to operate the cabinet business referenced in the lease with the Navajo Nation. Resolution No. NHA-3016-98, Whereas clause nos. 3, 4 (March 5, 1998). Cabinets incorporated as a non-profit entity under the Navajo Nation Non-Profit Corporation Act, 5 N.N.C. § 3301 *et seq*." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 5 (Nav. Sup. Ct. February 11, 2004).

§ 3103. Authorized purposes for organization of corporation

Corporations for profit may be organized under this Chapter for any lawful purpose or purposes.

History

CJA-2-86, January 30, 1986.

§ 3104. General powers

A. Each corporation shall have the power:

1. To have perpetual succession of its corporate name unless a limited period of duration is stated in its articles of incorporation;

2. To sue and be sued, complain and defend, in its corporate name;

3. To have a corporate seal, which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced, provided however corporate seals shall not duplicate or closely resemble the seals of the Navajo Nation or its entities;

4. To purchase, take, receive, lease, take by gift, devise, or bequest, or otherwise acquire, and to own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, including shares or other interests in, or obligations of, other domestic or foreign corporations, non-profit corporations, associations, partnerships, limited partnerships, or individuals or governmental units or bodies, wherever situated;

5. To redeem, acquire, cancel reacquired shares, reacquire and restore to the status of authorized but unissued, shares of stock issued by the corporation, but subsequently acquired by the corporation;

6. To sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets;

7. To lend money to, and otherwise assist, its employees;

8. To make contracts including contracts of guaranty, suretyship and indemnification and incur liabilities; to borrow money, to issue its notes, bonds, and other obligations; and to secure any of its obligations by mortgage or pledge of all or any of its property or income, except for property or income held in trust subject to legal restrictions on hypothecation;

9. To invest its surplus funds from time to time and to lend money for its corporate purposes, and to take and hold real and personal property as security for the payment of funds so invested or loaned;

10. To conduct its business, carry on its operations, and have offices and exercise the powers granted by this Chapter outside of Navajo Indian Country and to exercise in any reservation, state, territory, district, or possession of the United States, or in any foreign country the powers granted by this Chapter subject to the laws of such jurisdictions;

11. To elect or appoint officers and agents of the corporation, and to define their duties and fix their compensation;

12. To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of the Nation, for the administration and regulation of the affairs of the corporation;

13. To make contributions to charitable organizations;

14. To cease its corporate activities and surrender its corporate franchise; and

15. To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is formed.

B. Corporations organized under this Chapter shall not have the power to engage in banking business.

History

CJA-2-86, January 30, 1986.

§ 3105. Corporate name

A. The corporate name of a domestic corporation:

1. Shall contain the word "corporation", "company", "incorporated", or "limited", or shall contain an abbreviation of one of such words;

2. Shall not include the words "trust" or "trust company", separately or in combination to indicate or convey the idea that the corporation is engaged in trust business unless such corporation is to be and becomes actively and substantially engaged in trust business or such corporation is a holding company holding substantial interest in companies actively and substantially engaged in trust business;

3. Shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its articles of incorporation;

4. Shall not be the same as, or deceptively similar to, the name of any other entity organized or registered under this Code; and

5. Shall not contain the words "Navajo Nation" or "Navajo Tribe", nor in any way imply that it is associated with the Navajo Nation government or a Navajo Nation entity, unless the Navajo Nation is a majority stockholder.

History

CJA-2-86, January 30, 1986.

Article 2. Organic Documents

§ 3106. Incorporators

One or more persons may act as incorporators of a corporation by signing and filing in duplicate with the department articles of incorporation. Upon filing of the articles of incorporation and compliance with applicable regulations, the Department shall issue a certificate of incorporation.

History

CJA-2-86, January 30, 1986.

Note. The "Department", as referred to in this Subchapter, is the Business Regulatory Department within the Division of Economic Development.

§ 3107. Contents of articles of incorporation

A. The articles of incorporation shall set forth:

1. The name of the corporation;

2. The period of duration, which may be perpetual;

3. The purpose or purposes for which the cooperation is organized;

4. A brief statement of the character of the business which the corporation initially intends to conduct;

5. The class and aggregate number of shares which the corporation shall have the authority to issue and the par value of each of said shares, or a statement that all of said shares are without par value;

6. Any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation;

7. The address, including street and number, if any, of its principal office, and the name of its initial registered agent at such address;

8. The number of directors constituting the initial board of directors and the names and addresses, including street and number, if any, of the persons who are to serve as directors until the first annual meeting of shareholders; or until their successors are elected and qualified. The minimum number of directors constituting the initial board shall be one;

9. The name and address, including street and number, if any, of each incorporator; and

10. A provision stating that the corporation will agree to abide by all criminal, civil and regulatory laws of the Navajo Nation.

B. It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this Chapter. Whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation shall be controlling.

C. The articles of incorporation may provide for arbitration of any deadlock or dispute involving the internal affairs of the corporation.

History

CJA-2-86, January 30, 1986.

Annotations

1. Construction and application

"We believe the Navajo Nation possesses the same authority over corporations organized under Navajo law, as such corporations elected to incorporate under Navajo law, and therefore must abide by Navajo law as a condition of their existence. *Cf.* 5 N.N.C. § 3107(A)(10) (requiring explicit agreement by for-profit corporations to abide by Navajo law in articles of incorporation)." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission,* No. SC-CV-46-03, slip op. at 7 (Nav. Sup. Ct. February 11, 2004).

§ 3108. Effect of issuance of certificate of incorporation

Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Chapter, except as against the Navajo Nation in a proceeding to cancel or revoke the certificate of incorporation.

History

CJA-2-86, January 30, 1986.

§ 3109. Bylaws

The power to make, alter, amend, or repeal the bylaws of the corporation shall be vested in the board of directors unless reserved to the shareholders by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law, or the articles of incorporation.

History

CJA-2-86, January 30, 1986.

Article 3. Stock and Stockholders

§ 3110. Power to issue shares

Each corporation shall have the power to create and issue the number of shares in its articles of incorporation.

History

CJA-2-86, January 30, 1986.

§ 3111. Subscriptions, considerations, payment for shares, and determination of amount of stated capital

Subscriptions, consideration, payment for shares and determination of amount of stated capital, shall be governed consistent with the provisions of the Model Business Corporation Act (as revised and approved as of January 1, 1986, by the American Bar Association Committee on Corporate Laws).

History

CJA-2-86, January 30, 1986.

§ 3112. Transfer of stock

Stock shall be freely alienable except to the extent restricted by the articles of incorporation or bylaws, and except that this Section shall not be construed to restrict the operations of applicable blue sky or securities laws. No public offering of a security may be made without proof to the Department of compliance with such applicable blue sky or securities laws.

History

CJA-2-86, January 30, 1986.

§ 3113. Denial or restriction of voting rights

A corporation may deny or restrict the voting rights of any of its stock, in its articles of incorporation, so long as it does not restrict or deny voting class shareholders' right to cumulative voting and preemptive right to acquire additional shares of the corporation.

History

CJA-2-86, January 30, 1986.

§ 3114. Expenses of organization, reorganization, and financing

The reasonable charges and expenses of organization or reorganization of a corporation may be paid out of the consideration received by the corporation in payment for its shares without thereby rendering such shares not fully paid.

History

CJA-2-86, January 30, 1986.

§ 3115. Stock certificates; representation of shares; signers; restrictions or limitations on transferability; contents

A. The shares of a corporation shall be represented by certificates signed by the president. In case any officer who has signed such certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation with the same effect as if such officer had not ceased to hold such office at the date of its issue.

B. Every certificate representing shares, the transferability of which is restricted or limited, shall set forth a summary statement of any such restriction or limitation upon the transferability of such shares, on its face, and shall set forth on the back thereof a full statement of any such restriction or limitation upon the transferability of such shares, or shall state that the corporation will furnish to any shareholder upon request and without charge such statement.

C. Each certificate representing shares shall also state:

1. That the corporation is organized under the laws of the Navajo Nation;

2. The name of the person to whom issued;

3. The number and class of shares which such certificate represents; and

4. The par value of each share represented by such certificate, or a statement that the shares are without par value.

D. No certificate shall be issued for any share until such share is fully paid.

History

CJA-2-86, January 30, 1986.

§ 3116. Liability of subscribers and shareholders

A. A holder or a subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which said shares were issued or to be issued, which, as to shares having a par value, shall be not less than the par value thereof, except as set forth in Subsection (C) below. Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid, shall not be personally liable to the corporation or its creditors for any unpaid portion of such consideration.

B. No person holding shares as executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver shall be personally liable as a shareholder, but the shareholder estate and funds in the hands of said executor, administrator, conservator, guardian, trustee, assignee, or receiver shall be so liable. No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder.

C. A holder or subscriber to shares of a corporation is presumed not to be personally liable for the debts of the corporation, but may be personally liable to the corporation in proportion to their ownership interest, after all assets of the corporation have been applied to claims of creditors, and the debts, obligations and liabilities of the corporation are not thereafter paid and discharged, to the extent determined by the court based upon the application of general decisional law relating to the piercing of the corporate veil, pursuant to 7 N.N.C. § 204. The court may consider in making shareholders liable hereunder, whether under the circumstances giving rise to claims of creditors, the acts or omissions by the corporation involved:

1. Fraud;

2. Misrepresentation;

3. Thin-capitalization;

4. Ultra-hazardous activities;

5. Violation of applicable consumer protection laws;

6. Criminal wrong-doing;

7. Failure to maintain a reasonable amount of liability insurance coverage for the acts or omissions of its directors, officers, employees or agents; or

8. Failure to comply with any provision of this Code.

D. No right to contribution shall exist between the shareholders and no liability under this Section shall be asserted more than one year from the later of the time a creditor's claim in tort or contract accrued or the date such claim should have been discovered.

History

CJA-2-86, January 30, 1986.

§ 3117. Voting of shares; exclusion of shares or corporation's own stock; determination of number of outstanding shares

A. Unless otherwise provided in the articles of incorporation, each outstanding share shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders.

B. Shares of treasury stock belonging to a corporation shall not be voted, directly or indirectly, at any meeting and shall not be counted in determining the total number of outstanding shares at any given time, but shares of its own stock held by it in a fiduciary capacity may be voted and shall be counted in determining the total number of outstanding shares at any given time.

C. A shareholder may vote either in person or by proxy executed in writing by the shareholder or by his/her duly authorized attorney in fact. No proxy shall be valid after 11 months from the date of its execution, unless otherwise provided in the proxy. Every proxy shall be revocable at the pleasure of the person executing it or his/her personal representatives or assigns; but the parties to a valid pledge or to an executory contract of sale may agree in writing as to which of them shall vote the stock pledged or sold, until the contract of pledge or sale is fully executed.

D. In all elections for directors every shareholder entitled to vote shall have the right to vote, in person or by proxy, the number of shares owned by him/her, for as many persons as there are directors to be elected, or to cumulate said shares, and give one candidate as many votes as the number of such directors multiplied by the number of his/her shares shall equal, or to distribute such votes on the same principle among any number of such candidates.

History

CJA-2-86, January 30, 1986.

§ 3118. Certain holders; proxy presumed valid

A. Shares outstanding in the name of another corporation may be voted by such officer, agent, or proxy as the bylaws of such corporation may prescribe, or, in the absence of such provision, as the board of directors of such corporation may determine. A proxy purporting to be executed by a corporation shall be presumed to be valid and the burden of proving invalidity shall rest on any challenger.

B. Shares outstanding in the name of a deceased person may be voted by his/her administrator or executor, either in person or by proxy. Shares outstanding in the name of a guardian, conservator, or trustee may be voted by such fiduciary, either in person or by proxy, but no guardian, conservator, or trustee shall be entitled, as such fiduciary, to vote shares held by him/her without evidence of the guardian, conservator, or trust relationship with the shareholder.

C. Shares outstanding in the name of a receiver or a trustee in bankruptcy may be voted by such a receiver or trustee, and shares held by or under the control of a receiver or a trustee in bankruptcy may be voted by such receiver or trustee without the transfer thereof into his/her name, if authority to do so be contained in an appropriate order of the court, by which such receiver or trustee in bankruptcy was appointed.

D. Shares outstanding in the name of a partnership may be voted by any partner. A proxy purporting to be executed by a partnership shall be presumed to be valid and the burden of proving invalidity shall rest on any challenger.

E. Shares outstanding in the name of two or more persons as joint tenants, or tenants in common, or tenants by the entirety, may be voted in person or by proxy by any one or more of such persons. If more than one of such tenants shall vote such shares, the vote shall be divided among them in proportion to the number of such tenants voting in person or proxy unless a different apportionment by such tenants is requested in writing prior to the vote.

History

CJA-2-86, January 30, 1986.

§ 3119. Stockholders' meetings

A. The bylaws of a corporation shall provide for an annual meeting of stockholders.

B. Meetings of shareholders may be held at such place within or without the boundaries of Navajo Indian Country as may be provided in the bylaws. In the absence of any such provision, all meetings shall be held at the principal office of the corporation.

C. Special meetings of the shareholders may be called by the president, the secretary, the board of directors, the holders of not less than one-fifth of all the outstanding shares entitled to vote, or by such other officers or persons as may be provided in the articles of incorporation, or the bylaws.

History

CJA-2-86, January 30, 1986.

§ 3120. Notice

A. Except as provided herein, written or printed notice stating the place, day, and hour of the meeting, and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall, in the absence of a provision in the bylaws specifying a different period of notice, be delivered not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the president, the secretary, or the officer or person calling the meeting, to each shareholder of record entitled to vote at such meeting.

B. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his/her address as it appears on the records of the corporation, with postage thereon prepaid.

C. Notice may be waived in writing by any shareholder, and will be deemed to be waived by any shareholder attending the meeting in person.

History

CJA-2-86, January 30, 1986.

§ 3121. Quorum of shareholders required

A. Unless otherwise provided in the articles of incorporation, or bylaws, a majority of the outstanding shares having voting power, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders; provided, that in no event shall a quorum consist of less than one-third of the outstanding shares having voting power.

B. The shareholders present at a duly organized meeting may continue to do business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum.

C. If a meeting cannot be organized because a quorum has not attended, those present may adjourn the meeting from time to time until a quorum is present, at which time any business may be transacted that may have been transacted at the meeting as originally called.

D. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number is required by this Chapter, or the articles of incorporation; provided however, that in elections of directors, those receiving the greatest number of votes shall be deemed elected even though not receiving a majority.

History

CJA-2-86, January 30, 1986.

§ 3122. Dividends declaration and payment on outstanding shares; restrictions on payment on dividends

The board of directors of a corporation may declare and the corporation may pay dividends on its outstanding shares in cash, property, or its own shares, subject to the following provisions:

A. No dividend shall be declared or paid at a time when the corporation is insolvent or its net assets are less than its stated capital, or when payments thereof would render the corporation insolvent or reduce its net assets below its stated capital;

B. Dividends may be paid out of earned surplus or surplus arising from the surrender to the corporation of any of its shares, provided that the source of such dividends shall be disclosed to the shareholders receiving such dividends, concurrently with payment thereof. The limitations of this Paragraph shall not limit nor be deemed to conflict with the provisions of this Chapter in respect of the distribution of assets as a liquidating dividend;

C. If a dividend is declared payable in its own shares having a par value, such shares shall be issued at the par value thereof and there shall be transferred from earned surplus to stated capital at the time such dividend is paid, an amount of surplus equal to the aggregated par value of the shares to be issued as a dividend;

D. If a dividend is declared payable in its own shares without par value, such shares shall be issued at such value as shall be fixed by the board of directors by resolution adopted at the time such dividend is declared, and there shall be transferred from earned surplus to stated capital at the time such dividend is paid, an amount of surplus equal to the aggregated value so fixed in respect of such shares. The amount per share transferred to stated capital shall be disclosed to the shareholders receiving such dividends, concurrently with payment thereof;

E. A split-up or division of issued shares into a greater number of shares of the same class shall not be construed to be a share dividend within the meaning of this Section;

F. No dividend shall be declared or paid contrary to any restrictions contained in the articles of incorporation; and

G. Subject to any restrictions contained in its articles of incorporation, the directors of any corporation engaged in the exploitation of wasting assets (oil, gas or other minerals) may determine the net profits derived from the exploitation of such wasting assets without taking into consideration the depletion of such wasting assets resulting from lapse of time or from necessary consumption of such assets incidental to their exploitation, and may pay dividends from the net profits so determined by the directors.

History

CJA-2-86, January 30, 1986.

Note. Section renumbered for consistent Code format. (2004)

§ 3123. Stockholders' right on inspection

A stockholder of a corporation or his/her agent may inspect and copy during usual business hours any records or documents of the corporation relevant to its business and affairs, including any:

A. Bylaws;

B. Minutes of the proceedings of the stockholders and directors;

C. Annual statement of affairs;

D. Stock ledger; and

E. Books of account.

History

CJA-2-86, January 30, 1986.

Note. Section renumbered for consistent Code format. (2004).

§ 3124. Statement of affairs

A. Once during each calendar year, one or more stockholders of a corporation may present to any officer of the corporation a written request for a statement of its affairs.

B. Within 20 days after a request is made for a statement of corporation's affairs, the corporation shall prepare and have available on file at its principle office a statement, verified under oath by its president or treasurer or its Vice-President or assistant treasurer, which sets forth fairly and accurately, in reasonable detail, the corporation's assets and liabilities as of a reasonable current date. This statement once prepared, shall fulfill the request for such a statement made by any shareholder for the following 12 months.

History

CJA-2-86, January 30, 1986.

Article 4. Board of Directors; Officers

§ 3125. Organization meeting of Directors

Unless otherwise provided in the articles of incorporation, after the issuance of the certificate of incorporation, an organizational meeting of the board of directors named in the articles of incorporation shall be held within the United States, at the call of a majority of the directors so named, for the purpose of adopting bylaws, electing officers, and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least five days notice thereof by mail to each director so elected, which notice shall state the time and place of the meeting; provided however, that if all the directors shall waive notice in writing and fix a time and place for said organization meeting, no notice shall be required of such meeting.

History

CJA-2-86, January 30, 1986.

§ 3126. Board of Directors; powers authorized; qualifications

A. The business and affairs of a corporation shall be managed by a board of directors. Directors need not be shareholders in the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors.

B. Unless otherwise provided in the articles of incorporation or bylaws, the board of directors, by the affirmative vote of a majority of the directors then in office, and irrespective of any personal interest of any director, shall have authority to establish reasonable compensation of all directors for services to the corporation as directors, officers, or otherwise.

History

CJA-2-86, January 30, 1986.

§ 3127. Number; election

The number of directors shall be fixed by the bylaws, except as to the number constituting the first board of directors, which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to the bylaws. In the absence of a bylaw fixing the number of directors, the number shall be the same as that stated in the articles of incorporation. Such persons shall hold office until the first annual meeting of share holders or until their successors shall have been elected and qualified. Each director shall hold office for the term for which he/she is elected or until his/her successor shall have been elected and qualified.

History

CJA-2-86, January 30, 1986.

§ 3128. Classification

The bylaws may provide that the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. Absent any such classifications the term of a director shall be for one year. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes. No classification of directors shall be effective prior to the first annual meeting of shareholders.

History

CJA-2-86, January 30, 1986.

§ 3129. Vacancies

Any directorship to be filled by reason of an increase in the number of directors may be filled by election at an annual meeting or at a special meeting of shareholders entitled to vote called for that purpose. Any vacancy occurring in the board of directors for any cause other than by reason of an increase in the number of directors may be filled by an affirmative vote of a majority of the remaining directors, unless the articles of incorporation otherwise provide. A director elected to fill a vacancy shall be elected for the unexpired term of his/her predecessor in office.

History

CJA-2-86, January 30, 1986.

§ 3130. Quorum

A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

History

CJA-2-86, January 30, 1986.

§ 3131. Executive committee; powers

If the bylaws so provide, the board of directors, by resolution adopted by a majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors then of the number stated in the articles of incorporation, may designate two or more directors to constitute an executive committee, which committee, to the extent provided in such resolution or in the bylaws of the corporation shall have and may exercise all of the authority of the board of directors in the management of the business and affairs of the corporation, but, the designation of such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any member thereof, of any responsibility imposed by law.

History

CJA-2-86, January 30, 1986.

§ 3132. Place of meetings; special meetings

Meetings of the board of directors, regular or special, may be held at such place within or without the boundaries of Navajo Indian Country as may be provided in the bylaws or by resolution adopted by a majority of the board of directors.

History

CJA-2-86, January 30, 1986.

§ 3133. Notice of meetings; waiver of notice

Meetings of the board of directors shall be held upon such notice as is prescribed in the bylaws. Attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting.

History

CJA-2-86, January 30, 1986.

§ 3134. Officers; powers authorized

A. The officers of a corporation shall consist of at least a president and secretary, and may additionally consist of one or more vice-presidents and a treasurer, as may be prescribed by the bylaws. Each officer shall be elected by the board of directors at such time and in such manner as may be prescribed by the bylaws. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws. If the bylaws so provide, any two or more offices may be held by the same person.

B. All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the property and affairs of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws.

History

CJA-2-86, January 30, 1986.

§ 3135. Removal

Any officer or agent elected or appointed by the board of directors may be removed by a majority vote of the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed.

History

CJA-2-86, January 30, 1986.

§ 3136. Execution of documents

Notwithstanding any contrary provision of law, an individual who holds more than one office in a corporation may act in more than one capacity to execute, acknowledge, or verify any instrument required to be executed, acknowledged, or verified by more than one officer.

History

CJA-2-86, January 30, 1986.

§ 3137. Books and records; requirements for right to examine and make extracts therefrom

A. Each corporation shall keep correct and complete books and records of account, and shall also keep minutes of the proceedings of its shareholders and board of directors, and shall keep at its principal place of business or at the office, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each. Books, records and minutes shall be in written form, or in any other form capable of being converted into written form within a reasonable time.

B. Nothing herein contained shall impair the power of the court upon proof by a shareholder of proper purpose, irrespective of the period of time during which such shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him/her, to compel by mandamus or otherwise the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders.

History

CJA-2-86, January 30, 1986.

§ 3138. Liability of directors in certain cases

A. In addition to any other liabilities imposed by law upon directors of a corporation:

1. Directors of a corporation who vote for or assent to the declaration of any dividend or other distribution of the assets of a corporation to its shareholders contrary to the provisions of this Chapter or contrary to any restrictions contained in the articles of incorporation, shall be jointly and severally liable to the corporation for the amount of such dividend which is paid or the value of such assets

which are distributed in excess of the amount of such dividend or distribution which could have been paid or distributed without a violation of the provisions of this Chapter or the restrictions in the articles of incorporation;

2. Directors of a corporation who vote for or assent to the purchase of its own shares contrary to the provisions of this Chapter or contrary to any restrictions contained in the articles of incorporation shall be jointly and severally liable to the corporation for the amount of consideration paid for such shares which is in excess of the maximum amount which could have been paid therefor without a violation of the provisions of this Chapter; and

3. The directors of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

B. A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter under Subsection (A) is taken shall be presumed to have assented to the action taken unless his/her dissent shall be entered in the minutes of the meeting or unless he/she shall file his/her written dissent to such action with the secretary of the meeting before the adjournment thereof, or shall forward such dissent by registered or certified mail to the secretary of the corporation before five o'clock in the afternoon of the next day which is not a holiday or a Saturday after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

C. A director shall not be liable under Subsection (A) if he/she relied and acted in good faith upon financial statements of the corporation represented to him/her to be correct by the president or the officer of such corporation having charge of its books of account, or stated in a written report by an independent public or certified public accountant or firm of such accountants fairly to reflect the financial condition of such corporation, nor shall he/she be so liable if in good faith in determining the amount available for any such dividend or distribution he/she considered the assets to be fairly valued at their book value.

D. Any director against whom a claim shall be asserted under or pursuant to this Section for the payment of a dividend or other distribution of assets of a corporation and who shall be held liable thereon, shall be entitled to contribution from the shareholders who accepted or received any such dividend or assets, knowing or who should have reasonably known that such dividend or distribution to have been made in violation of this Chapter, in proportion to the amounts received by them.

E. Any director against whom a claim shall be asserted under or pursuant to this Section shall be entitled to contribution from the other directors who voted for or assented to the action upon which the claim is asserted.

F. No liability under this Section shall be asserted more than one year from the later of the time the claim accrued or the date such claim should have been discovered.

History

CJA-2-86, January 30, 1986.

Article 5. Merger and Dissolution

§ 3139. Voluntary dissolution, consolidation, merger, or transfer of assets

A voluntary dissolution, consolidation, merger or transfer of assets of a corporation shall be made in a manner consistent with the provisions applicable to domestic corporations under the corporation laws in the Model Business Corporation Act and Model Non-profit Corporation Act (as revised and approved as of January 1, 1986, by the American Bar Association Committee on Corporate Laws). However, approval of any proposed voluntary dissolution, consolidation, merger or transfer of assets under this Chapter requires the affirmative vote of at least a majority of stockholders of the corporation.

History

CJA-2-86, January 30, 1986.

§ 3140. Involuntary dissolution by shareholders

Any stockholder of a corporation may petition the court for dissolution of the corporation on the ground that there is such internal dissension among the stockholders of the corporation that the business and affairs of the corporation can no longer be conducted to the advantage of the stockholders generally.

History

CJA-2-86, January 30, 1986.

§ 3141. Involuntary dissolution by Attorney General of the Navajo Nation

A corporation may be dissolved involuntarily by a judgment of the court in an action filed against it by the Attorney General when any one of the following is established:

A. The corporation has failed to comply with the provisions of this Code or regulations promulgated thereunder;

B. The corporation procured its formation through fraudulent misrepresentation or concealment of material fact;

C. The corporation has violated the laws of the Navajo Nation;

D. The corporation has failed to file the statement of change of registered agent required by this Chapter within 30 days after such change is duly authorized by the corporation; or

E. The corporation has continued or persisted over a period of time to conduct its business in a fraudulent or otherwise illegal manner.

History

CJA-2-86, January 30, 1986.

Note. Section renumbered for consistent Code format. (2004).

§ 3142. Revocation by Department

A. The articles of incorporation of a corporation may be revoked by the Department if the corporation has failed to comply with the provisions of this Code or regulations promulgated thereunder.

B. The articles of incorporation shall not be revoked by the Department unless:

1. It shall have given the corporation not less than 60 days notice thereof by mail addressed to the address set forth on its most recently filed annual report, or if no annual report has been filed, then to its last known place of business; and

2. Specifies the violation and gives the corporation a reasonable opportunity to comply or cure said violation.

C. Upon such revocation, the Department shall:

1. Issue a certificate of revocation in duplicate;

2. File one such certificate in its office; and

3. Mail to such corporation at the address set forth on its most recently filed annual report, or if no annual report has been filed, then to its last known place of business a certificate of revocation.

D. Upon the issuance of such certificate of revocation, the existence of such corporation shall terminate, subject to the provisions of Subsection (E) of this Section. If the corporation has not applied for reinstatement within the six month period following the issuance of a certificate of revocation, the Department shall release the corporate name for use by any proposed domestic corporation, any foreign corporation applying for authority to do business within Navajo Indian Country or for use by a person intending to register the name as a trade name.

E. A corporation may apply for reinstatement within six months from the date a certificate of revocation is issued by the Department. If none of the conditions set forth in Subsection (A) of this Section exists at the time of such application of reinstatement and, if such corporation has paid all fees, penalties, and costs incurred by the Department, the Department shall issue a certificate of reinstatement.

F. The Department shall make available to the public a list, compiled annually, of the corporations whose articles of incorporation were revoked during the preceding year.

History

CJA-2-86, January 30, 1986.

§ 3143. Venue and process

Actions by the Attorney General for the involuntary dissolution of a corporation shall be commenced either in the court in which the known place of business or registered agent of the corporation is situated, or if the corporation has failed to maintain a registered agent or known place of business, then in the court of Window Rock. Process shall issue and be served as in other civil actions.

History

CJA-2-86, January 30, 1986.

§ 3144. Jurisdiction of Court to liquidate assets and business of corporation

The Court shall have full power to liquidate the assets and business of a corporation. It shall not be necessary to make shareholders parties to any such action or proceeding unless relief is sought against them personally.

History

CJA-2-86, January 30, 1986.

§ 3145. Procedure in liquidation of corporation by Court

A. In proceedings to liquidate the assets and business of a corporation the court shall have power to issue injunctions, to appoint a receiver or receivers pendente lite, with such powers and duties as the court from time to time may direct, and to take such other proceedings as may be requisite to preserve the corporate assets wherever situated, and carry on the business of the corporation until a full hearing can be had.

B. After a hearing had upon such notice as the court may direct to be given to all parties to the proceedings, and to any other parties in interest designated by the court, the court may appoint a liquidating receiver or receivers with authority to collect the assets of the corporation, including all amounts owing to the corporation by subscribers on account of any unpaid portion of the consideration for the issuance of shares. Such liquidating receiver or receivers shall have authority, subject to the order of the court, to sell, convey and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sales. The assets of the corporation or the proceeds resulting from a sale, conveyance or other disposition thereof shall be applied to the expenses of such liquidation and to the payment of the liabilities and obligations of the corporation, and any remaining assets or proceeds shall be distributed among its shareholders according to their respective rights and interests. The order appointing such liquidating receiver or receivers shall state their powers and duties. Such powers and duties may be increased or diminished at any time during the proceedings.

C. The court shall have power to allow from time to time as expenses of the liquidation, compensation to the receiver or receivers and to attorneys in the proceedings, and to direct the payment thereof out of the assets of the corporation or the proceeds of any sale or disposition of such assets.

D. A receiver of a corporation appointed under the provisions of this Section shall have authority to sue and defend in all courts in his/her own name as receiver of such corporation. The court appointing such receiver shall have exclusive jurisdiction over the corporation and its property, wherever situated.

History

CJA-2-86, January 30, 1986.

§ 3146. Filing of claims in liquidation proceedings

In proceedings to liquidate the assets and business of a corporation the court may require all creditors of the corporation to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs under oath of their respective claims. If the court requires the filing of claims it shall fix a date, which shall be not less than four months from the date of the order, as the last day of the filing of claims, and shall prescribe the notice that shall be given to creditors and claimants of the date so fixed. Prior to the date so fixed, the court may extend the time for filing of claims. Creditors and claimants failing to file proofs of claim on or before the date so fixed may be barred, by order of court, from participating in the distribution of the assets of the corporation.

History

CJA-2-86, January 30, 1986.

§ 3147. Discontinuance of liquidation proceedings

The liquidation of the assets and business of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the court shall dismiss the proceedings and direct the receiver to redeliver to the corporation all its remaining property and assets.

History

CJA-2-86, January 30, 1986.

§ 3148. Judgment of involuntary dissolution

In proceedings to liquidate the assets and business of a corporation, when the costs and expenses of such proceedings and all debts, obligations and liabilities of the corporation shall have been paid and discharged and all of its remaining property and assets distributed to its shareholders, or in case its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts and obligations, and all the property and assets have been applied to their payment, the court shall enter a judgment dissolving the corporation, whereupon the existence of the corporation shall cease.

History

CJA-2-86, January 30, 1986.

Note. The "Department" as referred to in this Section is the Business Regulatory Department within the Division of Economic Development.

§ 3149. Filing of judgment of dissolution

When the court enters a judgment dissolving a corporation, the clerk of such court shall cause a certified copy of the judgment to be filed with the Department. No filing fee shall be charged by the department.

History

CJA-2-86, January 30, 1986.

Note. The "Department" as referred to in this Section is the Business Regulatory Department within the Division of Economic Development.

§ 3150. Deposit with Division of Finance of amount due certain shareholders

Upon the voluntary or involuntary dissolution of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found, or who is under disability and there is no person legally competent to receive such distributive portion, shall be reduced to cash and deposited with the Division of Finance and shall be paid over to such creditor or shareholder or to his/her legal representative upon proof satisfactory to the Division of Finance of his/her right thereto, and shall escheat to the Navajo Nation if unclaimed for a period of not less than five years.

History

CJA-2-86, January 30, 1986.

§ 3151. Survival of remedy after dissolution

The dissolution of a corporation either by the issuance of a certificate of dissolution or revocation by the Department, or dissolution of a judgment of the court, or by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers or shareholders, for any right to claim existing, or any liability incurred, prior to such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of corporation at any time within five years of the expiration of its period of duration.

History

CJA-2-86, January 30, 1986.

Article 6. Registered Agent

§ 3152. Registered agent required

Each corporation shall have and continuously maintain within Navajo Indian Country a registered agent, which agent may be either an individual resident within Navajo Indian Country or a corporation authorized by its own articles of incorporation to act as such agent and authorized to transact business within Navajo Indian Country.

History

CJA-2-86, January 30, 1986.

§ 3153. Change of registered agent

A. A corporation may change its registered agent by filing with the Department a statement setting forth:

1. The name of the corporation;

2. The name and address of its then-registered agent;

3. The name and address of its successor registered agent;

4. The date upon which such change shall take effect; and

5. That such change was authorized by resolution duly adopted by its board of directors or was authorized by an officer of the corporation duly empowered to make such change.

B. Such statement shall be executed in duplicate by the corporation and delivered to the Department. If the Department finds that such statement conforms to the provisions of this Chapter, it shall:

1. Endorse on each of such duplicate originals the word "Filed," and the month, day and year of the filing thereof;

2. File one of such duplicate originals in its office; and

3. Return the other duplicate original to the corporation or its representative.

C. The change of registered agent shall become effective upon the filing of such statement by the Department.

D. Any registered agent of a corporation may resign as such agent upon filing a written notice thereof, executed in duplicate, with the Department, which shall forthwith mail one copy thereof to the corporation at its principal office as shown on the records of the Department. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Department or upon the appointment of a successor agent becoming effective, which ever occurs first. No fee or charge of any kind shall be imposed with respect to a filing under this Subsection.

E. A registered agent may change his/her address by filing with the Department a statement setting forth:

1. The name of the registered agent;

2. The present address, including street and number, if any, of such registered agent;

3. The names of the corporation or corporations represented by such registered agent at such address;

4. The address, including street and number, if any, to which the office of such registered agent is to be changed; and

5. The date upon which such change will take place.

F. Such statement shall be executed in duplicate by such registered agent in his/her individual name, but if such agent is a corporation, domestic or foreign, such statement shall be executed by such corporation by its president or Vice-President and delivered to the Department. However, if the registered agent represents more than one corporation, he/she shall file an additional copy for such additional corporation. If the Department finds that such statement conforms to law, it shall, when all fees and charges have been paid as prescribed in this Chapter:

1. Endorse on each of such duplicate originals the word "Filed" and the month, day, and year of the filing thereof;

2. File one of such duplicate originals in its office; and

3. Return the other duplicate original to the registered agent.

G. The change of address of such registered agent as to the domestic corporation or corporations named in such statement shall become effective upon the filing of such statement by the Department, or on the date set forth in such statement as the date on which such change of location of such registered office will take place, whichever is later.

History

CJA-2-86, January 30, 1986.

§ 3154. Registered agent as an agent for service; service when no registered agent

A. The registered agent so appointed by a corporation shall be an agent of such corporation upon whom process against the corporation may be served, and upon whom any notice or demand required or permitted by law to be served upon the corporation may be served. Service of any process, notice, or demand upon a corporate agent, as such agent, may be made by delivering a copy of such process, notice, or demand to any officer, director or managing agent of the corporation, in lieu of the registered agent.

B. Whenever a corporation shall fail to appoint or maintain a registered agent within Navajo Indian Country, or whenever any such registered agent cannot with reasonable diligence be found at his/her office within Navajo Indian Country or whenever the articles of incorporation of any domestic corporation shall be revoked, then the Department shall be an agent of such corporation upon whom any process against such corporation may be served and upon whom any notice or demand required or permitted by law to be served upon such corporation may be served. Service upon the Department of any such process, notice, or demand shall be made by delivering to and leaving with the Department, or with any clerk having charge of its office, duplicate copies of such process, notice, or demand. In the event any such process, notice, or demand is so served, the Department shall immediately cause one of such copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its principal office.

C. The Department shall keep a permanent record of all processes, notices, and demands served upon it under this Section, and shall record therein the time of such service and its action with respect thereto.

D. Service of process upon the Department as agent, pursuant to this Section shall not constitute an action against or service upon the Navajo Nation.

History

CJA–2–86, January 30, 1986.

§ 3155. Failure to maintain registered agent

Any corporation incorporated or reincorporated under this Code which fails or refuses to maintain a registered agent within Navajo Indian Country, in accordance with the provisions of this Chapter, shall be subject to a civil sanction in the amount of two hundred fifty dollars ($250.00). The Attorney General upon the recommendation of the Department shall seek the imposition of such in the Window Rock District Court.

History

CJA–2–86, January 30, 1986.

Article 7. Filings; Amendments

§ 3156. Articles of incorporation; procedure for filing

A. Duplicate originals of the articles of incorporation shall be delivered to the Department. If the Department finds that the articles of incorporation conform to law, it shall, when all fees have been paid as to this Chapter prescribed:

1. Endorse on each of such duplicate originals the word "Filed" and the month, day, and year of the filing thereof;

2. File one of such duplicate originals in its office; and

3. Issue a certificate of incorporation to which it shall affix the other duplicate original. Such certificate of incorporation may be evidenced by the signature of the director of the Department or his/her designee on the duplicate original of the articles of incorporation.

B. The certificate of incorporation, together with the duplicate original of the articles of incorporation affixed thereto by the Department shall be delivered to the incorporators or their representatives.

History

CJA-2-86, January 30, 1986.

§ 3157. Amendment of articles of incorporation; contents restricted; purposes

A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired; provided, that its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amendment, and, if a change in shares or the rights of shareholders, or any exchange, reclassification, or cancellation of shares or rights of shareholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification, or cancellation are stated.

History

CJA-2-86, January 30, 1986.

§ 3158. Procedures before acceptance of subscription to shares

Amendments to the articles of incorporation before any subscriptions to shares have been accepted by the board of directors shall be made in the following manner:

A. Amended articles of incorporation modifying, changing, or altering the original articles of incorporation shall be signed by all of the living or competent incorporators who signed the original articles of incorporation and filed with the Department. Such amended articles of incorporation shall contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amended articles of incorporation;

B. Such amended articles of incorporation shall be delivered in duplicate original to the Department. If the Department finds that such amended articles of incorporation conform to law, it shall, when all fees have been paid as in this Chapter prescribed:

1. Endorse on each of such duplicate originals the word "Filed" and the month, day, and year of the filing thereof;

2. File one of such duplicate originals in its office; and

3. Issue an amended certificate of incorporation, to which it shall affix the other duplicate original. Such certificate may be evidence in the same manner as provided in § 3156(A)(3);

C. The amended certificate of incorporation with the duplicate original of the amended articles of incorporation affixed thereto shall be delivered to the corporation or its representative; and

D. Upon the issuance of the amended certificate of incorporation, the amended articles of incorporation shall become effective and shall take the place of the original articles of incorporation.

History

CJA-2-86, January 30, 1986.

Note. Section renumbered for consistent Code format. (2004).

§ 3159. Procedures after acceptance of subscription to shares

Amendments to the articles of incorporation after acceptance of any subscriptions to shares shall be made in the following manner:

A. The board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting;

B. Written or printed notice setting forth the proposed amendment or a summary of the changes to be effective thereby shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Chapter for the giving of notice of meetings of shareholders. If the meeting be an annual meeting, the proposed amendment or such summary shall be included in the notice of such annual meeting;

C. At such meeting a vote of the shareholders entitled to vote shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote; and

D. Any number of amendments may be submitted to the shareholders, and voted upon by them, at one meeting.

History

CJA-2-86, January 30, 1986.

Note. Section renumbered for consistent Code format. (2004).

§ 3160. Articles of amendment; contents

A. The articles of amendment shall be executed in duplicate by the corporation by its president or a Vice-President and shall be set forth:

1. The name of the corporation;

2. The amendment so adopted;

3. The date of the adoption of the amendment by the shareholders;

4. The number of shares outstanding and the number of shares entitled to vote;

5. The number of shares voted for and against such amendment, respectively:

6. If such amendment provides for an exchange, reclassification, or cancellation of issued shares, and if the manner in which the same shall be effected is not set forth in the amendment, then a statement of the manner in which the same shall be effected; and

7. If such amendment effects a change in the amount of stated capital, or paid-in surplus, or both, then a statement of the manner in which the same is effected and a statement, expressed in dollars, of the amount of capital surplus, either stated capital or paid-in surplus, as changed by such amendment.

B. If issued shares without par value are changed into the same or a different number of shares having par value, the aggregate par value of the shares into which the shares without par value are changed shall not exceed the sum of:

1. The amount of stated capital represented by such shares without par value;

2. The amount of surplus, if any, transferred to stated capital on account of such change; and

3. Any additional consideration paid for such shares with par value and allocated to stated capital.

History

CJA-2-86, January 30, 1986.

§ 3161. Procedure for filing

A. Duplicate originals of the articles of amendment shall be delivered to the Department. If it appears to the Department that the articles of amendment conform to law, it shall, when all fees have been paid as in this Chapter prescribed:

1. Endorse on each of such duplicate originals the word "Filed" and the month, day, and year of the filing thereof,

2. File one of such duplicate originals in its office; and

3. Issue a certificate of amendment to which it shall affix the other duplicate original. Such certificate may be evidenced in the same manner as provided in § 3156(A)(3).

B. The certificate of amendment with the duplicate original of the articles of amendment affixed thereto shall be delivered to the corporation or its representative.

History

CJA-2-86, January 30, 1986.

§ 3162. Effect of certificate of amendment

A. Upon the issuance of the certificate of amendment, the amendment shall become effective and the articles of incorporation shall be deemed to be amended accordingly.

B. No amendment shall effect any existing cause of action in favor of or against such corporation, or any pending suit to which the corporation shall be a party, or the existing rights of persons other than shareholders; and, in the event the corporate name shall be changed by amendment, no suit brought by or against such corporation under its former name shall abate for that reason.

History

CJA-2-86, January 30, 1986.

Article 8. Department; Fees and Charges

§ 3163. Department; duties and functions

A. The Department shall be charged with the administration and enforcement of this Code. Said Department is authorized to employ such personnel as may be necessary for the administration of this Code.

B. Every certificate and other document or paper executed by the Department, in pursuance of any authority conferred upon it by this Chapter, and sealed with the seal of the Navajo Nation, and all copies of such papers as well as of documents and other papers filed in accordance with the provisions of this Chapter, when certified by it and authenticated by said seal, shall have the same force and effect as evidence as would the originals thereof in any action or proceedings in any court and before a public officer, or official body.

C. The Department is authorized to promulgate, upon the review and approval of the Attorney General and the Economic Development Committee of the Navajo Nation Council, regulations to effectuate the policies and purposes of this Code, or to modify or vary any provision of this Code incorporating by reference any Model Corporation Act. Provided, the Department shall set forth in such regulations what specific policy or purpose is purported to be furthered by such regulation.

History

CJA-2-86, January 30, 1986.

§ 3164. Fees and charges

The Department shall impose fees and charges in accordance with schedules promulgated by regulation pursuant to § 3163, provided however, the initial fee for filing of articles of incorporation shall be ten dollars ($10.00).

History

CJA-2-86, January 30, 1986.

§ 3165. Non-payment of fees; sanctions

A. The Department shall not file any articles, statements, certificates, reports, applications, notices, or other papers relating to any corporation organized under the provisions of this Chapter until all fees and charges provided to be paid in connection therewith shall have been paid to it or while the corporation is in default in the payment of any fees charges, or sanctions herein provided to be paid by or assessed against it. Nothing in this Section shall prevent the filing, without the payment of all such fees, charges, and sanctions, of a written notice of resignation by a registered agent of a corporation.

B. No corporation required to pay a fee, charge, or sanction under this Chapter shall maintain within Navajo Indian Country any civil action until all such fees, charges, and sanctions have been paid in full.

C. The Navajo Nation shall have the right to offset any amounts due and owing from a corporation under this Code against payments due from the Navajo Nation to such corporation.

History

CJA-2-86, January 30, 1986.

Article 9. Foreign Corporation

§ 3166. Admission of foreign corporation

A. No foreign corporation shall have the right to transact business within Navajo Indian Country until it shall have been authorized to do so as provided in this Chapter. No foreign corporation shall be authorized under this Chapter to transact within Navajo Indian Country any business which a corporation organized under this Chapter is not permitted to transact. A foreign corporation shall not be denied authority by reason of the fact that the laws under which such corporation is organized governing its organization and internal affairs differ from the laws of this Chapter, and nothing in this Chapter shall be construed to authorize regulation of the organization or the internal affairs of such corporation.

B. Without excluding other activities which may not constitute transacting business within Navajo Indian Country, a foreign corporation shall not be considered to be transacting business within Navajo Indian Country, for the purposes of this Chapter, by reason of carrying on within Navajo Indian Country any one or more of the following activities:

1. Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

2. Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

3. Maintaining checking or savings accounts;

4. Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositories with relation to its securities;

5. Effecting sales through independent contractors;

6. Soliciting or receiving orders outside Navajo Indian Country in pursuance of letters, circulars, catalogs or other forms of advertising or solicitation and accepting such orders outside Navajo Indian Country and filling them with goods shipped into Navajo Indian Country;

7. Creating as borrower or lender, or acquiring indebtedness, mortgages or other security interests in real or personal property; or

8. Securing or collecting debts or enforcing any rights in property securing the same.

C. The provisions of this Section shall not apply to the question of whether any foreign corporation is subject to service of process and suit within Navajo Indian Country.

D. The Department may promulgate regulations governing the registration and regulation of unincorporated associations, consistent with the policies and purposes contained herein.

History

CJA-2-86, January 30, 1986.

§ 3167. Powers of foreign corporation

A foreign corporation authorized to transact business under this Chapter shall, until withdrawal as provided in this Chapter, enjoy the right to engage in any lawful activities, and shall be subject to the applicable provisions of this Chapter.

History

CJA-2-86, January 30, 1986.

§ 3168. Corporate name of foreign corporation

No authority shall be given a foreign corporation unless the corporate name of such corporation:

A. Shall contain the word "association", or "bank", "corporation", "company", "incorporated", or "limited", or shall contain an abbreviation of one of such words, or such corporation shall, for use within Navajo Indian Country, add at the end of its name one of such words or an abbreviation thereof;

B. Shall not contain any word or phrase likely to mislead the public or which indicates or implies that it is organized for any purpose other than any specific purpose contained in its articles of incorporation;

C. Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under the laws of the Navajo Nation, or any foreign corporation authorized to transact business within Navajo Indian Country, or a name the exclusive right to which is, at the time, reserved in the manner provided in this Chapter or any trade name, except that this provision shall not apply if the foreign corporation applying for authority files with the department any one of the following:

1. A resolution of its board of directors adopting a fictitious name for use in transacting business within Navajo Indian Country which fictitious name is not deceptively similar to the name of any domestic corporation or of any foreign corporation authorized to transact business within Navajo Indian Country of any trade name;

2. The written consent of such other corporation or holder of a reserved or trade name to use the same or deceptively similar name and one or more words are added to make such name distinguishable from such other name; or

3. A certified copy of a final decree of a court of competent jurisdiction establishing the prior right of such foreign corporation to the use of such name within Navajo Indian Country.

D. Notwithstanding the provisions of Subsection (A)(1) of this Section, shall not include the words "bank", "trust", or "trust company" separately or in combination to indicate or convey the idea that the corporation is engaged in banking or trust business unless such corporation is to be and becomes actively and substantially engaged in banking or trust business or such corporation is a holding company holding substantial interest in companies actively and substantially engaged in banking or trust business; and

E. Shall not contain the words "Navajo Nation" or "Navajo Tribe", nor in any way imply that it is associated with the Navajo Nation government or a Navajo Nation entity.

History

CJA-2-86, January 30, 1986.

Note. Section renumbered for consistent Code format. (2004).

§ 3169. Change of name by foreign corporation

Whenever a foreign corporation which is authorized to transact business within Navajo Indian Country shall change its name to one under which authority would not be granted to it on application therefore, it shall not thereafter transact any business within Navajo Indian Country until it has changed its name to a name which is available to it under the laws of the Navajo Nation, or has otherwise complied with the provision of this Chapter.

History

CJA-2-86, January 30, 1986.

§ 3170. Application for authority to transact business

A foreign corporation, in order to procure authority to transact business within Navajo Indian Country, shall make application therefor in accordance with regulations promulgated by the Department.

History

CJA-2-86, January 30, 1986.

§ 3171. Known place of business and registered agent of foreign corporation

Each foreign corporation authorized to transact business within Navajo Indian Country shall have and continuously maintain within Navajo Indian Country:

A. A known place of business which shall be the office of its registered agent, unless otherwise designated in its application for authority; and

B. A registered agent, which agent may be either an individual resident of the Navajo Nation, a domestic corporation, or a foreign corporation authorized to transact business within Navajo Indian Country.

C. Notification of any change of the known place of business or registered agent of a foreign corporation shall be in accordance with regulations promulgated by the Department.

History

CJA-2-86, January 30, 1986.

Note. Section renumbered for consistent Code format. (2004).

§ 3172. Service of process on foreign corporation

A. The registered agent so appointed by a foreign corporation authorized to transact business within Navajo Indian Country shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served, and which, when so served, shall be lawful personal service on the corporation. Process, notice or demand may be served upon an officer, director or managing agent of the corporation in lieu of the registered agent.

B. Whenever a foreign corporation authorized to transact business within Navajo Indian Country shall fail to appoint or maintain a registered agent at the address shown on the records of the Department, the Department shall make available to any person the last known address of such corporation, its shareholders and officers upon whom any such process, notice or demand may be served. The litigant instituting an action shall be responsible for serving the corporation with process, in accordance with the Navajo Rules of Civil Procedure.

C. Nothing herein contained shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law.

History

CJA-2-86, January 30, 1986.

§ 3173. Revocation of authority

A. The authority of a foreign corporation to transact business within Navajo Indian Country may be revoked by the Department if the corporation fails to comply with the provisions of this Code or regulations promulgated thereunder.

B. The authority of a foreign corporation shall not be revoked by the Department unless:

1. It shall have given the corporation not less than 60 days notice thereof by mail addressed to the address set forth on its most recently filed annual report, or if no annual report has been filed, then to its last known place of business a certificate of revocation. Upon the issuance of such certification of revocation, the existence of such corporation shall terminate; and

2. It specifies the violation and gives the corporation a reasonable opportunity to comply or cure said violation.

C. Upon such revocation, the department shall:

1. Issue a certificate of revocation in duplicate;

2. File one such certificate in its office; and

3. Mail to such corporation at the address set forth on its most recently filed annual report, or if no annual report has been filed, then to its last known place of business a certificate of revocation. Upon the issuance of such certification of revocation, the existence of such corporation shall terminate.

D. The Department shall make available to the public a list, compiled annually, of the foreign corporations for which authority to transact business within Navajo Indian Country has been revoked during the preceding year.

History

CJA-2-86, January 30, 1986.

§ 3174. Transacting business without authority

A. No foreign corporation transacting business within Navajo Indian Country without authority shall be permitted to maintain any action, suit or proceeding in any Navajo Nation Court, until such corporation shall have been authorized to transact business. Nor shall any action, suit or proceeding be maintained in any such court by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation within Navajo Indian Country, until authority to transact business has been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets.

B. The failure of a foreign corporation to obtain authority to transact business within Navajo Indian Country shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any Navajo Nation Court.

C. A foreign corporation which transacts business within Navajo Indian Country without authority shall be liable to the Navajo Nation, for the years or portions thereof during which it transacted business within Navajo Indian Country without authority, in an amount equal to all fees which would have been imposed by this Chapter upon such corporation had it duly applied for, and received authority to transact business within Navajo Indian Country as required by this Chapter and thereafter filed all reports required by this Chapter, plus all penalties imposed by this Chapter for failure to pay such fees. The Attorney General shall have authority to bring proceedings to recover all amounts due the Navajo Nation under the provisions of this Section.

D. The Attorney General or any other person may bring and maintain an action to enjoin any foreign corporation from transacting business within Navajo Indian Country without authority. Upon a foreign corporation obtaining authority such action shall be dismissed but the plaintiff therein shall recover his/her costs and reasonable attorneys' fees. A determination by a court that a party to the action is a foreign corporation which was requested to, but, failed to qualify as a foreign corporation under this Chapter shall be prima facie evidence against such foreign corporation in any other action brought by or against it by any other person of such requirement to and failure to qualify.

History

CJA-2-86, January 30, 1986.

Article 10. Reports and Filing

§ 3175. Annual report of domestic and foreign corporations

Each domestic corporation, and each foreign corporation authorized to transact business within Navajo Indian Country, shall file with the Department an annual report and accounting in accordance with regulations promulgated by the Department.

History

CJA-2-86, January 30, 1986.

§ 3176. Civil liability for false statements

A. If, as required by regulation, any report, certificate or other statement made, or public notice given by the officers or directors of a corporation is false in a material representation, or if any book, record or account of the corporation is knowingly or wrongfully altered, the officers, directors of agents knowingly or wrongfully authorizing, signing or making the false report, certificate, other statement or notice or authorizing or making the wrongful alteration are in their person jointly and severally liable to a person who has become a creditor or share holder of the corporation upon the faith in the false, material representation or alteration therein for all damages resulting therefrom.

B. An action for the liability imposed by this Section shall be commenced within two years after discovery of the false representation or alteration and within six years after the certificate, report, public notice or other statement or the alteration has been made or given by the officers, directors or agents of the corporation.

History

CJA-2-86, January 30, 1986.

§ 3177. Civil investigatory demand or signature violations; corporate records; classification

A. A person who knowingly fails or refuses within the time prescribed by this Chapter to answer truthfully and fully any civil investigatory demand propounded to him/her by the Department in accordance with this Chapter, or who signs any articles, statement, report, application or other document filed with the Department which is known to the person as false in any material respect, is guilty of a misdemeanor and is subject to a civil sanction of five hundred dollars ($500.00), or a sentence not to exceed six months in jail, or both, and, in the case of a non-Indian is subject to such civil sanction and exclusion from Navajo Indian Country.

B. A person who with the intent to defraud or deceive knowingly falsifies, alters, steals, destroys, mutilates, defaces, removes or secretes the books, records or accounts of a corporation is guilty of a misdemeanor and is subject to a civil sanction of five hundred dollars ($500.00), or a sentence not to exceed six months in jail, or both, and, in the case of a non-Indian is subject to such civil sanction and exclusion from Navajo Indian Country.

History

CJA-2-86, January 30, 1986.

§ 3178. Civil investigative demands by the Department

The Department may propound to any corporation, domestic or foreign, subject to the provisions of this Chapter, and to any director, officer, shareholders or employee thereof, such civil investigative demands as may be reasonably necessary and proper to enable it to ascertain whether such corporation has complied with all the provisions of this Chapter or applicable regulations promulgated thereunder. The Department may also depose directors, officers, shareholders or employees for the same purpose. The Department by regulations shall specify the manner and method of responding to such civil investigative demands.

History

CJA-2-86, January 30, 1986.

§ 3179. Public records; information disclosed by annual reports; certificates of disclosures civil investigative demands

Articles of Incorporation, amendments thereto, dissolution and certificates of incorporation, dissolution, revocation or reinstatement shall be maintained on file by the Department and available for public inspection and copying. Annual reports or information received in response to regulations or civil investigative demands propounded by the Department shall not be open to public inspection, nor shall the Department disclose any facts or information obtained therefrom, except as the same are to be made public or in the event such civil investigative demands or the answers are required for evidence in any court proceeding.

History

CJA-2-86, January 30, 1986.

Article 11. Miscellaneous

§ 3180. Jurisdiction of Navajo Nation Courts

A. The Court shall have original jurisdiction to the extent permitted by due process over any action against, or by, any domestic or foreign corporation, or for actions arising under this Chapter including actions by an aggrieved party contesting acts or omissions by the Department, under this Chapter. In the case of contests of Department acts or omissions, the Department shall provide for informal hearings within 30 days of a written request. Such written request shall be filed within 10 days of the alleged act or omission giving rise to the contested issue. Timely filing of such shall be jurisdictional to any subsequent court proceeding. A decision by the Department on the contested issue shall be rendered in writing within 30 days from the date of such hearing. Failure to render such decision within 30 days shall constitute denial of the requested relief.

B. Within 30 days of a written decision or a denial of requested relief or a failure to act on a written request after 60 days of receipt of such request an aggrieved party may bring an action *de novo*, either in the court where the principle place of business is located or in the court in Window Rock, to compel, by injunctive or mandamus relief, the Department to discharge its statutory obligations or to refrain from violating such party's legal rights.

C. Nothing in this Section shall be construed as an exception to or repeal of the provisions of the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, as may be amended from time to time.

History

CJA-2-86, January 30, 1986.

§ 3181. Certified copies to be received in evidence

All copies of documents except for annual reports or responses to civil investigatory demands delivered to and filed by the Department in accordance with the provisions of this Chapter when certified by it, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. A certificate by the Department under seal, as to the existence or nonexistence of the facts relating to corporations shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

History

CJA-2-86, January 30, 1986.

§ 3182. Greater voting requirements

Whenever with respect to any action to be taken by the shareholders of a corporation, the articles of incorporation or bylaws require the vote or concurrence of the holders of a greater proportion of the shares, or of any class or series thereof, than required by this Subchapter with respect to such action, the provisions of the articles of incorporation or bylaws shall control.

History

CJA-2-86, January 30, 1986.

§ 3183. Action by shareholders without a meeting

A. Any action required by this Chapter to be taken at a meeting of the shareholders of a corporation or any action which may be taken at a meeting of the shareholders may be taken without a meeting, if a consent in writing setting forth the action so taken, is signed by all of the shareholders entitled to vote with respect to the subject matter thereof.

B. Such consent shall have the same effect as a unanimous vote of shareholders, and may be stated as such in any articles or document filed with the Department under this Chapter.

History

CJA-2-86, January 30, 1986.

§ 3184. Unauthorized assumption of corporate powers

All persons who assume to act as a corporation without authority to do so, or who procured incorporation through fraudulent misstatements or omissions of material fact in documents filed with the Department, shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof. Ratification of preincorporation acts constitute authority to act in a corporate capacity as used herein.

History

CJA-2-86, January 30, 1986.

§ 3185. Indemnification of officers, directors, employees and agents

A corporation shall have power to indemnify any person who was or is a party, or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, if he/she acted, or failed to act, in good faith and in a manner he/she reasonably believed to be in, or not opposed to, the best interests of the corporation, but, with respect to any criminal action or proceeding, the corporation shall not pay criminal fines for which a person is personally liable.

History

CJA-2-86, January 30, 1986.

§ 3186. Defense of ultra vires

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act, or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

A. In a proceeding by a shareholder against the corporation to enjoin the doing of any act, or the transfer of real or personal property by or to the corporation. If the unauthorized act or transfer sought to be enjoined is being, or is to be, performed or made pursuant to a contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained;

B. In a proceeding by the corporation, whether acting directly or through a receiver, trustee or other legal representative, or through shareholders in a representative suit, against the incumbent or former officers or directors of the corporation; or

C. In a proceeding by the Attorney General, as provided in this Chapter, to dissolve the corporation, or in a proceeding by the Attorney General to enjoin the corporation from the transaction of unauthorized business.

History

CJA-2-86, January 30, 1986.

Subchapter 2. Close Corporations

History

[Subchapter 2 redesignated] Common or Contract Carriers previously codified as Chapter 19, §§ 3201-3203 has been redesignated to Title 5, Chapter 3, Subchapter 2, §§ 411-413.

§ 3201. Short title

This Chapter shall be known and may be cited as the "Navajo Nation Close Corporation Act".

History

CJA-2-86, January 30, 1986.

§ 3202. Definitions

A. "Capital units" means the proportions of the proprietary interest in the corporation owned by the investors;

B. "Corporation" or "closed corporation" means a corporation for profit organized pursuant to the provisions of this Chapter;

C. "Good faith" or "in good faith" means an act or thing done when it is in fact done honestly, whether it be done negligently or not;

D. "Investor" means one who is the owner of capital units in a close corporation; and

E. "Manager" means the person or persons named in the articles of incorporation, either originally or by amendment thereto, in the capacity of manager or assistant manager, and does not include any person who is not so named.

History

CJA-2-86, January 30, 1986.

§ 3203. Mandatory provisions of articles of incorporation

A. The articles of incorporation of a close corporation shall set forth:

1. The name of the corporation which shall contain the words "close corporation" or an abbreviation therefor;

2. The name and address of the manager or managers of the corporation;

3. The names, addresses and amount of initial contribution of capital units of each of the original investors. The number of original investors shall not exceed 30;

4. The aggregate amount in dollars of the initial capital units to be paid to be the corporation; and

5. The name and address of the corporation's initial registered agent.

B. It shall not be necessary to set forth in the articles of incorporation any corporate powers or any corporate purposes.

History

CJA-2-86, January 30, 1986.

Note. Section renumbered for consistent Code format. (2004).

§ 3204. Optional provisions of articles of incorporation

The articles of incorporation of a close corporation may set forth any of the following:

A. The period of duration, if less than perpetual;

B. Any restrictions on the authority of the manager or managers of the close corporation;

C. Any reservations of authority to the investors;

D. Any restriction on the power of any investor to sell, transfer or to create a security interest in his/her capital units. No restriction on the power to sell, transfer or create a security interest shall be binding except as to persons who have actual knowledge thereof unless such restriction is set forth in the articles of incorporation;

E. Any restriction on the subsequent issuance of additional capital units;

F. Whether the corporation will have the power to acquire its capital units and if so any restrictions or limitations thereon. If no power to acquire its capital units is set forth in the articles of incorporation, the corporation may not acquire any of its outstanding capital units;

G. Any provisions which provide for arbitration or other non-judicial procedure seeking resolution of any dispute as provided in § 3206;

H. Any provisions for replacement or succession of a manager inconsistent with § 3205(D);

I. Any provision which either relieves the manager entirely of the obligation to make accountings to investors or which modifies the period or form of such accounting in a manner inconsistent with § 3205(E);

J. Any provision for annual or other periodic meetings of investors. If no such provision is set forth in the articles of incorporation, there shall be no requirement for meetings for investors;

K. Any requirement for bond or other security to be given to the corporation by a manager to secure the faithful performance of his/her duties;

L. Any restrictions upon competition by investors directly or indirectly with the business of the corporation;

M. Any provision for delegation of his/her authority by a manager;

N. Any provision for a dissolution option pursuant to § 3207;

O. Any provision for varying relationships among investors as to relative rights in capital units; and

P. Any other provisions consistent with law which the incorporators elect to set forth.

History

CJA–2–86, January 30, 1986.

§ 3205. Managers

A. All managers shall be natural persons. It is the purpose of this Chapter that the corporation be operated on a day-to-day basis by one manager, by managers having divided functions or by assistant managers who can serve either as alternates to the manager or assume some portion of managerial responsibility. As among the corporation, its investors, and any manager, there shall be no limitations on the authority of a manager unless specifically limited by provisions of the articles of incorporation, the written employment contract of such manager, or the records of the corporation evidencing the acts of the investors. Any person other than manager or investor who deals in good faith with the corporation will not be subject to any limitation on the authority of any manager, even though such manager's authority is expressly limited in the articles of incorporation.

B. No manager may delegate any of his/her authority to any other agent, employee or representative of a corporation unless authority to do so is contained in the articles of incorporation or is granted by act of the investors.

C. Any manager shall have the same rights, duties, obligations and privileges as a person who is both a director and officer of a corporation for profit under the provisions of Subchapter 1, except as specifically modified in this Chapter.

D. Any manager may be replaced or succeeded by a new manager at any time by a majority of the votes of the investors, unless otherwise provide by the articles of incorporation. Such replacement shall be effective when a certificate of change of manager, sworn under oath by an investor is filed with the Department stating the name of the replaced manager and the name and address of the new manager and that such new manager was elected by the required vote.

E. Unless the articles of incorporation or vote of the investors provided otherwise, a manager shall mail to each investor an annual accounting and annual report. Such annual accounting and report shall be mailed or delivered to the investors within 30 days after the date filing is required.

History

CJA-2-86, January 30, 1986.

§ 3206. Settlement of disputes; arbitration

The articles of incorporation may provide for arbitration of any deadlock or dispute involving the internal affairs of the corporation.

History

CJA-2-86, January 30, 1986.

§ 3207. Option to dissolve

A. The articles of incorporation of any corporation may include a provision granting to any investor or investors an option to have the corporation dissolved at will or upon the performance or occurrence of any specified event or contingency. Whenever any such option to dissolve is exercised, the investor or investors exercising such option shall give written notice thereof to all other investors. After the expiration of 30 days following the mailing of such notice, the dissolution of the corporation shall proceed as if the required vote had consented to the dissolution of the corporation as provided by § 3139.

B. If the articles of incorporation as originally filed do not contain a provision authorized by Subsection (A) of this Section, the articles of incorporation may be amended to include such provision if adopted by the affirmative vote of all investors. If the articles of incorporation as originally filed contain a provision authorized by Subsection (A) of this Section, such provision may be amended only by the affirmative vote of all investors.

History

CJA-2-86, January 30, 1986.

§ 3208. Purposes

Close corporations may be organized under this article for any lawful purpose or purposes.

History

CJA-2-86, January 30, 1986.

§ 3209. Capital units, transfer and encumbrances

A. Until a statement substantially in the form set forth in Subsection (B) of this Section has been filed with the Department, any transfer, hypothecation, other voluntary encumbrance of security interest in, or of any capital unit or units shall be void as to creditors and subsequent purchasers for valuable consideration without notice.

B. The state of transfer, hypothecation or other voluntary encumbrance or security interest in or of any capital unit or units in a close corporation shall be acknowledged and be substantially in one of the following forms:

1. Transfer:

On the ___ day of __________ , __________ , the undersigned

(name of transferor) transferred to (name of transferee), whose address is (address of transferee) (all or a stated percentage) of the undersigned's interest in the capital units of (name of corporation), a Navajo close corporation.

____

(Signature of transferor)

acknowledgment

2. Hypothecation, other voluntary encumbrance or security interest:

On the ___ day of __________ , __________ , the undersigned (name of debtor) hypothecated and voluntarily encumbered to (name of creditor) (all or a stated percentage) of the undersigned's interest in the capital units of (name of corporation), a Navajo close corporation.

____

(Signature of debtor)

acknowledgment

History

CJA-2-86, January 30, 1986.

§ 3210. Definition of relative rights of capital units

"Relative rights of capital units" means all the rights, privileges, obligations and duties of the capital units and may include, but are not limited to, disproportionate variations of the following:

A. Participation in dividends or distributions from operating income;

B. Participation in dividends or distributions from income other than operating income;

C. Participation in distributions of the proceeds of a sale of all or substantially all of the assets of the corporation with further disproportionate variation depending upon the degree of gain or loss;

D. Participation in distribution upon liquidation or dissolution;

E. Voting rights;

F. Restrictions of limitations on transfer;

G. The obligation to perform services or provide goods or other property to the corporation;

H. The obligation to devote time and energies which are collateral to corporate purposes; and

I. Assessments, if any.

History

CJA-2-86, January 30, 1986.

§ 3211. Changes in investor relationship

Unless otherwise provided by the articles of incorporation, any redemption, termination or cancellation of capital units, acquisition of capital units by the corporation, issuance of additional units or any change in the relative rights of capital units other than transfers or encumbrances provided for in § 3209, shall be effective only upon an amendment of the articles of incorporation. The unanimous vote of all outstanding capital units shall be required to amend the articles of incorporation to create or to change the relative rights in capital units.

History

CJA–2–86, January 30, 1986.

§ 3212. Variable relative rights

The articles of incorporation may provide for varying relationships among investors as to relative rights in capital units. It is not necessary that each close corporation provide in its articles of incorporation for variable relative rights of capital units as encumbered in this Section. Only those variable relative rights of capital units set forth in the articles of incorporation shall apply to the particular close corporation. When no provision is made in the articles of incorporation concerning a particular relative right of capital units, then that particular relative right of capital units shall be proportionate to the dollar amount of the capital units.

History

CJA–2–86, January 30, 1986.

§ 3213. Limitation of liability

The investor shall not be liable for the debts, obligations or liabilities of the close corporation, except that investors will be held in the same standards as subscribers and shareholders as set forth in § 3116(C).

History

CJA–2–86, January 30, 1986.

§ 3214. Appointment of conservator

A. The court in which the known place of business or registered agent of the corporation is situated, may in an action by an investor, appoint a conservator or interim manager of the corporation if the court finds that a deadlock or dispute involving the internal affairs of the corporation impairs or threatens to impair the value of the assets or the continued conduct of the business of the corporation. Upon or subsequent to appointing such a conservator or interim manager, the court may enter orders, which, despite any contract or provision of the articles of incorporation to the contrary:

1. Suspend, revoke or nullify the authority, in whole or in part, of any existing manager or managers or any conservator or interim manager appointed in any arbitration pursuant to § 3206;

2. Define the authority of such conservator or interim manager;

3. Set the compensation of such conservator or interim manager to be paid by the corporation; and/or

4. Resolve, partially resolve or aid in the resolution of any such deadlock or dispute.

B. When any order or appointment is issued pursuant to Subsection (A) of this Section, the clerk of the court shall immediately supply a copy thereof to the Department.

History

CJA–2–86, January 30, 1986.

§ 3215. Involuntary dissolution or liquidation pursuant to court order

The court shall have full power to liquidate the assets and business of a close corporation.

A. In an action filed by an investor when the court finds:

1. That a deadlock or dispute involving the internal affairs of the corporation, continues to impair or threatens to impair the value of the assets or the continued conduct of the business of the corporation, notwithstanding bona fide attempts to utilize the arbitration provisions in the articles of incorporation if available and the provisions of § 3214;

2. That a deadlock or dispute involving the internal affairs of the corporation, impairs or threatens to impair the value of the assets, or the continued conduct of the business of the corporation, and no provision is contained in the articles of incorporation for arbitration of such disputes and that it would be a useless effort to invoke the provisions of § 3214;

3. That the investors are so divided respecting the manager of the business and affairs of the corporation that either the corporation is suffering or will suffer irreparable injury, or the business and affairs of the corporation can no longer be conducted to the advantage of the investors generally, and the provisions of §§ 3206 and 3214 are inapplicable; or

4. That the corporation has abandoned its business and has failed within a reasonable period of time to take steps to dissolve and liquidate its affairs and distribute its assets.

B. In an action filed by the Attorney General in the manner provided by § 3141.

History

CJA–2–86, January 30, 1986.

§ 3216. Court relief other than dissolution, liquidation or appointment of conservator

A. The court in an action filed by an investor seeking relief under § 3215, shall have full power to make any such order or grant any such relief other than dissolution or liquidation as in its discretion it may deem appropriate including but not limited to:

1. Canceling, altering or amending any provisions contained in the articles of incorporation of such close corporation;

2. Directing, prohibiting or enjoining any act of the corporation or other persons who are parties to the court action; or

3. Providing for the purchase by the corporation or by other investors at their fair market value the capital units of the person bringing such action.

B. Relief under this Section may be granted even though the court does not find any of the elements prescribed for relief under § 3215.

History

CJA-2-86, January 30, 1986.

§ 3217. Merger of close corporations

Any two or more Navajo close corporations may merge as may be provided for pursuant to § 3139.

History

CJA-2-86, January 30, 1986.

§ 3218. Conversion of corporate status

A. A close corporation may convert its status to that of a corporation organized pursuant to Subchapter 1 by amending its articles of incorporation to delete therefrom all reference to the term "close corporation", including its use in the name of the corporation, and to comply with § 3107. Such an amendment shall be adopted by a two-thirds vote of the voting rights of the capital units unless the articles of incorporation require a greater vote to convert. The articles of incorporation as amended shall also provide for the cancellation of capital units and the basis on which shares will be issued in lieu thereof.

B. The conversion of a close corporation is affected if there has been substantial compliance in good faith with the requirements of Subsection (A) of this Section.

C. A corporation organized pursuant to Subchapter 1 having 30 or fewer shareholders may convert its status to that of a close corporation and be subject to the provisions of this article by amending its articles of incorporation to comply with § 3203. A resolution so amending its articles of incorporation shall be adopted by the unanimous vote of all shareholders whether otherwise entitled to vote or not. The resolution amending the articles of incorporation shall provide for the cancellation of all issued outstanding shares of stock and state the relative rights of capital units.

D. No conversion pursuant to this Section shall be deemed a termination or dissolution of the corporate entity or a sale or exchange of the shares of capital units.

History

CJA-2-86, January 30, 1986.

§ 3219. Application of General Corporation Law

Close corporations organized pursuant to this Subchapter are subject to the provisions of Subchapter 1 except insofar as this Subchapter modifies or differs from such provision, in which case this Chapter prevails. This Chapter shall be applicable to all close corporations except as otherwise provided. This Chapter shall be construed to simplify the management, structure, and operations of close corporations.

History

CJA-2-86, January 30, 1986.

Subchapter 3. Non-Profit Corporations

§ 3301. Short title

This Chapter shall be known and may be cited as the "Navajo Nation Non-Profit Corporation Act".

History

CJA-2-86, January 30, 1986.

§ 3302. Definitions

The definitions of Subchapter 1 are applicable in this Chapter.

History

CJA-2-86, January 30, 1986.

§ 3303. Conversion of corporate status prohibited

No non-profit corporation organized under this Chapter may convert its status to a corporation organized for profit, either foreign or domestic, or merge or consolidate with a domestic corporation or foreign corporation organized for profit, unless the corporation surviving the merger or consolidation is a non-profit corporation.

History

CJA-2-86, January 30, 1986.

§ 3304. Purposes

Corporations may be organized under this Chapter for any lawful purpose or purposes, including without limitation any of the following purposes:

A. Charitable;

B. Benevolent;

C. Eleemosynary,

D. Educational;

E. Civic;

F. Patriotic;

G. Political;

H. Religious;

I. Social;

J. Fraternal;

K. Literary;

L. Cultural;

M. Athletic;

N. Scientific;

O. Agricultural;

P. Horticultural;

Q. Animal husbandry; or

R. Professional, commercial, industrial or trade associations.

History

CJA-2-86, January 30, 1986.

§ 3305. Members

A. A non-profit corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of such class or classes, the manner of each class shall be set forth in the articles of incorporation or bylaws. If the corporation has no members, that fact shall be set forth in the articles of incorporation or bylaws. A corporation may issue certificates evidencing membership rights, voting rights, or ownership rights, as authorized in the articles of incorporation or bylaws.

B. Members are not liable for the debts, obligations or liabilities of the corporation.

C. A corporation formed under this Chapter by a recognized Chapter of the Navajo Nation shall have one class of members, and any Navajo 18 years or older who is entitled to vote within said chapter in Navajo Nation or chapter elections shall be entitled to be a member of said corporation, and shall be entitled to vote on matters on which members are entitled to vote.

History

CJA-2-86, January 30, 1986.

§ 3306. Bylaws

The power to make, alter, amend, or repeal the bylaws of the non-profit corporation shall be vested in the board of directors unless reserved to the members by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law, or the articles of incorporation.

History

CJA-2-86, January 30, 1986.

§ 3307. Meetings of members

A. Meetings of members may be held at such place within or without Navajo Indian Country as stated in or fixed in accordance with the bylaws. If no other place is stated or so fixed, meetings shall be held at the known place of business of the non-profit corporation.

B. An annual meeting of the voting members, if any, shall be held at such time as stated in or fixed in accordance with the bylaws. If the annual meeting is not held within any 13 month period the court may, on the application of any voting member, order a meeting to be held. Failure to hold such annual meeting shall not work as a forfeiture of the corporate charter or dissolution of the corporation.

C. Special meetings of the voting members, if any, may be called by the board of directors, the members having at least one-tenth of the votes entitled to be cast at such meeting or any other person as may be authorized in the articles of incorporation or bylaws.

History

CJA-2-86, January 30, 1986.

§ 3308. Notice of members' meetings

Unless otherwise provided in the articles of incorporation or bylaws, written notice stating the place, day and hour of the meeting, and in case of a special meeting, the purpose for which the meeting is called, shall be mailed or delivered not less than ten nor more than 50 days before the date of the meeting by an officer of the non-profit corporation, at the direction of the person calling the meeting, to each member entitled to vote at such meeting. If mailed, such notice shall be addressed to the member at his/her address as it appears on the records of the corporation. When a meeting is adjourned to another time or place, unless the bylaws otherwise require, notice need not be given at the adjourned meeting if the time and place of the meeting are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the corporation may transact any business which may have been transacted at the original meeting. If the adjournment is for more than 30 days, a notice of the adjourned meeting shall be given to each member entitled to vote at the meeting.

History

CJA–2–86, January 30, 1986.

§ 3309. Voting

A. Except for a non-profit corporation formed by a chapter of the Navajo Nation, the right of the members or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or bylaws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

B. A member entitled to vote may vote in person or, unless the articles of incorporation or bylaws otherwise provide, by proxy executed in writing by the member or by his/her duly authorized attorney in fact. No proxy may be valid after 11 months from the date of its execution.

C. If directors or officers are to be elected, the bylaws may provide that the elections be conducted by mail.

D. If a corporation has no members or its members have no right to vote, the directors have the sole voting power, unless otherwise provided in the articles of incorporation or bylaws.

History

CJA–2–86, January 30, 1986.

§ 3310. Quorum

The bylaws may provide the number or percentage of members entitled to vote, present or represented by proxy, or the number of percentage of votes entitled to be cast by members present or represented by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provisions, members present or represented by proxy, holding one-tenth of the votes entitled to be cast shall constitute a quorum.

History

CJA-2-86, January 30, 1986.

§ 3311. Board of directors

A. The affairs of a non-profit corporation shall be managed by a board of directors except as may be otherwise provided in Subsection (B). Directors need not be members of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors.

B. The articles of incorporation may vest the management of the affairs of the corporation in its members or may limit the authority of the board of directors to whatever extent is set forth in the articles of incorporation or bylaws.

History

CJA-2-86, January 30, 1986.

§ 3312. Number, election and classification and removal of directors

A. Unless the articles of incorporation provide otherwise, a non-profit corporation may have only one director. The number of directors shall be fixed by or in the manner provided in the articles of incorporation or bylaws. The number of directors may be increased or decreased by amendment to, or in the manner provided, in the articles of incorporation or bylaws, but no decrease in number may have the effect of shortening the term of any incumbent director. If the number of directors has not been fixed by, or in the manner provided, in the articles of incorporation or bylaws, the number shall be the same as the number of initial directors.

B. The person(s) constituting the initial board of directors shall be named in the articles of incorporation to hold office until the first annual election of directors, or for any other period as may be specified in the articles of incorporation or bylaws. Thereafter, directors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or bylaws. In the absence of a provision prescribing the manner of election or appointment of directors, the members having voting rights shall elect the directors, or, if a corporation has no members or no members having voting rights, the directors are elected or appointed by the incumbent directors or by the officer, representative body of any organization or society or other person designated in the articles of incorporation or bylaws. In the absence of a provision fixing the term of office, the term of office of a director is one year.

C. Directors may be divided into classes, and the terms of office of the several classes need not be uniform. Each director shall hold office for the term for which he/she is elected or appointed, and until his/her successor is elected or appointed and qualified, or until his/her earlier death, resignation or removal. Any director may resign at any time upon written notice to the corporation.

D. A director may be removed from office pursuant to any procedure provided in the articles of incorporation or bylaws.

History

CJA–2–86, January 30, 1986.

§ 3313. Vacancies

Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum, or by a sole remaining director, and any director so chosen shall hold office until the next election of directors when his/her successor is elected and qualified. Any newly created directorship shall be deemed a vacancy. Unless otherwise provided in the articles of incorporation or bylaws, when one or more directors resigns from the board, effective at a future time, a majority of the directors then in office, including those who have so resigned, may fill such vacancy, the vote on the vacancy to take effect when such resignation becomes effective. Each director so chosen shall hold office as provided for the filling of other vacancies. If by reason of death, resignation or otherwise, a non-profit corporation has no directors in office, any officer or members may call a special meeting of members for the purpose of electing the board of directors unless otherwise provided in the articles of incorporation or bylaws.

History

CJA–2–86, January 30, 1986.

§ 3314. Quorum of directors

A majority of the number of directors fixed pursuant to the articles of incorporation or bylaws constitutes a quorum unless otherwise provided in the articles of incorporation or bylaws, but in no event may a quorum consist of less than one-third of the total number of directors.

History

CJA–2–86, January 30, 1986.

§ 3315. Committees of the board of directors

A. A majority of the full board of directors may designate from among the directors one or more committees each of which, to the extent provided in the articles of incorporation or bylaws, may be given all the authority of the board of directors, except no such committee may exercise the authority of the board of directors in reference to the following matters:

1. Submission to the members of any matter that requires an act of the members;

2. Filling vacancies on the board of directors or on any committee of the board of directors;

3. Adoption, amendment or repeal of bylaws; or

4. Fixing compensation of directors.

B. The board of directors, with or without cause, may dissolve any such committee or remove any director from the committee at anytime. The designation of any such committee and the delegation of authority shall not operate to relieve the board of directors or any director of any responsibility imposed by law.

History

CJA-2-86, January 30, 1986.

§ 3316. Place and notice of directors' meeting

A. Meetings of the board of directors, regular or special, shall be held at least annually either within or without Navajo Indian Country, and may be held by means of conference telephone or similar communication equipment by means of which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this Section shall constitute presence in person at such meeting.

B. Regular meetings of the board of directors may be held with or without notice as prescribed in the bylaws. Special meetings of the board of directors shall be held upon such notice as is prescribed in the bylaws. Attendance of a director at any meeting shall constitute a waiver of notice of such meeting except when a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. The business to be transacted at any regular or special meeting of the board of directors need not be specified in the notice or waiver of notice of such meeting unless required by the articles of incorporation or bylaws.

History

CJA-2-86, January 30, 1986.

§ 3317. Officers

A. The officers of a non-profit corporation shall consist of a president, a secretary and a treasurer, each of whom shall be elected by the board of directors at such time and in such manner as may be prescribed by the bylaws. Other officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws. Any two or more offices may be held by the one person.

B. All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as provided in the bylaws or determined by resolution of the board of directors not inconsistent with the bylaws.

C. The articles of incorporation or bylaws may provide that any one or more officers of the corporation shall be *ex officio* members of the board of directors.

D. The officers of a corporation may be designated by such additional titles as may be provided in the articles of incorporation or bylaws.

History

CJA-2-86, January 30, 1986.

§ 3318. Removal of officers

Any officer or agent elected or appointed may be removed by the persons authorized to elect or appoint such officer or agent whenever in their judgment the best interests of the non-profit corporation will be served by the removal, but such removal shall be without prejudice to the contract rights, if any, of the person removed. Election or appointment of an officer or agent shall not in itself create contract rights.

History

CJA-2-86, January 30, 1986.

§ 3319. Books and records

A. Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees of the board of directors. Each corporation shall keep at its registered agent's office, or its known place of business within Navajo Indian Country, a record of the name and addresses of its members entitled to vote. Books, records and minutes shall be in written form, or in any other form capable of being converted into written form within a reasonable time.

B. Each member entitled to vote, upon written demand stating the purpose of the examination, may examine, in person or by agent or attorney, at any reasonable time for any proper purpose, the corporation's relevant books and records of account, minutes and record of members and may make copies of or extracts from the books, records or minutes.

C. Nothing contained in this Section shall impair the power of any court of competent jurisdiction, upon proof by a member of proper purpose, to compel the production for examination or copying by such member of the books and records of account, minutes and record of members of a corporation.

History

CJA-2-86, January 30, 1986.

§ 3320. Shares of stock and dividends prohibited

A non-profit corporation shall not have or issue shares of stock. No dividend may be paid and no part of the income or profit of such corporation may be distributed to its members, directors or officers. A corporation may pay compensation in a reasonable amount of its members, directors or officers for services rendered, may confer benefits upon its members in conformity with its purposes, and upon dissolution or final liquidation may make distributions to its members as permitted by this Chapter, but no such payment benefit or distribution may be deemed to be a dividend or a distribution or income or profit.

History

CJA–2–86, January 30, 1986.

§ 3321. Loans to directors and officers prohibited

A non-profit corporation shall not lend money to or use its credit to assist its directors, officers or employees. Any director, officer or employees who assents to or participates in the making of any such loan shall be personally liable to the corporation for the amount of such loan together with interest at eighteen percent (18%) per annum until the repayment of the loan.

History

CJA–2–86, January 30, 1986.

§ 3322. Incorporators

One or more persons capable of contracting may act as incorporators of a corporation by signing and delivering to the department an original and one or more copies of articles of incorporation for such corporation.

History

CJA–2–86, January 30, 1986.

§ 3323. Articles of Incorporation

A. The articles of incorporation shall state:

1. The name of the corporation;

2. The period of duration, if less than perpetual;

3. The purpose or purposes for which the corporation is organized, which may be stated to include conducting any or all lawful affairs for which corporations may be incorporated under this Subchapter;

4. A brief statement of the character of affairs which the corporation initially intends to actually conduct in this state. Such statement shall not limit the character of affairs which the corporation ultimately conducts;

5. The name and address of its initial registered agent;

6. The number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as

directors until the first annual election of directors or until their successors are elected and qualify;

7. The name and address of each incorporator; and

8. Any other provision not inconsistent with law which the incorporators elect to set forth.

B. It is not necessary to state in the articles of incorporation any of the corporate powers enumerated in this Chapter.

History

CJA-2-86, January 30, 1986.

§ 3324. Filing of articles of incorporation

A. When the articles of incorporation have been delivered for filing, the Department shall determine that the articles:

1. Set forth the information required by § 3323; and

2. Do not adopt as the name of the corporation a name which is in violation of § 3105.

B. Upon making such determinations, the Department shall proceed with filing the articles.

History

CJA-2-86, January 30, 1986.

§ 3325. Effect of filing articles of incorporation

Upon the filing of the articles of incorporation, the corporate existence begins, and the filing is conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with, and that the non-profit corporation has been incorporated under this Subchapter, except as against the Navajo Nation in a proceeding for involuntary dissolution of the corporation or revocation of the articles of incorporation.

History

CJA-2-86, January 30, 1986.

§ 3326. Organization meeting

A. After delivery of the articles of incorporation for filing, an organization meeting of the initial board of directors shall be held at the call of a majority of the incorporators for the purpose of adopting bylaws, electing officers and the transaction of such other business as may come before the meeting. The incorporators calling the meeting shall give at least three days notice of the meeting by mail to each director so named, which notice shall state the time and place of the meeting.

B. A first meeting of the members may be held at the call of a majority of the directors upon at least three days notice for those purposes as stated in the notice of the meeting.

History

CJA-2-86, January 30, 1986.

§ 3327. Right to amend articles of incorporation

A corporation may amend its articles of incorporation in any lawful respect.

History

CJA-2-86, January 30, 1986.

§ 3328. Procedures to amend articles of incorporation

A. Amendments to the articles of incorporation shall be made in the following manner:

1. If there are members entitled to vote on the proposed amendment, the board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of those members, which may be either an annual or a special meeting. Written notice setting forth the proposed amendment or a summary of the changes to be effected shall be given to each member entitled to vote at the meeting within the time and in the manner provided in this Subchapter for the giving of notice of meetings of members. The proposed amendment may be adopted only by act of the members; or

2. If there are no members or no members entitled to vote on the proposed amendment, an amendment may be adopted by act of the board of directors.

B. Any number of amendments may be submitted and voted upon at any one meeting.

History

CJA-2-86, January 30, 1986.

§ 3329. Articles of amendment

The articles of amendment shall be executed by the non-profit corporation in duplicate and shall state:

A. The name of the corporation;

B. The amendments adopted;

C. The date of the adoption of the amendments; and

D. That the amendments were duly adopted by act of the members or of the board of directors.

History

CJA-2-86, January 30, 1986.

§ 3330. Filing of articles of amendment; effect of amendment

A. When the articles of amendment have been delivered for filing, the Department shall determine that the articles set forth the information required by § 3329.

B. Upon making such determination, the Department shall proceed with the filing the articles.

C. Upon the delivery of the articles of amendment to the Department, the amendment shall become effective and the articles of incorporation shall be deemed to be amended, except that, if the determination of the requirements of this Chapter for filing are not satisfied completely, the articles of amendment shall not be filed, the amendment shall not become effective and the articles of incorporation shall not be deemed to have been amended.

D. No amendment may affect any existing claim in favor of or against the non-profit corporation or any pending action or proceeding to which the corporation is a party or the existing rights of persons other than members. If the corporate name is changed by amendment, no action or proceeding brought by or against the corporation under its former name may abate for that reason.

History

CJA-2-86, January 30, 1986.

§ 3331. Sale, lease, exchange, mortgage or pledge of assets

A. A sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the assets of a non-profit corporation may be made only upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as are authorized in the following manner:

1. If there are members entitled to vote on the matter, the board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge or other disposition and directing that it be submitted to a vote at a meeting of those members, which may be either an annual or a special meeting. Written notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the assets of the corporation shall be given to each member entitled to vote at such meeting within the time and the manner provided by this Subchapter for the giving of notice of meetings, the members may

authorize such sale, lease exchange, mortgage, pledge or other disposition and may fix or may authorize the board of directors to fix, any or all of the terms and conditions and the consideration to be received by the corporation. Such authorization shall require an act of the members; or

2. If there are no members or no members entitled to vote on the matter, a sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the assets of a corporation may be authorized by act of the board of directors.

B. If the authorization provides, the board of directors may abandon the sale, lease, exchange, mortgage, pledge or other disposition subject to the contractual rights of third parties.

History

CJA-2-86, January 30, 1986.

§ 3332. Application of general corporation law

The provisions of the general corporation laws of the Navajo Nation, and all powers, rights and duties thereunder, where applicable, shall apply to non-profit corporations organized hereunder, except when in conflict with the provisions of this Chapter.

History

CJA-2-86, January 30, 1986.

Subchapter 4. Agricultural Cooperatives

History

[Subchapter 4 redesignated] Signs, Billboards, and Advertising Devices previously codified as Chapter 21, §§ 3401-3412 has been redesignated to Title 5, Chapter 3, Subchapter 3, §§ 421-432.

CJA-2-86, January 30, 1986.

Note. Issuance of Chapter. CMY-38-69, May 22, 1969, Northern Arizona Livestock Association, Inc.

Annotations

See annotations under Licenses and Permits, and under Taxation in digest.

§ 3401. Short title

This Subchapter shall be known and may be cited as the "Navajo Agricultural Cooperative Act".

History

CJA-2-86, January 30, 1986.

§ 3402. Definitions

A. The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bees, and any farm and ranch products;

B. The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock;

C. The term "association" means any corporation organized under this Chapter of any association organized under the cooperative marketing acts of any other tribe or state. Associations organized hereunder shall be deemed non-profit because as they are organized not to make profit for themselves or for their members but only for their members as producers.

History

CJA-2-86, January 30, 1986.

§ 3403. Organizers

A. Five or more persons engaged in the production of agricultural procedures may form an association under this Subchapter.

B. An agricultural cooperative organized under this Chapter by recognized chapters of the Navajo Nation shall permit as members entitled to hold common stock, or if organized without common stock, as members entitled to vote, all Navajos 18 years or older who are entitled to vote within said chapter in Navajo Nation or chapter elections.

History

CJA-2-86, January 30, 1986.

§ 3404. Purpose

An association may be organized to engage in any activity in connection with the production, cultivation, marketing or selling of agricultural products produced by and marketed for its members, or in the harvesting, preserving, drying, processing, canning, storing, handling, shipping or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities. Provided, however, any such activities may extend to nonmembers and to the production, cultivation of lands owned or cultivated by them and their products.

History

CJA-2-86, January 30, 1986.

§ 3405. Powers

Associations organized under this Chapter shall have all of the powers granted to corporations organized under Subchapter 1, and in addition shall specifically have the following powers:

A. To engage in any activity in connection with the production, cultivation of farm products, including the marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members, or the production, manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this Subchapter;

B. To borrow money and make advances to members;

C. To act as the agent or representative of any member or members in any of the above-mentioned activities;

D. To purchase or otherwise acquire, and to hold, own and exercise all rights of ownership in, and to sell, transfer, or pledge shares of capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association; including the power to subscribe, pay for and own the capital stock of Banks for Cooperatives organized under the "Farm Credit Act of 1933" passed by the Congress of the United States and approved June 16, 1933;

E. To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the bylaws;

F. To buy, hold and exercise privileges of ownership over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association or incidental thereto;

G. To extend its activities to the products and supplies of non-members;

H. To consolidate with the consent of individual permittees land use permits and grazing permits under long-term agricultural business land leases with the Navajo Nation;

I. To enter into leasehold assignments, approved by the Navajo Nation, and the Secretary of the Interior or his/her authorized designee, with suppliers of agricultural production credit; and

J. To enter into management contracts and joint venture agreements for the mutual benefit of its members.

History

CJA-2-86, January 30, 1986.

§ 3406. Members

A. Under the terms and conditions prescribed in its bylaws, an association may admit as members, or issue common stock to only persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

B. If a member of a non-stock association be other than a natural person, such member may be represented by an individual, associate officer or member thereof, duly authorized in writing.

C. Any association as defined in § 3402(C) may become a member or stockholder of any other association or associations organized hereunder.

History

CJA-2-86, January 30, 1986.

§ 3407. Liability for debts

The stockholders or members of an association organized under this Chapter shall not be individually liable for the debts of such association except as they may be held liable under provisions of Subchapter 1.

History

CJA-2-86, January 30, 1986.

§ 3408. Articles of incorporation

Each association formed under this Chapter must prepare and file articles of incorporation, setting forth:

A. The name of the association;

B. The purpose for which it is formed;

C. The place where its principal business will be transacted;

D. The term for which it is to exist, which may be perpetual;

E. The number of directors thereof, which must not be less than five and may be any number in excess thereof, and the term of the office of such directors;

F. If organized without capital stock, whether the property rights and interests of each member shall be equal or unequal; and if unequal, the property rights and interests of each member shall be set forth by the general rule or rules applicable to all members by which the property rights and interest, respectively, of each member may and shall be determined and fixed; and the association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision of the articles of incorporation shall not be altered, amended or repealed except by the written consent or the vote of three-fourths of the members; and

G. If organized with capital stock, the amount of such capital stock and the number of shares into which it is divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the nature and extent of the preferences and privileges granted to each. The incorporators must sign and file in duplicate the articles in accordance with the provisions of the general non-profit corporation law of the Navajo Nation; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in the courts, and other places, as prima facie evidence of the facts contained therein, and of the incorporation of such association. No part of such capital stock shall be required to be subscribed and/or paid in as a prerequisite to the filing of such articles of incorporation; provided further that such association may, from time to time sell and issue to their members or stockholders, shares of capital stock in such manner as provided in the bylaws.

History

CJA–2–86, January 30, 1986.

§ 3409. Amendments to articles of incorporation

The articles of incorporation may be altered or amended at any regular meeting or at any special meeting called for that purpose. An amendment must first be approved by two-thirds vote of the directors and then adopted by a vote representing a majority of all the members of the association. Amendments to the articles of incorporation when so adopted shall be filed in accordance with the provisions of the general non-profit corporation law of the Navajo Nation.

History

CJA–2–86, January 30, 1986.

§ 3410. Bylaws

Each association incorporated under this Chapter must, within 30 days after its incorporation, adopt for its regulation and the management of its affairs, bylaws, not inconsistent with the powers granted by this Chapter. A majority vote of the members or common stockholders is necessary to adopt such bylaws. Each association, under its bylaws, may also provide for any or all of the following matters:

A. The time, place and manner of calling and conducting its meetings;

B. The number of stockholders or members constituting a quorum;

C. The right of members or stockholders to vote by proxy or by mail or by both and the conditions, manner and effects of such vote and the method and manner in which an association which is a member may cast its vote;

D. The number of directors constituting a quorum;

E. The qualifications, compensation and duties and term of office of directors and officers; time of their election and the mode and manner of giving notice thereof;

F. Penalties for violations of the bylaws;

G. The amount of entrance, organization and membership fees, if any, the manner and method of collection of the same, and the purposes for which they must be used;

H. The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association; the charge, if any, to be paid by each member or stockholder for services rendered by the association to him/her and the time of payment and the manner of collection; the marketing contract between the association to him/her and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member of stockholder may be required to sign;

I. The number and qualifications of members or stockholders of the association and the conditions precedent to membership or ownership or common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock, the manner of assignment and transfer of the interest of members and of shares of common stock, and conditions upon which, and time when membership of any member shall cease. The automatic suspension of the rights of a member when he/she ceases to be eligible to membership in the association, and mode, manner and effect of the expulsion of interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his/her membership, or at the option of the association by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his/her property interest in the association and shall fix the amount thereof in money, which shall be paid to him/her within one year after such expulsion or withdrawal; and

J. The distribution of earned surplus to members and nonmembers on the basis of patronage and land contribution.

History

CJA–2–86, January 30, 1986.

§ 3411. Meetings; notice; election of directors and officers

Meetings, notice and election of directors and officers shall be governed by the provisions of Subchapter 3 pertaining to non-profit corporations.

History

CJA–2–86, January 30, 1986.

§ 3412. Stock-membership certificates

A. When a member of an association established without capital stock, has paid his/her membership fee in full, he/she shall receive a certificate of membership. No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the notice, but such retention as security shall not affect the members' right to vote.

B. Except for debts lawfully contracted between him/her and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his/her membership, fee or his/her subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

C. No stockholder or a cooperative association shall own more than one-fifth of the issued common stock of the association; and an association, in its bylaws, may limit the amount of common stock which one member may own to any amount less than one-fifth of the issued common stock.

D. No member or stockholder shall be entitled to more than one vote.

E. Any association organized with stock under this Subchapter may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retrievable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

F. The bylaws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association, and such restrictions must be printed upon every certificate of stock subject thereto.

G. The association may at any time, except when the debts of the association exceed fifty percent (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors and pay for it in cash within one year thereafter.

History

CJA-2-86, January 30, 1986.

§ 3413. Removal of officer or director

A. Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten percent (10%) of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association; by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy.

B. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses; the person or persons bringing the charges against him/her shall have the same opportunity.

History

CJA-2-86, January 30, 1986.

§ 3414. Referendum

Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting. A special meeting may be called for that purpose.

History

CJA-2-86, January 30, 1986.

§ 3415. Marketing contract

A. The association and its members may make and execute marketing contracts requiring the members to sell, for a period of time, not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto; and pay over to its members the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, if any, and other proper reserves; and interest not exceeding eight percent (8%) per annum upon common stock.

B. The bylaws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him/her of any provisions of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts. In the event of any breach or threatened breach of such marketing contract by the member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof.

C. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

History

CJA-2-86, January 30, 1986.

§ 3416. Patronage distributions including land rentals

The earned surplus of an association organized under this Chapter, including revenues received from land rentals, shall be apportioned, distributed, and paid periodically on the basis of patronage and land use rights contributed to the association as the bylaws shall provide.

History

CJA-2-86, January 30, 1986.

§ 3417. Preferred stock

An association organized hereunder may issue preferred capital stock for any purpose so long as fair value is received therefore.

History

CJA-2-86, January 30, 1986.

§ 3418. Annual reports

Each association formed under this Chapter shall prepare and make out an annual report on forms furnished by the department containing the name of the association, its principal place of business and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up and the number of members and amount of membership fees received, if a non-stock association; the total expenses of operation; the amount of its indebtedness, or liability, and its balance sheets.

History

CJA-2-86, January 30, 1986.

§ 3419. Bond

Each and all officers, employees and agents, handling funds, or property of the corporation or funds of any person placed under the control of or in the possession of said corporation, shall be required to execute and deliver to the corporation a bond of indemnity, indemnifying the corporation and members against any fraudulent, dishonest or unlawful act on the part of such officers and employees and other acts as provided in the bylaws of the association. In case the officers and directors of any corporation authorized to be created under the provisions of this Chapter, shall fail to have all officers, employees and agents handling such funds or property execute the bond provided for herein, each and all of said officers and directors shall be personally liable for all losses occasioned by such failure and which might have been recovered on said bond.

History

CJA-2-86, January 30, 1986.

§ 3420. Interest in other corporations or associations

An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engage in preserving, drying, pressing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing or selling of the agricultural products handled by the association, or by the by-products thereof. If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of the Navajo Nation, its warehouse receipts shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association.

History

CJA-2-86, January 30, 1986.

§ 3421. Contracts and agreement with other associations

Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts and arrangements with any other cooperative corporation, association or associations, formed in the Navajo Nation or other tribal government or any other state for the cooperative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same methods, means and agencies for carrying on and conducting their respective businesses.

History

CJA-2-86, January 30, 1986.

§ 3422. Association heretofore organized

Any corporation association organized under previously existing statutes, may by a majority vote of its stockholders or members be brought under the provisions of this Chapter by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the Department, to the effect that the corporation or association has, by a majority vote of its stockholders or members decided to accept the benefits and be bound by the provisions of this Subchapter. Articles of incorporation shall be filed as required in § 3407 of this Chapter except that they shall be signed by the members of the board of directors.

History

CJA-2-86, January 30, 1986.

§ 3423. Breach of contract or false reports

Any person or person or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be liable to the association aggrieved thereby in a civil suit for damages suffered in three times the amount of actual damage proven for each offense.

History

CJA-2-86, January 30, 1986.

§ 3424. Associations not in restraint of trade

No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily; nor shall the marketing contracts or agreements between the association and its members nor any agreements authorized in this Subchapter, be considered illegal or in restraint of trade.

History

CJA-2-86, January 30, 1986.

§ 3425. Application of general corporation law

The provision of the general corporation laws of the Navajo Nation, and all powers, rights and duties thereunder shall apply to associations organized hereunder except when in conflict with the provisions of this Subchapter. Provided, however, that any cooperative marketing association incorporated under the laws of the Navajo Nation may apply for and be granted a permit to do business as a foreign corporation under laws organized for a similar purpose. Provided further, that such foreign cooperative marketing associations shall not be required to have a paid-up capital or any portion of the capital paid-up in order to be entitled to such permit.

History

CJA-2-86, January 30, 1986.

Chapter 21. Navajo Nation Limited Liability Company Act

Article 1. General Provisions

§ 3600. Policy and purpose

The Navajo Nation Limited Liability Company Act is hereby enacted:

A. The purpose of this Act is to permit the formation of various limited liability entities and require registration of foreign limited liabilities; and to regulate such entities so as to promote economic growth and further exercise Navajo Nation sovereignty in the governance of its territory, and citizens.

B. This Act is based upon general principles of limited liability companies. The interpretation of this Act shall be based on Navajo Nation court interpretation and such interpretation that shall give the utmost respect in deciding the meaning and purpose of this Act to the unique traditions and customs of the Navajo People. General decisional law interpreting similar provisions of other limited liability company laws in other jurisdictions may be used as guidance.

C. Unless as otherwise expressly stated by law, the sovereign immunity of the Navajo Nation shall not extend to corporate entities organized under this Act, nor shall such entities be considered a subdivision, entity, or enterprises of the Navajo Nation, nor shall the Navajo Nation be liable for the debts or obligations of any kind of such entities.

D. The Division of Economic Development through its Business Regulatory Department shall administer the provisions of the Act. The Business Regulatory Department shall promulgate rules and regulations to implement this Act. All proposed rules and regulations shall be published for public comments at least 90 days prior to submission to the Economic Development Committee of the Navajo Nation Council for final review and approval. The Division of Economic Development is directed to prepare an appropriate supplemental budget for carrying out its responsibilities under this Act.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection C corrected to replace "or any kind" with "of any kind".

§ 3601. Definitions

In this Chapter, unless the context otherwise requires:

A. "Articles of organization" means initial, amended, and restated articles of organization and articles of merger. In the case of a foreign limited liability company, the term includes all records serving a similar function required to be filed in the Department or other official having custody of company records in the State, Indian Nation or country under whose law it is organized.

B. "At-will company" means a limited liability company other than a term company.

C. "Business" includes every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit.

D. "Debtor in bankruptcy" means a person who is the subject of an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application or a comparable order under federal, state, or foreign law governing insolvency.

E. "Department" means the Business Regulatory Department within the Division of Economic Development or its designate successor.

F. "Distribution" means a transfer of money, property, or other benefit from a limited liability company to a member in the member's capacity as a member or to a transferee of the member's distributional interest.

G. Distributional Interest means all of a member's interest in distributions by the limited liability company.

H. "Entity" means a person other than an individual.

I. "Foreign limited liability company" means an unincorporated entity organized under laws other than the laws of the Navajo Nation which afford limited liability to its owners comparable to the liability under Section 3642 and is not required to obtain a certificate of authority to transact business under any law of the Navajo Nation other than this Act.

J. "Limited liability company" means a limited liability company organized and existing under this Act.

K. "Manager" means a person, whether or not a member of a manager-managed company, who is vested with authority under Section 3640.

L. "Manager-managed company" means a limited liability company which is so designated in its articles of organization.

M. "Member-managed company" means a limited liability company other than a manager-managed company.

N. "Navajo Nation" means:

1. When referring to the body politic, the Navajo Nation government, including its Council and applicable standing committees and boards;

2. When referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, including:

a. All land within the exterior boundaries of the Navajo Indian Reservation, including the Navajo Partitioned Land, or of the Eastern Navajo portion of the Navajo Nation, including Alamo, Canoncito, and Ramah, or of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments;

b. All lands held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for, the use or benefit of the Navajo Nation, the Navajo Tribe, any Band of Navajo Indians, or any individual Navajo Indian as such; and

c. All other land over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

O. "Operating agreement" means any written under Section 3603 concerning the relations among the members, managers, and limited liability company. The term includes amendments to the agreement.

P. "Person" includes any individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, government subdivision, government agency, or instrumentality, or any other legal or commercial entity.

Q. "Principal office" means the office, whether or not in the Navajo Nation, where the principal executive office of a domestic or foreign limited liability company is located.

R. "Record" means information that is inscribed on a tangible medium or that it stored in an electronic or other medium and is retrievable in perceived form.

S. "Sign" means to identify a record by means of a signature, mark, or other symbol, with intent to authenticate it.

T. "State" means a state of the United States, a federally-recognized Indian Tribe, the District of Columbia, the Commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States.

U. "Term company" means a limited liability company in which its members have agreed to remain members until the expiration of a term specified in the articles of incorporation.

V. "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, and gift.

History

CJY–17–08, July 22, 2008.

Note. For purposes of statutory consistency, the term "agreement" inserted after the term "written" within Subsection O.

§ 3602. Knowledge and notice

A. A person knows a fact if the person has actual knowledge of it.

B. A person has notice if the person:

1. Knows the fact;

2. Has received a notification of the fact; or

3. Has reason to know the fact exists from all of the facts known to the person at the time in question.

C. A person notifies or gives a notification of a fact to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows the fact.

D. A person receives a notification when the notification:

1. Comes to the person's attention; or

2. Is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communication.

E. An entity knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction for the entity knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention had the entity exercised reasonable diligence. An entity exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction for the entity and there is reasonable compliance with the routine. Reasonable diligence does not require an individual acting for the entity 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

CJY-17-08, July 22, 2008.

§ 3603. Effect of operating agreement; nonwaivable provisions

A. Except as otherwise provided in Subsection (B), all members of a limited liability company may enter into an operating agreement, which shall be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. To the extent the operating agreement does not otherwise provide, this Act governs relations among the members, managers, and company.

B. The operating agreement may not:

1. Unreasonably restrict a right to information or access to records under Section 3657.

2. Eliminate the duty of loyalty under Section 3658(B) or 3682(B)(3), but the agreement may:

a. Identity specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and

b. Specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

3. Unreasonably reduce the duty of care under Section 3658(C) or 3682(B)(3);

4. Eliminate the obligation of good faith and fair dealing under Section 3658(D), but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the

standards are not manifestly unreasonable;

5. Vary the right to expel a member in an event specified in Section 3680(6);

6. Vary the requirement to wind up the limited liability company's business in a case specified in Section 3700(A)(3) or (A)(4); or

7. Restrict rights of a person, other than a manager, member, and transferee of a member's distributional interest, under this Act.

History

CJY-17-08, July 22, 2008.

Note. Typographical errors at Subsection B(1) corrected to change the word "restricts" to "restrict"; and at Subsection B(2) to correct the citation from section 3683(B)(3) to 3682(B)(2).

§ 3604. Supplemental principles of law

A. Unless displaced by particular provisions of this Act, the principles of law and equity supplement this Act.

B. If an obligation to pay interest arises under this Act and the rate is not specified, the rate that is specified is ten percent (10%) per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to.

History

CJY-17-08, July 22, 2008.

Note. Inserted the numeric form of "10%" following the words "ten percent" for codification.

§ 3605. Name

The name of a limited liability company as set forth in its articles of organization shall:

A. Contain the words "limited liability company" or "limited company" or the abbreviations "L.L.C.," "LLC," "L.C.," or "LC". Limited may be abbreviated as "Ltd.," and "company" may be abbreviated as "Co.".

B. Not contain the words "association," "corporation" or "incorporated" or an abbreviation of these words.

C. Not be the same as, or deceptively similar to, the name of a limited liability company, limited partnership or corporation existing under the laws of the Navajo Nation or a foreign limited liability company, limited partnership or corporation authorized to transact business in the Navajo Nation, or a name the exclusive right to which is, at the time, reserved in the manner provided under the laws of the Navajo Nation or a registered trade name.

This paragraph does not apply if the applicant files with the Department one of the following:

1. The written consent of the holder of the name to use the same or a deceptively similar name and one or more words are added or deleted to make the name distinguishable from the other name;

2. A certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the applicant to use the name in the Navajo Nation; or

3. Documents showing the other company is organized or authorized to transact business in the Navajo Nation and the company proposing to use the name has:

a. Merged with the other company;

b. Been formed by reorganization with the other company; or

c. Acquired substantially all of the assets, including the name, of the other company.

D. Not contain the words "Navajo Nation" or "Navajo Tribe," nor in anyway imply that it is associated with the Navajo Nation government or a Navajo Nation entity, unless the Navajo Nation government or a Navajo Nation entity is the manager of a manager-managed company.

History

CJY-17-08, July 22, 2008.

§ 3606. Reserved name

A. A person may reserve the exclusive use of the name of a limited liability company, including a fictitious name for a foreign company whose name is not available, by delivering an application to the Department for filing. The application must set forth the name and street and mailing address of the applicant and the name proposed to be reserved. If the Department finds that the name applied for is available, it must be reserved for the applicant's exclusive use for a nonrenewable 120-day period.

B. The owner of a name reserved for a limited liability company may transfer the reservation to another person by delivering to the Department a signed notice of the transfer which states the name and street and mailing address of the transferee.

History

CJY-17-08, July 22, 2008.

§ 3607. Registered name

A. A foreign limited liability company may register its name subject to the requirements of Section 3734, if the name is distinguishable upon the records of the Department from names that are not available under Section 3606(B).

B. A foreign limited liability company registers its name, or its name with any additions required by Section 3734, by delivering to the Department for filing an application:

1. Setting forth its name, or its name with any addition required by Section 3734, the State or country and date of its organization, and a brief description of the nature of the business in which it is engaged; and

2. Accompanied by a certificate of existence, or record of similar import, from the State, Indian Nation or country of organization.

C. A foreign limited liability company whose registration is effective may renew it for successive years by delivering for filing in Department a renewal application complying with Subsection (B) between October 1 and December 31 of the preceding year. The renewal application renews the registration for the following calendar year.

D. A foreign limited liability company whose registration is effective may qualify as a foreign company under its name or consent in writing to the use of its name by a limited liability company later organized under this Act or by another foreign company later authorized to transact business in the Navajo Nation. The registered name terminates when the limited liability company is organized or the foreign company qualifies or consent to the qualification of another foreign company under the registered name.

History

CJY-17-08, July 22, 2008.

§ 3608. Designated office and agent for service of process

A. A limited liability company and a foreign limited liability company authorized to do business in the Navajo Nation shall designate and continuously maintain in the Navajo Nation:

1. An office, which need not be a place of its business in the Navajo Nation; and

2. An agent, street and mailing address, phone number of the agent for service of process on the company.

B. An agent must be an individual resident of the Navajo Nation, a domestic corporation, another limited liability company, or a foreign corporation or foreign company authorized to do business in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 3609. Change of registered office, statutory agent or statutory agent's

contact information

A limited liability company may change its designated office or agent for service of process by delivering to the Department for filing a statement of change which sets forth:

1. The name of the company;

2. The street and mailing address of its current designated office;

3. The current phone number to its principle office;

4. If the current designated office is to be changed, the street and mailing address of the new designated office;

5. The name and street and mailing address of its current agent for service of process; and

6. If the current agent for service of process or street and mailing address of that agent is to be changed, the new street and mailing address or the name and street and mailing address of the new agent for service of process.

History

CJY-17-08, July 22, 2008.

§ 3610. Resignation of agent for service of process

A. An agent for service of process of a limited liability company may resign by delivering to the Department for filing a record of the statement of resignation.

B. After filing a statement of resignation, the Department shall mail a copy to the designated office and another copy to the limited liability company at its principal office.

C. An agent is terminated on the 31st day after the statement is filed in the Department.

History

CJY-17-08, July 22, 2008.

§ 3611. Service of process

A. An agent for service of process appointed by a limited liability company or a foreign limited liability company is an agent of the company for service of any process, notice, or demand required or permitted by law to be served upon the company.

B. If a limited liability company or foreign limited liability company fails to appoint or maintain an agent for service of process in the Navajo Nation or the agent for service of process cannot with reasonable diligence be found at the agent's street and mailing address, the Department is an agent of the company upon whom process, notice, or demand may be served.

C. Service of any process, notice, or demand on the Department may be made by delivering to and leaving with the Department, duplicate copies of the process, notice, or demand. If the process, notice, or demand is served on the Department, the Department shall forward one of the copies by registered or certified mail, return receipt requested, to the company at its designated office. Service is effected under this Subsection at the earliest of:

1. The date the company receives the process, notice, or demand;

2. The date shown on the return receipt, if signed on behalf of the company; or

3. Five days after its deposit in the mail, if mailed postpaid and correctly addressed.

D. The Department shall keep a record of all processes, notices, and demands served pursuant to this Section and record the time of and the action taken regarding the service.

E. This Section does not affect the right to serve process, notice, or demand in any manner otherwise provided by law.

History

CJY–17–08, July 22, 2008.

§ 3612. Nature of business and powers

A. A limited liability company may be organized under this chapter and may conduct or promote business and other activities for any lawful purpose, subject to any law of the Navajo Nation governing or regulating businesses.

B. Unless its articles of organization provide otherwise, a limited liability company has the same power as an individual to do all things necessary or convenient to carry on its business or affairs, including the power to:

1. Sue and be sued, and defend in its name;

2. Purchase, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real property or personal property, or any legal or equitable interest in property, wherever located;

3. Sell, convey, mortgage, grant a security interest in, lease, exchange, and otherwise encumber or dispose of all or any part of its property;

4. Purchase, receive, subscribe for or otherwise acquire, own, hold, vote, sell, mortgage, lend, grant a security interest in, or otherwise dispose of and deal in and with, shares or other interests in

or obligations of any other entity;

5. Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds and other obligations, which may be convertible into or include the option to purchase other securities of the limited liability company, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income;

6. Lend money, invest and reinvest its funds, and receive and hold real property and personal property as security for repayment;

7. Be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

8. Conduct its business, locate offices, and exercise the powers granted by this Act within or without the Navajo Nation;

9. Elect managers or appoint officers, employees, and agents of the limited liability company, define their duties, fix their compensation, and lend them money and credit;

10. Pay pensions and establish pension plans, pension trusts, profit sharing plans, bonus plans, option plans, and benefits or incentive plans for any or all of its current or former members, managers, employees, officers, employees and agents;

11. Make donations for the public welfare or for charitable, scientific or educational purposes;

12. Indemnify a member, manager, employee, officer or agent or any other person; and

13. Make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited liability company.

History

CJY-17-08, July 22, 2008.

Article 2. Organization

§ 3620. Limited liability company as legal entity

A limited liability company is a legal entity distinct from its members.

History

CJY-17-08, July 22, 2008.

§ 3621. Organization

A. One or more persons may organize a limited liability company, consisting of one or more members, by delivering articles of organization to the Department for filing.

B. Unless a delayed effective date is specified, the existence of a limited liability company begins when the articles of organization are filed.

C. The filing of the articles of organization by the Department is conclusive proof that the organizers satisfied all conditions precedent to the creation of a limited liability company.

History

CJY-17-08, July 22, 2008.

§ 3622. Articles of organization

A. Articles of organization of a limited liability company shall set forth:

1. The name of the limited liability company;

2. The street and mailing address and phone number of the initial designated office;

3. The name and street and mailing address of the initial agent for service of process;

4. The name and street and mailing address of each organizer;

5. Whether the company is to be a term company and, if so, the term specified;

6. Whether the company is to be manager-managed and, if so, the name, street and mailing address and phone number of each initial manager;

7. Whether one or more of the members of the company are to be liable for its debts and obligations under Section 3642(C).

8. A provision stating that the company will agree to abide by all applicable criminal, civil and regulatory laws of the Navajo Nation.

B. The articles of organization may set forth:

1. Provisions permitted to be set forth in an operating agreement; or

2. Other matters not inconsistent with law.

C. Articles of organization of a limited liability company may not vary the nonwaivable provision of Section 3603(B). As to all other matters, if any provision of an operating agreement is inconsistent with articles of organization:

1. The operating agreement controls as to managers, members, and members' transferees; and

2. The articles of organization controls as to persons, other than managers, members and their transferees, who reasonably rely on the articles to their detriment.

History

CJY-17-08, July 22, 2008.

§ 3623. Amendment or restatement of articles of organization

A. Articles of organization of a limited liability company may be amended at any time by delivering articles of amendment to the Department for filing. The articles of amendment must set forth the:

1. Name of the limited liability company;

2. Date of filing of articles of organization; and

3. Amendment to the articles.

B. A limited liability company may restate its articles of organization at any time. Restated articles of organization must be signed and filed in the same manner as articles of amendment. Restated articles of organization must be designated as such in the heading and state in the heading or in an introductory paragraph the limited liability company's present name and, if it has been changed, all of its former names and the date of the filing of its initial articles of organization.

History

CJY-17-08, July 22, 2008.

§ 3624. Signing of records

A. Except as otherwise provided in this Act, a record to be filed by or on behalf of a limited liability company in the Department shall be signed in the name of the company by a:

1. Manager of a manager-managed company;

2. Member of a member-managed company;

3. Person organizing the company, if the company has not been formed; or

4. Fiduciary, if the company is in the hands of a receiver, trustee, or other court-appointed fiduciary.

B. A record signed under Subsection (A) must state adjacent to the signature the name and capacity of the signer.

C. Any person may sign a record to be filed under Subsection (A) by an attorney-in-fact. Powers of attorney relating to the signing of records to be filed under Subsection (A) by an attorney-in-fact need not be filed in the office of the Department as evidence of authority by the person filing but must be retained by the company.

History

CJY-17-08, July 22, 2008.

§ 3625. Filing with the Department

A. Articles of organization or any other record authorized to be filed under this Act must be in a medium permitted by the Department and must be delivered to the Department. Unless the Department determines that a record fails to comply as to form with filing requirements of this Act, and if all filing fees have been paid, the Department shall file the record and send a receipt for the record and the fees to the limited liability company or its representative.

B. Upon request and payment of a fee, the Department shall send to the requester a certified copy of the requested record.

C. Except as otherwise provided in Subsection (D) and Section 3626(C), a record accepted for filing by the Department is effective:

1. At the time of filing on the date it is filed, as evidenced by the Department's date and time endorsement on the original record; or

2. At the time specified in the record as its effective time on the date it is filed.

D. A record may specify a delayed effective time and date, and if it does so the record becomes effective at the time and date specified. If a delayed effective date but no time is specified, the record is effective at the close of the business on that date. If a delayed effective date is later than the 90th day after the record is filed, the record is effective on the 90th day.

History

CJY-17-08, July 22, 2008.

§ 3626. Correcting filed record

A. A limited liability company or foreign limited liability company may correct a record filed by the Department if the record contains a false or erroneous statement or was defectively signed.

B. A record is corrected:

1. By preparing articles of correction that:

a. Describe the record, including its filing date, or attach a copy of it to the articles of correction;

b. Specify the incorrect statement and the reason it is incorrect or the manner in which the signing was defective; and

c. Correct the incorrect statement or defective signing; and

2. By delivering the corrected record to the Department for filing.

C. Articles of correction are effective retroactively on the effective date of the record they correct except as to persons relying on the uncorrected record and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

History

CJY-17-08, July 22, 2008.

§ 3627. Certificate of existence or authorization

A. A person may request the Department to furnish a certificate of existence for a limited liability company or a certificate of authorization for a foreign limited liability company.

B. A certificate of existence for a limited liability company must set forth:

1. The company's name;

2. That it is duly organized under the laws of the Navajo Nation, the date of organization, whether its duration is at-will or for a specified term, and, if the latter, the period specified;

3. If payment is reflected in the records of the Department and if nonpayment affects the existence of the company, that all fees, taxes, and penalties owed to the Navajo Nation have been paid;

4. Whether its most recent annual report required by Section 3630 has been filed with the Department;

5. That articles of termination have not been filed; and

6. Other facts of record in the Department which may be requested by the applicant.

C. A certificate of authorization for a foreign limited liability company must set forth:

1. The company's name used in the Navajo Nation;

2. That it is authorized to transact business in the Navajo Nation;

3. If payment is reflected in the records of the Department and if nonpayment affects the authorization of the company, that all fees, taxes, and penalties owed to the Navajo Nation have been paid;

4. Whether its most recent annual report required by Section 3630 has been filed with the Department;

5. That a certificate of cancellation has not been filed; and

6. Other facts of record in the Department which may be requested by the applicant.

D. Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Department may be relied upon as conclusive evidence that the domestic or foreign limited liability company is in existence or is authorized to transact business in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 3628. Liability for false statement in filed record

If a record authorized or required to be filed under this Act contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from a person who signed the record or caused another to sign it on the person's behalf and knew the statement to be false at the time the record was signed.

History

CJY-17-08, July 22, 2008.

§ 3629. Filing by judicial act

If a person required by Section 3624 to sign any record fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the Navajo Nation District Court to direct the signing of the record. If the court finds that it is proper for the record to be signed and that a person so designated has failed or refused to sign the record, it shall order the Department to sign and file an appropriate record.

History

CJY-17-08, July 22, 2008.

§ 3630. Annual report for Department

A. A limited liability company, and a foreign limited liability company authorized to transact business in the Navajo Nation, shall deliver to the Department for filing an annual report that sets forth:

1. The name of the company and the state or country under whose law it is organized;

2. The street and mailing address and phone number of its designated office and the name, street and mailing address, and phone

numbers of its agent for service of process in the Navajo Nation;

3. The street and mailing address and phone number of its principal office; and

4. The names, business addresses and phone numbers of any managers.

B. Information in an annual report must be current as of the date the annual report is signed on behalf of the limited liability company.

C. The first annual report must be delivered to the Department after the first year of the company's operating year in which a limited liability company was organized or a foreign company was authorized to transact business. Subsequent annual reports must be delivered to the Department on every anniversary year in which a limited liability company was organized or a foreign company was authorized to transact business.

D. If an annual report does not contain the information required in Subsection (A), the Department shall promptly notify the reporting limited liability company or foreign limited liability company and return the report to it for correction. If the report is corrected to contain the information required in Subsection (A) and delivered to the Department within 90 days after the effective date of the notice, it is timely filed.

History

CJY-17-08, July 22, 2008.

Article 3. Relations of Members and Managers to Persons Dealing with Limited Liability Company

§ 3640. Agency of members and managers

A. Subject to Subsections (B) and (C), in a member-managed company:

1. Each member is an agent of the limited liability company for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority.

2. An act of a member which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by the other members.

B. Subject to Subsection (C), in a manager-managed company:

1. A member is not an agent of the company for the purpose of its business solely by reason of being a member. Each manager is an agent of the company for the purpose of its business, and an act of a manager,

including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacked authority.

2. An act of a manager which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized under Section 3653.

C. Unless the articles of organization limit their authority, any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Article 3 heading corrected to insert the word "of" between "Relations" and "Members".

§ 3641. Limited liability company liable for member's or manager's actionable conduct

A limited liability company is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a member or manager acting in the ordinary course of business of the company or with authority of the company.

History

CJY-17-08, July 22, 2008.

§ 3642. Liability of members and managers

A. Except as otherwise provided in Subsection (C), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

B. The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

C. All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if.

1. A provision to that effect is contained in the articles of organization; and

2. A member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

History

CJY-17-08, July 22, 2008.

Article 4. Relations of Members to Each Other and to Limited Liability Company

§ 3650. Form of contribution

A contribution of a member of a limited liability company may consist of tangible or intangible property or other benefit to the company, including money, promissory notes, services performed, or other agreements to contribute cash or property, or contracts for services to be performed.

History

CJY-17-08, July 22, 2008.

§ 3651. Member's liability for contributions

A. A member's obligation to contribute money, property, or other benefit to, or to perform services for, a limited liability company is not excused by the member's death, disability, or other inability to perform personally. If a member does not make the required contribution of property or services, the member is obligated at the option of the company to contribute money equal to the value of that portion of the stated contribution which has not been made.

B. A creditor of a limited liability company who extends credit or otherwise acts in reliance on an obligation described in Subsection (A), and without notice of any compromise under Section 3653(C)(5), may enforce the original obligation.

History

CJY-17-08, July 22, 2008.

§ 3652. Member's and manager's rights to payment and reimbursement

A. A limited liability company shall reimburse a member or manager for payments made and indemnify a member or manager for liabilities incurred by the member or manager in the ordinary course of the business of the company or for the preservation of its business or property.

B. A limited liability company shall reimburse a member for an advance to the company beyond the amount of contribution the member agreed to make.

C. A payment or advance made by a member which gives rise to an obligation of a limited liability company under Subsection (A) or (B) constitutes a loan to the company upon which interest accrues from the date of the payment or advance.

D. A member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection C corrected to replace reference to "Subsection (C) or (B)" with "Subsection (A) or (B)".

§ 3653. Management of limited liability company

A. In a member-managed company:

1. Each member has equal rights in the management and conduct of the company's business; and

2. Except as otherwise provided in Subsection (C), any matter relating to the business of the company may be decided by a majority of the members.

B. In a manager-managed company:

1. Each manager has equal rights in the management and conduct of the company's business;

2. Except as otherwise provided in Subsection (C), any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers; and

3. A manager:

a. Must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority of the members; and

b. Holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed.

C. The only matters of a member or manager-managed company's business requiring the consent of all of the members are:

1. The amendment of the operating agreement under Section 3603;

2. The authorization or ratification of acts or transactions under Section 3603(B)(2)(b) which would otherwise violate the duty of loyalty;

3. An amendment to the articles of organization under Section 3623;

4. The compromise of an obligation to make a contribution under Section 3651(B);

5. The compromise, as among members, of an obligation of a member to make a contribution or return money or other property paid or distributed in violation of this Act;

6. The making of interim distributions under Section 3654(A), including the redemption of an interest;

7. The admissions of a new member;

8. The use of the company's property to redeem an interest subject to a charging order;

9. The consent to dissolve the company under Section 3700(A)(2);

10. A waiver of the rights to have the company's business wound up and the company terminated under Section 3701(B);

11. The consent of members to merge with another entity under Section 3723(C)(1); and

12. The sale, lease, exchange, or other disposal of all, or substantially all, of the company's property with or without goodwill.

D. Action requiring the consent of members or managers under this Act may be taken without a meeting.

E. A member or manager may appoint a proxy to vote or otherwise act for the member or manager by signing an appointment instrument, either personally or by the member's or manager's attorney-in-fact.

History

CJY–17–08, July 22, 2008.

Note. Typographical error at Subsection C(9) corrected to replace citation to Section 3700(B)(2) with 3700(A)(2).

§ 3654. Sharing of and rights to distributions

A. Any distributions made by a limited liability company before its dissolution and winding up must be in equal shares.

B. A member has no right to receive, and may not be required to accept, a distribution in kind.

C. If a member becomes entitled to receive a distribution, the member has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution.

History

CJY-17-08, July 22, 2008.

§ 3655. Limitations on distributions

A. A distribution may not be made if:

1. The limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or

2. The company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those receiving the distribution.

B. A limited liability company may base a determination that a distribution is not prohibited under Subsection (A) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

C. Except as otherwise provided in Subsection (E), the effect of a distribution under Subsection (A) is measured:

1. In the case of distribution by purchase, redemption, or other acquisition of a distributional interest in a limited liability company, as of the date money or other property is transferred or debt incurred by the company; and

2. In all other cases, as of the date the:

a. Distribution is authorized if the payment occurs within 120 days after the date of authorization; or

b. Payment is made if it occurs more than 120 days after the date of authorization.

D. A limited liability company's indebtedness to a member incurred by reason of a distribution made in accordance with this Section is at parity with the company's indebtedness to its general, unsecured creditors.

E. Indebtedness of a limited liability company, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of determinations under Subsection (A) if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to members could then be made under this Section. If the indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

History

CJY-17-08, July 22, 2008.

§ 3656. Liability for unlawful distributions

A. A member of a member-managed company or a member or manager of a manager-managed company who votes for or assents to a distribution made in violation of Section 3655, the articles of organization, or the operating agreement is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without violating Section 3655, the articles of organization, or the operating agreement if it is established that the member or manager did not perform the member's or manager's duties in compliance with Section 3658.

B. A member of a manager-managed company who knew a distribution was made in violation of Section 3655, the articles of organization, or the operating agreement is personally liable to the company, but only to the extent that the distribution received by the member exceeded the amount that could have been properly paid under Section 3655.

C. A member or manager against whom an action is brought under this Section may implead in the action all:

1. Other members or managers who voted for or assented to the distribution in violation of Subsection (A) and may compel contribution from them; and

2. Members who received a distribution in violation of Subsection (B) and may compel contribution from the member in the amount received in violation of Subsection (B).

D. A proceeding under this Section is barred unless it is commenced within two years after the distribution.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection A corrected to replace "of it is established" with "if it is established".

§ 3657. Member's right to information

A. A limited liability company shall provide members and their agents and attorneys access to its records, if any, at the company's principal office or other reasonable locations specified in the operating agreement. The company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members. The right of access provides the opportunity to inspect and copy records during ordinary business hours. The company may impose a reasonable charge, limited to the costs of labor and material, for copies of records furnished.

B. A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability:

1. Without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the member's rights and performance of the member's duties under the operating agreement or this Act; and

2. On demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

C. A member has the right upon written demand given to the limited liability company to obtain at the company's expense a copy of any written operating agreement.

History

CJY-17-08, July 22, 2008.

§ 3658. General standards of member's and manager's conduct

A. The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by Subsections (B) and (C).

B. A member's duty of loyalty to a member-managed company and its other members is limited to the following:

1. To account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;

2. To refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and

3. To refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

C. A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

D. A member shall discharge the duties to a member-managed company and its other members under this Act or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

E. A member of a member-managed company does not violate a duty or obligation under this Act or under the operating agreement merely because the member's conduct furthers the member's own interest.

F. A member of a member-managed company may lend money to and transact other business with the company. As to each loan or transaction, the rights and obligations of the member are the same as those of a person who is not a member, subject to other applicable law.

G. This Section applies to a person winding up the limited liability company's business as the personal or legal representative of the last surviving member as if the person were a member.

H. In a manager-managed company:

1. A member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member;

2. A manager is held to the same standards of conduct prescribed for members in Subsections (B) through (F).

3. A member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company's business is held to the standards of conduct in Subsections (B) through (F) to the extent that the member exercises the managerial authority vested in a manager by this Act; and

4. A manager is relieved of liability imposed by law for violation of the standards prescribed by Subsections (B) through (F) to the extent of the managerial authority delegated to the members by the operating agreement.

History

CJY-17-08, July 22, 2008.

§ 3659. Actions by members

A. A member may maintain an action against a limited liability company or another member for legal or equitable relief, with or without an accounting as to the company's business, to enforce:

1. The member's rights under the operating agreement;

2. The member's rights under this Act; and

3. The rights and otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company.

B. The accrual, and any time limited for the assertion, of a right of action for a remedy under this Section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

History

CJY-17-08, July 22, 2008.

§ 3660. Continuation of term company after expiration of specified term

A. If a company is continued after the expiration of the specified term, the rights and duties of the members and managers remain the same as they were at the expiration of the term except to the extent inconsistent with rights and duties of members and managers of an at-will company.

B. If the members in a member-managed company or the managers in a manager-managed company continue the business without any winding up of the business of the company, it continues as an at-will company.

History

CJY-17-08, July 22, 2008.

Article 5. Transferees and Creditors of Members

§ 3670. Member's distributional interest

A. A member is not a co-owner of, and has no transferable interest in, property of a limited liability company.

B. A distributional interest in a limited liability company is personal property and, subject to Sections 3671 and 3672, may be transferred in whole or in part.

C. An operating agreement may provide that a distributional interest may be evidenced by a certificate of the interest issued by the limited liability company and, subject to Section 3672, may also provide for the transfer of any interest represented by the certificate.

History

CJY-17-08, July 22, 2008.

§ 3671. Transfer of distributional interest

A transfer of a distributional interest does not entitle the transferee to become or to exercise any rights of a member. A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled.

History

CJY-17-08, July 22, 2008.

§ 3672. Rights of transferee

A. A transferee of a distributional interest may become a member of a limited liability company if and to the extent that the transferor gives the transferee the right in accordance with authority described in the operating agreement or all other members consent.

B. A transferee who has become a member, to the extent transferred, has the rights and powers, and is subject to the restrictions and liabilities, of a member under the operating agreement of a limited liability company and this Act. A transferee who becomes a member also is liable for the transferor member's obligations to make contributions under Section 3651 and for obligations under Section 3656 to return unlawful distributions, but the transferee is not obligated for the transferor member's liabilities unknown to the transferee at the time the transferee becomes a member.

C. Whether or not a transferee of a distributional interest becomes a member under Subsection (A), the transferor is not released from liability to the limited liability company under the operating agreement or this Act.

D. A transferee who does not become a member is not entitled to participate in the management or conduct of the limited liability company's business, require access to information concerning the company's transactions, or inspect or copy any of the company's records.

E. A transferee who does not become a member is entitled to:

1. Receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;

2. Receive, upon dissolution and winding up of the limited liability company's business:

a. In accordance with the transfer, the net amount otherwise distributable to the transferor;

b. A statement of account only from the date of the latest statement of account agreed to by all the members;

3. Seek under Section 3700(A)(5) a judicial determination that it is equitable to dissolve and wind up the company's business.

F. A limited liability company need not give effect to a transfer until it has notice of the transfer.

History

CJY-17-08, July 22, 2008.

§ 3673. Rights of creditor

A. On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order.

B. A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. A purchaser at the foreclosure sale has the rights of a transferee.

C. At any time before foreclosure, a distributional interest in a limited liability company which is charged may be redeemed:

1. By the judgment debtor;

2. With property other than the company's property, by one or more of the other members; or

3. With the company's property, but only if permitted by the operating agreement.

D. This Act does not affect a member's right under exemption laws with respect to the member's distributional interest in a limited liability company.

E. This Section provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributional interest in a limited liability company.

History

CJY-17-08, July 22, 2008.

Article 6. Member's Dissociation

§ 3680. Events causing member's dissociation

A member is dissociated from a limited liability company upon the occurrence of any of the following events:

1. The company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member;

2. An event agreed to in the operating agreement as causing the member's dissociation;

3. Upon transfer of all of a member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;

4. The member's expulsion pursuant to the operating agreement;

5. The member's expulsion by unanimous vote of the other members if:

a. It is unlawful to carry on the company's business with the member;

b. There has been a transfer of substantially all of the member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;

c. Within 90 days after the company notifies a corporate member that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, the member fails to obtain a revocation of the certificate of dissolution or a reinstatement of its charter or its right to conduct business; or

d. A partnership or a limited liability company that is a member has been dissolved and its business is being wound up;

6. On application by the company or another member, the member's expulsion by judicial determination because the member:

a. Engaged in wrongful conduct that adversely and materially affected the company's business;

b. Willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under Section 3658; or

c. Engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member;

7. The member's:

a. Becoming a debtor in bankruptcy;

b. Executing an assignment for the benefit of creditors;

c. Seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property; or

d. Failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the member's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;

8. In the case of a member who is an individual:

a. The member's death;

b. The appointment of a guardian or general conservator for the member; or

c. A judicial determination that the member has otherwise become incapable of performing the member's duties under the operating agreement;

9. In the case of a member that is a trust or is acting as a member by virtue of being a trustee of a trust, distribution of the trust's entire rights to receive distributions from the company, but not merely by reason of the substitution of a successor trustee;

10. In the case of a member that is an estate or is acting as a member by virtue of being a personal representative of an estate, distribution of the estate's entire rights to receive distributions from the company, but not merely the substitution of a successor personal representative; or

11. Termination of the existence of a member if the member is not an individual, estate, or trust other than a business trust.

History

CJY-17-08, July 22, 2008.

§ 3681. Member's power to dissociate; wrongful dissociation

A. Unless otherwise provided in the operating agreement, a member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to Section 3680.

B. If the operating agreement has not eliminated a member's power to dissociate, the member's dissociation from a limited liability company is wrongful only if:

1. It is in breach of an express provision of the agreement; or

2. Before the expiration of the specified term of a term company:

a. The member withdraws by express will;

b. The member is expelled by judicial determination under Section 3680(6);

c. The member is dissociated by becoming a debtor in bankruptcy; or

d. In the case of a member who is not an individual, trust other than a business trust, or estate, the member is expelled or otherwise dissociated because it willfully dissolved or terminated its existence.

C. A member who wrongfully dissociates from a limited liability company is liable to the company and to the other members for damages caused by the dissociation. The liability is in addition to any other obligation of the member to the company or to the other members.

D. If a limited liability company does not dissolve and wind up its business as a result of a member's wrongful dissociation under Subsection (B), damages sustained by the company for the wrongful dissociation must be offset against distributions otherwise due the member after the dissociation.

History

CJY-17-08, July 22, 2008.

§ 3682. Effect of member's dissociation

A. Upon a member's dissociation:

1. In an at-will company, the company must cause the dissociated member's distributional interest to be purchased under Article 7; and

2. In a term company:

a. If the company dissolves and winds up its business on or before the expiration of its specified term, Article 8 applies to determine the dissociated member's rights to distributions; and

b. If the company does not dissolve and wind up its business on or before the expiration of its specified term, the company must cause the dissociated member's distributional interest to be purchased under Article 7 on the date of the expiration of the term specified at the time of the member's dissociation.

B. Upon a member's dissociation from a limited liability company:

1. The member's right to participate in the management and conduct of the company's business terminates, except as otherwise provided in Section 3702, and the member ceases to be a member and is treated the same as a transferee of a member;

2. The member's duty of loyalty under Section 3658(B)(3) terminates; and

3. The member's duty of loyalty under Section 3658(B)(1) and (2) and duty of care under Section 3658(C) continue only with regard to matters arising and events occurring before the member's dissociation, unless the member participates in winding up the company's business pursuant to Section 3702.

History

CJY-17-08, July 22, 2008.

Article 7. Member's Dissociation When Business Not Wound Up

§ 3690. Company purchase of distributional interest

A. A limited liability company shall purchase a distributional interest of a:

1. Member of an at-will company for its fair value determined as of the date of the member's dissociation if the member's dissociation does not result in a dissolution and winding up of the company's business under Section 3700; or

2. Member of a term company for its fair value determined as of the date of the expiration of the specified term that existed on the date of the member's dissociation if the expiration of the specified term does not result in a dissolution and winding up of the company's business under Section 3700.

B. A limited liability company must deliver a purchase offer to the dissociated member whose distributional interest is entitled to be purchased not later than 30 days after the date determined under Subsection (A). The purchase offer must be accompanied by:

1. A statement of the company's assets and liabilities as of the date determined under Subsection (A);

2. The latest available balance sheet and income statement, if any; and

3. An explanation of how the estimated amount of the payment was calculated.

C. If the price and other terms of a purchase of a distributional interest are fixed or are to be determined by the operating agreement, the price and terms so fixed or determined govern the purchase unless the purchaser defaults. If a default occurs, the dissociated member is entitled to commence a proceeding to have the company dissolved under Section 3700(A)(4)(d).

D. If an agreement to purchase the distributional interest is not made within 120 days after the date determined under Subsection (A), the dissociated member, within another 120 days, may commence a proceeding against the limited liability company to enforce the purchase. The company at its expense shall notify in writing all of the remaining members, and any other person the court directs, of the commencement of the proceeding. The jurisdiction of the court in which the proceeding is commenced under this Subsection is plenary and exclusive.

E. The court shall determine the fair value of the distributional interest in accordance with the standards set forth in Section 3691 together with the terms for the purchase. Upon making these determinations, the court shall order the limited liability company to purchase or cause the purchase of the interest.

F. Damages for wrongful dissociation under Section 3681(B), and all other amounts owing, whether or not currently due, from the dissociated member to a limited liability company, must be offset against the purchase price.

History

CJY-17-08, July 22, 2008.

§ 3691. Court action to determine fair value of distributional interest

A. In an action brought to determine the fair value of a distributional interest in a limited liability company, the court shall:

1. Determine the fair value of the interest, considering among other relevant evidence the going concern value of the company, any agreement among some or all of the members fixing the price or specifying a formula for determining value of distributional interests for any other purpose, the recommendations of any appraiser appointed by the court, and any legal constraints on the company's ability to purchase the interest;

2. Specify the terms of the purchase, including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of the company's other creditors, security for a deferred purchase price, and a covenant not to compete or other restriction on a dissociated member; and

3. Require the dissociated member to deliver an assignment of the interest to the purchaser upon receipt of the purchase price or the first installment of the purchase price.

B. After the dissociated member delivers the assignment, the dissociated member has no further claim against the company, its members, officers, or managers, if any, other than a claim to any unpaid balance of the purchase price and a claim under any agreement with the company or the remaining members that is not terminated by the court.

C. If the purchase is not completed in accordance with the specified terms, the company is to be dissolved upon application under Section 3700(A)(4)(d). If a limited liability company is so dissolved, the dissociated member has the same rights and priorities in the company's assets as if the sale had not been ordered.

D. If the court finds that a party to the proceeding acted arbitrarily, vexatiously, or not in good faith, it may award one or more other parties their reasonable expenses, including attorney's fees and the expenses of appraisers or other experts, incurred in the proceeding. The finding may be based on the company's failure to make an offer to pay or to comply with Section 3690(B).

E. Interest must be paid on the amount awarded from the date determined under Section 3690(A) to the date of payment.

History

CJY-17-08, July 22, 2008.

Note. Typographical errors at Subsection C corrected to replace citation to Section 3700(B)(5)(d) with Section 3700(A)(4)(d); and Subsection E corrected to replace citation to Section 701(A) with Section 3690(A).

§ 3692. Dissociated member's power to bind limited liability company

For two years after a member dissociates without the dissociation resulting in a dissolution and winding up of a limited liability company's business, the company, including a surviving company under Article 9, is bound by an act of the dissociated member which would have bound the company under Section 3640 before dissociation only if at the time of entering into the transaction the other party:

1. Reasonably believed that the dissociated member was then a member;

2. Did not have notice of the member's dissociation; and

3. Is not deemed to have had notice under Section 3693.

History

CJY-17-08, July 22, 2008.

§ 3693. Statement of dissociation

A. A dissociated member or a limited liability company may file in the Department a statement of dissociation stating the name of the company and that the member is dissociated from the company.

B. For the purposes of Sections 3690 and 3692, a person not a member is deemed to have notice of the dissociation 90 days after the statement of dissociation is filed.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection B corrected to replace citation to Sections 3640 and 3692 with Sections 3690 and 3692.

Article 8. Winding Up Company's Business

§ 3700. Events causing dissolution and winding up of company's business

A. A limited liability company is dissolved, and its business must be wound up, upon the occurrence of any of the following events:

1. An event specified in the operating agreement;

2. Consent of the number or percentage of members specified in the operating agreement;

3. An event that makes it unlawful for all or substantially all of the business of the company to be continued, but any cure of illegality within 90 days after notice to the company of the event is effective retroactively to the date of the event for purposes of this Section;

4. On application by a member or a dissociated member, upon entry of a judicial decree that:

a. The economic purpose of the company is likely to be unreasonably frustrated;

b. Another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;

c. It is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement;

d. The company failed to purchase the petitioner's distributional interest as required by Section 3690;

e. The managers or members in control of the company have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner; or

5. On application by a transferee of a member's interest, a judicial determination that it is equitable to wind up the company's business:

a. After the expiration of the specified term, if the company was for a specified term at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer; or

b. At any time, if the company was at will at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer.

B. A limited liability company may be dissolved involuntarily by a judgment of a Navajo Nation Court in an action filed against it by the Attorney General of the Navajo Nation, and the company's business must be wound up, when any of the following is established:

1. The company has failed to comply with the provisions of this Act or regulations promulgated thereunder;

2. The company procured its formation through fraudulent misrepresentation or concealment of material facts;

3. The company violated the laws of the Navajo Nation; or

4. The company has continued to persist over a period of time to conduct its business in a fraudulent or otherwise illegal manner.

History

CJY-17-08, July 22, 2008.

Note. Typographical errors at Subsection (A)(3) corrected to replace "In event" with "An event"; and Subsection (B)(2) corrected to replace "misrepresentative" with "misrepresentation".

§ 3701. Limited liability company continues after dissolution

A. Subject to Subsection (B), a limited liability company continues after dissolution only for the purpose of winding up its business.

B. At any time after the dissolution of a limited liability company and before the winding up of its business is completed, the members, including a dissociated member whose dissociation caused the dissolution, may unanimously waive the right to have the company's business wound up and the company terminated. In that case:

1. The limited liability company resumes carrying on its business as if dissolution had never occurred and any liability incurred by the company or a member after the dissolution and before the waiver is determined as if the dissolution had never occurred; and

2. The rights of a third party accruing under Section 3703(A) or arising out of conduct in reliance on the dissolution before the third party knew or received a notification of the waiver are not adversely affected.

History

CJY-17-08, July 22, 2008.

§ 3702. Right to wind up limited liability company's business

A. After dissolution, a member who has not wrongfully dissociated may participate in winding up a limited liability company's business, but on application of any member, member's legal representative, or transferee, the Navajo Nation Courts, for good cause shown, may order judicial supervision of the winding up.

B. A legal representative of the last surviving member may wind up a limited liability company's business.

C. A person winding up a limited liability company's business may preserve the company's business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the company's business, dispose of and transfer the company's property, discharge the company's liabilities, distribute the assets of the company pursuant to Section 3705, settle disputes by mediation or arbitration, and perform other necessary acts.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection C corrected to replace citation to Section 806 with Section 3705.

§ 3703. Member's or manager's power and liability as agent after dissolution

A. A limited liability company is bound by a member's or manager's act after dissolution that:

1. Is appropriate for winding up the company's business; or

2. Would have bound the company under Section 3640 before dissolution, if the other party to the transaction did not have notice of the dissolution.

B. A member or manager who, with knowledge of the dissolution, subjects a limited liability company to liability by an act that is not appropriate for winding up the company's business is liable to the company for any damage caused to the company arising from the liability.

History

CJY-17-08, July 22, 2008.

§ 3704. Articles of termination

A. At any time after dissolution and winding up, a limited liability company may terminate its existence by filing with the Department articles of termination stating:

1. The name of the company;

2. The date of the dissolution; and

3. That the company's business has been wound up and the legal existence of the company has been terminated.

B. The existence of a limited liability company is terminated upon the filing of the articles of termination, or upon a later effective date, if specified in the articles of termination.

History

CJY-17-08, July 22, 2008.

§ 3705. Distribution of assets in winding up limited liability company's business

A. In winding up a limited liability company's business, the assets of the company must be applied to discharge its obligations to creditors, including members who are creditors. Any surplus must be applied to pay in money the net amount distributable to members in accordance with their right to distributions under Subsection (B).

B. Each member is entitled to a distribution upon the winding up of the limited liability company's business consisting of a return of all contributions which have not previously been returned and a distribution of any remainder in equal shares.

History

CJY-17-08, July 22, 2008.

§ 3706. Known claims against dissolved limited liability company

A. A dissolved limited liability company may dispose of the known claims against it by following the procedure described in this section.

B. A dissolved limited liability company shall notify its known claimants in writing of the dissolution. The notice must:

1. Specify the information required to be included in a claim;

2. Provide a street and mailing address where the claim is to be sent;

3. State the deadline for receipt of the claim, which may not be less than 120 days after the date the written notice is received by the claimant; and

4. State that the claim will be barred if not received by the deadline.

C. A claim against a dissolved limited liability company is barred if the requirements of Subsection (B) are met, and:

1. The claim is not received by the specified deadline; or

2. In the case of a claim that is timely received but rejected by the dissolved company, the claimant does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of the rejection.

D. For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

History

CJY-17-08, July 22, 2008.

§ 3707. Other claims against dissolved limited liability company

A. A dissolved limited liability company may publish notice of its dissolution and request persons having claims against the company to present them in accordance with the notice.

B. The notice must:

1. Be published at least once in a newspaper of general circulation in the area in which the dissolved limited liability company's principal office is located or, if none in the Navajo Nation, in which its designated office is or was last located;

2. Describe the information required to be contained in a claim and provide a street and mailing address where the claim is to be sent; and

3. State that a claim against the limited liability company is barred unless a proceeding to enforce the claim is commenced within five years after publication of the notice.

C. If a dissolved limited liability company publishes a notice in accordance with Subsection (B), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved company within five years after the publication date of the notice:

1. A claimant who did not receive written notice under Section 3706;

2. A claimant whose claim was timely sent to the dissolved company but not acted on; and

3. A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

D. A claim not barred under this Section may be enforced:

1. Against the dissolved limited liability company, to the extent of its undistributed assets; or

2. If the assets have been distributed in liquidation, against a member of the dissolved company to the extent of the member's proportionate share of the claim or the company's assets distributed to the member in liquidation, whichever is less, but a member's total liability for all claims under this Section may not exceed the total amount of assets distributed to the member.

History

CJY-17-08, July 22, 2008.

§ 3708. Grounds for administrative dissolution

The Department may commence a proceeding to dissolve a limited liability company administratively if the company does not:

1. Pay any fees, taxes, or penalties imposed by this Act or other law within 60 days after they are due; or

2. Deliver its annual report to the Department within 90 days after it is due.

History

CJY-17-08, July 22, 2008.

§ 3709. Procedure for and effect of administrative dissolution

A. If the Department determines that a ground exists for administratively dissolving a limited liability company, the Department shall enter a record of the determination and serve the company with a copy of the record.

B. If the company does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Department that each ground determined by the Department does not exist within 60 days after service of the notice, the Department shall administratively dissolve the company by signing a certification of the dissolution that recites the ground for dissolution and its effective date. The Department shall file the original of the certificate and serve the company with a copy of the certificate.

C. A company administratively dissolved continues its existence but may carry on only business necessary to wind up and liquidate its business and affairs under Section 3701 and to notify claimants under Sections 3706 and 3707.

D. The administrative dissolution of a company does not terminate the authority of its agent for service of process.

History

CJY-17-08, July 22, 2008.

§ 3710. Reinstatement following administrative dissolution

A. A limited liability company administratively dissolved may apply to the Department for reinstatement within two years after the effective date of dissolution. The application must:

1. Recite the name of the company and the effective date of its administrative dissolution;

2. State that the ground for dissolution either did not exist or have been eliminated;

3. State that the company's name satisfies the requirements of Section 3605; and

4. Contain a certificate from the Office of Navajo Tax Commission reciting that all taxes owed by the company have been paid.

B. If the Department determines that the application contains the information required by Subsection (A) and that the information is correct, the Department shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites this determination and the effective date of reinstatement, file the original of the certificate, and serve the company with a copy of the certificate.

C. When reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the company may resume its business as if the administrative dissolution had never occurred.

History

CJY-17-08, July 22, 2008.

§ 3711. Appeal from denial of reinstatement

A. If the Department denies a limited liability company's application for reinstatement following administrative dissolution, the Department shall serve the company with a record that explains the reason or reasons for denial.

B. The company may appeal the denial of reinstatement to the Department by filing a notice of appeal within thirty (30) days after service of the notice of denial is perfected.

C. The notice of appeal shall be in writing and shall:

1. Identify the company being denied reinstatement, and contain a short statement of facts indicating the nature and circumstances of the denial;

2. Specify the legal basis for the appeal; and

3. Contain a statement of facts upon which the company relies in support of the appeal and such argument as the company may care to make in support of the appeal.

D. Within five (5) days after receiving a notice of appeal, the Department shall refer the appeal to the Navajo Office of Hearing and Appeals for assignment to a qualified and impartial hearing officer.

E. The hearing officer shall hear the appeal within thirty (30) days of receipt of the notice of appeal by the Department. Upon request or agreement of the company, a delay of not more than fifteen (15) days may be granted.

F. Notice shall be afforded to the parties at least ten (10) days in advance of the date set for hearing. Each party at the hearing may be represented by counsel and shall have the opportunity to subpoena witnesses, present evidence, and examine witnesses.

G. After the hearing, each party shall have ten (10) days to submit in writing proposed findings of fact and conclusions of law. The hearing officer may uphold or reverse the decision of the Department or any part thereof, but may not grant any other relief.

H. The hearing officer shall issue written findings of fact and conclusions of law that shall state the decision and grounds thereof.

I. The decision of the hearing officer shall be final and may be appealed by any party to the Navajo Nation Supreme Court in accordance with the Navajo Nation Rules of Civil Appellate Procedure. The court shall review the decision of the hearing officer of the administrative record only. The decision shall not be subject to de novo review on appeal. The court may substitute its judgment on those questions of law within its special competence but shall otherwise uphold the decision of the hearing officer where reasonable.

History

CJY-17-08, July 22, 2008.

Article 9. Conversions and Mergers

§ 3720. Definitions

In this Article:

1. "Corporation" means a corporation under Navajo Nation Corporation Code, a predecessor law, or comparable law of another jurisdiction.

2. "General partner" means a partner in a partnership and a general partner in a limited partnership.

3. "Limited partner" means a limited partner in a limited partnership.

4. "Limited partnership" means a limited partnership created under Navajo Nation Limited Partnership Act, a predecessor law, or comparable law of another jurisdiction.

5. "Partner" includes a general partner and a limited partner.

6. "Partnership" means a general partnership under the Navajo Nation Uniform Partnership Act, a predecessor law, or comparable law of another jurisdiction.

7. "Partnership agreement" means an agreement among the partners concerning the partnership or limited partnership.

8. "Shareholder" means a shareholder in a corporation.

History

CJY-17-08, July 22, 2008.

§ 3721. Conversion of partnership or limited partnership to limited liability company

A. A partnership or limited partnership may be converted to a limited liability company pursuant to this section.

B. The terms and conditions of a conversion of a partnership or limited partnership to a limited liability company must be approved by all of the partners or by a number or percentage of the partners required for conversion in the partnership agreement.

C. An agreement of conversion must set forth the terms and conditions of the conversion of the interests of partners of a partnership or of a limited partnership, as the case may be, into interests in the converted limited liability company or the cash or other consideration to be paid or delivered as a result of the conversion of the interests of the partners, or a combination thereof.

D. After a conversion is approved under Subsection (B), the partnership or limited partnership shall file articles of organization in the Department which satisfy the requirements of Section 3622 and contain:

1. A statement that the partnership or limited partnership was converted to a limited liability company from a partnership or limited partnership, as the case may be;

2. Its former name;

3. A statement of the number of votes cast by the partners entitled to vote for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion under Subsection (B); and

4. In the case of a limited partnership, a statement that the certificate of limited partnership is to be canceled as of the date the conversion took effect.

E. In the case of a limited partnership, the filing of articles of organization under Subsection (D) cancels its certificate of limited partnership as of the date the conversion took effect.

F. A conversion takes effect when the articles of organization are filed in the Department or at any later date specified in the articles of organization.

G. A general partner who becomes a member of a limited liability company as a result of a conversion remains liable as a partner for an obligation incurred by the partnership or limited partnership before the conversion takes effect.

H. A general partner's liability for all obligations of the limited liability company incurred after the conversion takes effect is that of a member of the company. A limited partner who becomes a member as a result of a conversion remains liable only to the extent the limited partner was liable for an obligation incurred by the limited partnership before the conversion takes effect.

History

CJY-17-08, July 22, 2008.

Note. Typographical error corrected to delete Subsection I, without any text.

§ 3722. Effect of conversion; entity unchanged

A. A partnership or limited partnership that has been converted pursuant to this Article is for all purposes the same entity that existed before the conversion.

B. When a conversion takes effect:

1. All property owned by the converting partnership or limited partnership vests in the limited liability company;

2. All debts, liabilities, and other obligations of the converting partnership or limited partnership continue as obligations of the limited liability company;

3. An action or proceeding pending by or against the converting partnership or limited partnership may be continued as if the conversion had not occurred;

4. Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting partnership or limited partnership vest in the limited liability company; and

5. Except as otherwise provided in the agreement of conversion under Section 3721(C), all of the partners of the converting partnership continue as members of the limited liability company.

History

CJY-17-08, July 22, 2008.

§ 3723. Merger of entities

A. Pursuant to a plan of merger approved under Subsection (C), a limited liability company may be merged with or into one or more limited liability companies, foreign limited liability companies, corporations, foreign corporations, partnerships, foreign partnerships, limited partnerships, foreign limited partnerships, or other domestic or foreign entities.

B. A plan of merger must set forth:

1. The name of each entity that is a party to the merger;

2. The name of the surviving entity into which the other entities will merge;

3. The type of organization of the surviving entity;

4. The terms and conditions of the merger;

5. The manner and basis for converting the interests of each party to the merger into interests or obligations of the surviving entity, or into money or other property in whole or in part; and

6. The street and mailing address of the surviving entity's principal place of business.

C. A plan of merger must be approved:

1. In the case of a limited liability company that is a party to the merger, by all of the members or by a number or percentage of members specified in the operating agreement;

2. In the case of a foreign limited liability company that is a party to the merger, by the vote required for approval of a merger by the law of the State or foreign jurisdiction in which the foreign limited liability company is organized;

3. In the case of a partnership or domestic limited partnership that is a party to the merger, by the vote required for approval of a conversion under Section 3721(B); and

4. In the case of any other entities that are parties to the merger, by the vote required for approval of a merger by the law of the Navajo Nation or of the state or foreign jurisdiction in which the entity is organized and, in the absence of such a requirement, by all the owners of interests in the entity.

D. After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

E. The merger is effective upon the filing of the articles of merger with the Department, or at such later date as the articles may provide.

History

CJY-17-08, July 22, 2008.

§ 3724. Articles of merger

A. After approval of the plan of merger under Section 3723(C), unless the merger is abandoned under Section 3723(D), articles of merger must be signed on behalf of each limited liability company and other entity that is a party to the merger and delivered to the Department for filing. The articles must set forth:

1. The name and jurisdiction of formation or organization of each of the limited liability companies and other entities that are parties to the merger;

2. For each limited liability company that is to merge, the date its articles of organization were filed with the Department;

3. That a plan of merger has been approved and signed by each limited liability company and other entity that is to merge;

4. The name, street and mailing address, and phone numbers of the surviving limited liability company or other surviving entity;

5. The effective date of the merger;

6. If a limited liability company is the surviving entity, such changes in its articles of organization as are necessary by reason of the merger;

7. If a party to a merger is a foreign limited liability company, the jurisdiction and date of filing of its initial articles of organization and the date when its application for authority was filed by the Department or, if an application has not been filed, a statement to that effect; and

8. If the surviving entity is not a limited liability company, an agreement that the surviving entity may be served with process in the Navajo Nation and is subject to liability in any action or proceeding for the enforcement of any liability or obligation of any limited liability company previously subject to suit in the Navajo Nation which is to merge, and for the enforcement, as provided in this Act, of the right of members of any limited liability company to receive payment for their interest against the surviving entity.

B. If a foreign limited liability company is the surviving entity of a merger, it may not do business in the Navajo Nation until an application for that authority is filed with the Department.

C. The surviving limited liability company or other entity shall furnish a copy of the plan of merger, on request and without cost, to any member of any limited liability company or any person holding an interest in any other entity that is to merge.

D. Articles of merger operate as an amendment to the limited liability company's articles of organization.

History

CJY-17-08, July 22, 2008.

§ 3725. Effect of merger

A. When a merger takes effect:

1. The separate existence of each limited liability company and other entity that is a party to the merger, other than the surviving entity, terminates;

2. All property owned by each of the limited liability companies and other entities that are party to the merger vests in the surviving entity;

3. All debts, liabilities, and other obligations of each limited liability company and other entity that is party to the merger become the obligations of the surviving entity;

4. An action or proceeding pending by or against a limited liability company or other party to a merger may be continued as if the merger had not occurred or the surviving entity may be substituted as a

party to the action or proceeding; and

5. Except as prohibited by other law, all the rights, privileges, immunities, powers, and purposes of every limited liability company and other entity that is a party to a merger vest in the surviving entity.

B. The Department is an agent for service of process in an action or proceeding against the surviving foreign entity to enforce an obligation of any party to a merger if the surviving foreign entity fails to appoint or maintain an agent designated for service of process in the Navajo Nation or the agent for service of process cannot with reasonable diligence be found at the designated office. Upon receipt of process, the Department shall send a copy of the process by registered or certified mail, return receipt requested, to the surviving entity at the street and mailing address set forth in the articles of merger. Service is effected under this Subsection at the earliest of:

1. The date the company receives the process, notice, or demand;

2. The date shown on the return receipt, if signed on behalf of the company; or

3. Five days after its deposit in the mail, if mailed postpaid and correctly addressed.

C. A member of the surviving limited liability company is liable for all obligations of a party to the merger for which the member was personally liable before the merger.

D. Unless otherwise agreed, a merger of a limited liability company that is not the surviving entity in the merger does not require the limited liability company to wind up its business under this Act or pay its liabilities and distribute its assets pursuant to this Act.

E. Articles of merger serve as articles of dissolution for a limited liability company that is not the surviving entity in the merger.

History

CJY-17-08, July 22, 2008.

§ 3726. Article not exclusive

This Article does not preclude an entity from being converted or merged under other law.

History

CJY-17-08, July 22, 2008.

Article 10. Foreign Limited Liability Companies

§ 3730. Law governing foreign limited liability companies

A. The laws of the Navajo Nation or other jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its managers, members, and their transferees.

B. A foreign limited liability company may not be denied a certificate of authority by reason of any difference between the laws of another jurisdiction under which the foreign company is organized and the laws of the Navajo Nation.

C. A certificate of authority does not authorize a foreign limited liability company to engage in any business or exercise any power that a limited liability company may not engage in or exercise in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection C corrected to replace "authorized" with "authorize".

§ 3731. Application for certification of authority

A. A foreign limited liability company may apply for a certificate of authority to transact business in the Navajo Nation by delivering an application to the Department for filing. The application must set forth:

1. The name of the foreign company or, if its name is unavailable for use in the Navajo Nation, a name that satisfies the requirements of Section 3734;

2. The name of the state or country under whose law it is organized;

3. The street and mailing address and phone number of its principal office;

4. The street and mailing address and phone number of its initial designated office in the Navajo Nation;

5. The name, street and mailing address and phone number of its initial agent for service of process in the Navajo Nation;

6. Whether the duration of the company is for a specified term and, if so, the period specified;

7. Whether the company is manager-managed, and, if so, the name, street and mailing address and phone number of each initial manager; and

8. Whether the members of the company are to be liable for its debts and obligations under a provision similar to Section 3642(C).

B. A foreign limited liability company shall deliver with the completed application a certificate of existence or a record of similar import authenticated by the secretary of state or other official having custody of company records in the State or country under whose law it is organized.

History

CJY-17-08, July 22, 2008.

§ 3732. Activities not constituting transacting business

A. Activities of a foreign limited liability company that do not constitute transacting business in the Navajo Nation within the meaning of this Article include:

1. Maintaining, defending, or settling an action or proceeding;

2. Holding meetings of its members or managers or carrying on any other activity concerning its internal affairs;

3. Maintaining bank accounts;

4. Maintaining offices or agencies for the transfer, exchange, and registration of the foreign company's own securities or maintaining trustees or depositories with respect to those securities;

5. Selling through independent contractors;

6. Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside the Navajo Nation before they become contracts;

7. Creating or acquiring indebtedness, mortgages, or security interests in real or personal property;

8. Securing or collecting debts or enforcing mortgages or other security interests in property securing the debts, and holding, protecting, and maintaining property so acquired;

9. Conducting an isolated transaction that is completed within 30 days and is not one in the course of similar transactions of a like manner; and

10. Transacting business in interstate commerce.

B. For purposes of this Article, the ownership in the Navajo Nation of income-producing real property or tangible personal property, other than property excluded under Subsection (A), constitutes transacting business in the Navajo Nation.

C. This Section does not apply in determining the contacts or activities that may subject a foreign limited liability company to service of process, taxation, or regulation under any other law of the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 3733. Issuance of certificate of authority

Unless the Department determines that an application for a certificate of authority fails to comply as to form with the filing requirements of this Act, the Department, upon payment of all filing fees, shall file the application and send a receipt for it and the fees to the limited liability company or its representative.

History

CJY-17-08, July 22, 2008.

§ 3734. Name of foreign limited liability company

A. If the name of a foreign limited liability company does not satisfy the requirements of Section 3605, the company, to obtain or maintain a certificate of authority to transact business in the Navajo Nation, must use a fictitious name to transact business in the Navajo Nation if its real name is unavailable and it delivers to the Department for filing a copy of the resolution of its managers, in the case of a manager-managed company, adopting the fictitious name.

B. Except as authorized by Subsections (C) and (D), the name, including a fictitious name to be used to transact business in the Navajo Nation, of a foreign limited liability company must be distinguishable upon the records of the Department from:

1. The name of any corporation, limited partnership, or company incorporated, organized, or authorized to transact business in the Navajo Nation;

2. A name reserved or registered under Section 3606 or 3607; and

3. The fictitious name of another foreign limited liability company authorized to transact business in the Navajo Nation.

C. A foreign limited liability company may apply to the Navajo Nation for authority to use in the Navajo Nation a name that is not distinguishable upon the records of the Department from a name described in Subsection (B). The Department shall authorize use of the name applied for if:

1. The present user, registrant, or owner of a reserved name consents to the use in a record and submits an undertaking in form satisfactory to the Department to change its name to a name that is distinguishable upon the records of the Department from the name of the foreign applying limited liability company; or

2. The applicant delivers to the Navajo Nation a certified copy of a final judgment of a court establishing the applicant's right to use the name applied for in the Navajo Nation.

D. A foreign limited liability company may use in the Navajo Nation the name, including the fictitious name, of another domestic or foreign entity that is used in the Navajo Nation if the other entity is incorporated, organized, or authorized to transact business in the Navajo Nation and the foreign limited liability company:

1. Has merged with the other entity;

2. Has been formed by reorganization of the other entity; or

3. Has acquired all or substantially all of the assets, including the name, of the other entity.

E. If a foreign limited liability company authorized to transact business in the Navajo Nation changes its name to one that does not satisfy the requirements of Section 3605, it may not transact business in the Navajo Nation under the name as changed until it adopts a name satisfying the requirements of Section 3605 and obtains an amended certificate of authority.

History

CJY-17-08, July 22, 2008.

§ 3735. Revocation of certificate of authority

A. A certificate of authority of a foreign limited liability company to transact business in the Navajo Nation may be revoked by the Department in the manner provided in Subsection (B) if;

1. The company fails to:

a. Pay any fees, taxes, and penalties owed to the Navajo Nation;

b. Deliver its annual report required under Section 3630 to the Department within 90 days after it is due;

c. Appoint and maintain an agent for service of process as required by this Article; or

d. File a statement of a change in the name or business address of the agent as required by this Article; or

2. A misrepresentation has been made of any material matter in any application, report, affidavit, or other record submitted by the company pursuant to this Article.

B. The Department may not revoke a certificate of authority of a foreign limited liability company unless the Department sends the company notice of the revocation, at least 60 days before its effective date, by a record addressed to its agent for service of process in the Navajo Nation, or if the company fails to appoint and maintain a proper agent in the Navajo Nation, addressed to the office required to be maintained by Section 3608. The notice must specify the cause for the revocation of the certificate of authority. The authority of the company to transact business in the Navajo Nation ceases on the effective date of the revocation unless the foreign limited liability company cures the failure before that date.

History

CJY-17-08, July 22, 2008.

§ 3736. Cancellation of authority

A foreign limited liability company may cancel its authority to transact business in the Navajo Nation by filing in the Department a certificate of cancellation. Cancellation does not terminate the authority of the Department to accept service of process on the company for claims for relief arising out of the transactions of business in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 3737. Effect of failure to obtain certificate of authority

A. A foreign limited liability company transacting business in the Navajo Nation may not maintain an action or proceeding in the Navajo Nation unless it has a certificate of authority to transact business in the Navajo Nation.

B. The failure of a foreign limited liability company to have a certificate of authority to transact business in the Navajo Nation does not impair the validity of a contract or act of the company or prevent the foreign limited liability company from defending an action or proceeding in the Navajo Nation.

C. Limitations on personal liability of managers, members, and their transferees are not waived solely by transacting business in the Navajo Nation without a certificate of authority.

D. If a foreign limited liability company transacts business in the Navajo Nation without a certificate of authority, it appoints the Department as its agent for service of process for claims for relief arising out of the transaction of business in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 3738. Action by Attorney General

The Attorney General of the Navajo Nation may maintain an action to restrain a foreign limited liability company from transacting business in the Navajo Nation in violation of this Article.

History

CJY-17-08, July 22, 2008.

Article 11. Derivative Actions

§ 3740. Right of action

A member of a limited liability company may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed.

History

CJY-17-08, July 22, 2008.

Note. Typographical error corrected to change third use of the word "actions" to "action".

§ 3741. Proper plaintiff

In a derivative action for a limited liability company, the plaintiff must be member of the company when the action is commenced; and

1. Must have been a member at the time of the transaction of which the plaintiff complains; or

2. The plaintiff's status as a member must have devolved upon the plaintiff by operation of law or pursuant to the terms of the operating agreement from a person who was a member at the time of the transaction.

History

CJY-17-08, July 22, 2008.

§ 3742. Pleading

In a derivative action for a limited liability company, the complaint must set forth with particularity the effort of the plaintiff to secure initiation of the action by a member or manager or the reasons for not making the effort.

History

CJY-17-08, July 22, 2008.

§ 3743. Expenses

If a derivative action for a limited liability company is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited liability company the remainder of the proceeds received.

History

CJY-17-08, July 22, 2008.

Article 12. Miscellaneous Provisions

§ 3750. Uniformity of application and construction

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among the governments enacting it.

History

CJY-17-08, July 22, 2008.

Note. Typographical error corrected to replace "effectuate it" with "effectuate its".

§ 3751. Short title

This Act may be cited as the Navajo Nation Limited Liability Company Act.

History

CJY-17-08, July 22, 2008.

§ 3752. Severability clause

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

History

CJY-17-08, July 22, 2008.

Note. Typographical error corrected to replace "to end" with "to this end".

§ 3753. Effective date

This Act shall become effective 30 days after approval by the Navajo Nation Council.

History

CJY-17-08, July 22, 2008. Approved by the Navajo Nation Council on July 22, 2008. Signed into law by the Navajo Nation President on August 8, 2008.

§ 3754. Saving clause

Notwithstanding Section 3755, this Act does not affect an action or proceeding commenced or right accrued before the effective date of this Act.

History

CJY-17-08, July 22, 2008.

§ 3755. Jurisdiction of Navajo Nation courts

The Navajo Nation District Court shall have original jurisdiction over any action against, or by, any domestic or foreign limited liability company, or for actions arising under this Act including actions by an aggrieved party contesting acts or omissions by the Department, under this Act.

History

CJY-17-08, July 22, 2008.

§ 3756. Consent to the jurisdiction of Navajo Nation

A. Any limited liability company created pursuant to this Act or any member or other parties mentioned therein or thereafter its formation shall be deemed to have consented to legislative, executive and judicial jurisdiction of the Navajo Nation in connection with all activities conducted by the company within the Navajo Nation.

B. The Navajo Nation courts shall have original jurisdiction over any action against, or by, any domestic or foreign limited liability company, or for actions arising under this Act including actions by an aggrieved party contesting acts or omissions by the Department, under this Act.

C. Nothing contained in the articles of organization and other applicable organizational documents shall be construed to reduce or impair this section.

D. Nothing in this Section shall be construed as an exception to or repeal of the provisions of the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, as may be amended from time to time.

History

CJY-17-08, July 22, 2008.

§ 3757. Taxation

A limited liability company established under this Act or a foreign limited liability company transacting business in the Navajo Nation pursuant to this Act shall pay applicable taxes that are imposed by the laws of the Navajo Nation on domestic and foreign limited liability companies on an identical basis.

History

CJY-17-08, July 22, 2008.

§ 3758. Department; duties and functions; rules and regulations

A. The Department shall be charged with the administration and enforcement of this Act. The Department is authorized to employ such personnel as maybe necessary for the administration of this Act.

B. The Department is authorized to promulgate rules and regulations from time to time as may be necessary to carry out the provisions and policies of this Act. Such rules and regulations shall include:

1. Regulations governing the determination of fees and charges for the proper and efficient administration of this Act.

2. Regulations governing administration of this Act by the Department.

C. The effectiveness and enforceability of the provisions of the Act shall not be dependent upon the adoption of regulations pursuant to Subsection (B) of this Section.

History

CJY-17-08, July 22, 2008.

§ 3759. Non-payment of fees; sanctions

A. The Department shall not file any articles, statements, certificates, reports, applications, notices, or other papers relating to any limited liability company organized under the provisions of this Act until all fees and charges provided to be paid in connection therewith shall have been paid to it or while the corporation is in default in the payment of any fees, charges, or sanctions herein provided to be paid by or assessed against it. Nothing in this Section shall prevent the filing, without the payment of all such fees, charges, and sanctions, of a written notice of resignation by a registered agent of a corporation.

B. No limited liability company required to pay a fee, charge, or sanction under this Act shall maintain within the Navajo Nation any civil action until all such fees, charges, and sanctions have been paid in full.

C. The Navajo Nation shall have the right to offset any amounts due and owing from a limited liability company under this Act against any payment due from the Navajo Nation to such limited liability company.

History

CJY-17-08, July 22, 2008.

Note. Slightly reworded at Subsection A.

Chapter 23. Navajo Nation Uniform Partnership Act

Article 1. General Provisions

§ 3800. Policy and purpose

The Navajo Nation Uniform Partnership Act is hereby enacted:

A. The purpose of this Act is to permit the formation of various partnership entities and require registration of foreign partnerships; and to regulate such entities so as to promote economic growth and further exercise Navajo Nation sovereignty in the governance of its territory, and citizens.

B. This Act is based upon the model Uniform Partnership Act (1993) general principles of general partnerships. The interpretation of this Act shall be based on Navajo Nation court interpretation and such interpretation shall give the utmost respect in deciding the meaning and purpose of this Act to the unique traditions and customs of the Navajo People. General decisional law interpreting similar provisions of other general partnership laws in other jurisdictions may be used as guidance.

C. Unless otherwise expressly stated by law, the sovereign immunity of the Navajo Nation shall not extend to partnership entities organized under this Act, nor shall such entities be considered a subdivision, entity, or enterprise of the Navajo Nation, nor shall the Navajo Nation be liable for the debts or obligations of any such entities established as set herein.

D. The Division of Economic Development through its Business Regulatory Department shall administer the provisions of the Act. The Business Regulatory Department shall promulgate rules and regulations to implement this Act. All proposed rules and regulations shall be published for public comments at least 90 days prior to submission to the Economic Development Committee of the Navajo Nation Council for final review and approval. The Division of Economic Development is directed to prepare an appropriate supplemental budget for carrying out its responsibilities under this Act.

History

CJY-17-08, July 22, 2008.

§ 3801. Definitions

In this Act, unless the context otherwise requires:

A. "Business" includes every trade, occupation and profession.

B. "Debtor in bankruptcy" means a person who is the subject of either:

1. An order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

2. A comparable order under federal, state or foreign law governing insolvency.

C. "Department" means the Business Regulatory Department within the Division of Economic Development or its designee successor.

D. "Distribution" means a transfer of money or other property from a partnership to a partner in the partner's capacity as a partner or to the partner's transferee.

E. Limited liability partnership means a partnership that has filed a statement of qualification under Section 3890.

F. "Navajo Nation" means:

1. When referring to the body politic, the Navajo Nation government, including its Council and applicable standing committees and boards;

2. When referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, including:

a. All land within the exterior boundaries of the Navajo Indian Reservation, including the Navajo Partitioned Land, or of the Eastern Navajo portion of the Navajo Nation, including Alamo, Tóhajiilee, and Ramah, or of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments;

b. All lands held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for, the use or benefit of the Navajo Nation, the Navajo Nation, any Band of Navajo Indians, or any individual Navajo Indian as such; and

c. All other land over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

G. "Partnership" means an association of two or more persons to carry on as co-owners of a business for profit created under Section 3811, predecessor law or comparable law of another jurisdiction.

H. "Partnership agreement" means the agreement, whether written, oral or implied, among the partners concerning the partnership, including amendments to the partnership agreement.

I. "Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

J. "Partnership interest" or "partner's interest in the partnership" means all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights.

K. "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency or instrumentality or any other legal or commercial entity.

L. "Property" means all property, real, personal or mixed, tangible or intangible, or any interest therein.

M. "State" means a state of the United States, a federally-recognized

Indian nation, the District of Columbia, the Commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States.

N. "Statement" means a statement of partnership authority under Section 3822, a statement of denial under Section 3823, a statement of dissociation under Section 3863, a statement of dissolution under Section 3874, a statement of merger under Section 3886, or an amendment or cancellation of any of the foregoing.

O. "Transfer" includes an assignment, conveyance, lease, mortgage, deed and encumbrance.

History

CJY-17-08, July 22, 2008.

§ 3802. Knowledge and notice

A. A person knows a fact if the person has actual knowledge of it.

B. A person has notice of a fact if the person:

1. Knows of it;

2. Has received a notification of it; or

3. Has reason to know it exists from all of the facts known to the person at the time in question.

C. A person notifies or gives a notification of a fact to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person learns of it.

D. A person receives a notification when it:

1. Comes to the person's attention; or

2. Is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

E. Except as provided in Subsection (F), a person other than an individual knows, has notice or receives a notification of a fact for purposes of a particular transaction when the individual acting for the person and conducting the transaction knows, has notice or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention if the person had exercised reasonable diligence. The person exercises reasonable diligence if the person maintains reasonable routines for communicating significant information to the individual conducting the transaction and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the person 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.

F. A partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of fraud on the partnership committed by or with the consent of that partner.

History

CJY-17-08, July 22, 2008.

§ 3803. Effect of partnership agreement; nonwaivable provisions

A. Except as otherwise provided in Subsection (B), a partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this Act governs relations among the partners and between the partners and the partnership.

B. The partnership agreement may not:

1. Vary the rights and duties under Section 3805 except to eliminate the duty to provide copies of statements to all of the partners;

2. Unreasonably restrict the right of access to books and records under Section 3832(B);

3. Eliminate the duty of loyalty under Section 3833(B) or Section 3852(B)(3):

a. The partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; or

b. All of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

4. Unreasonably reduce the duty of care under Section 3833(C), or 3852(B)(3);

5. Eliminate the obligation of good faith and fair dealing under Section 3833(D), but the partnership by agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

6. Vary the power to dissociate as a partner under Section 3851(A), except to require the notice under Section 3850(1) to be in writing;

7. Vary the rights of a court to expel a partner in the events specified in Section 3850(5);

8. Vary the requirement to wind up the partnership business in cases specified in Section 3870(4), (5), or (6); or

9. Restrict rights of third parties under the Act.

History

CJY-17-08, July 22, 2008.

Note. Typographical errors at Subsection B(2) corrected to replace the citation to Section 3831(B) with Section 3832(B); Subsection B(3) corrected to replace the citation to Section 3832(B) with Section 3833(B); Subsection B(3)(a) corrected by replacing "do no violate" with "do not violate"; Subsection B(4) corrected to replace the citation to Section 3832(C) with Section 3833(C); and Subsection B(5) corrected to replace the citation to Section 3832(D) with Section 3833(D).

§ 3804. Supplemental principles of law

Unless displaced by particular provisions of this Act, the principles of law and equity supplement this Act.

History

CJY-17-08, July 22, 2008.

§ 3805. Execution, filing and recording of statements

A. A statement may be filed in the Department. A certified copy of a statement that is filed in an office in another state may be filed in the Department. Either filing has the effect provided in this Act with respect to partnership property located in or transactions that occur in the Navajo Nation.

B. A certified copy of a statement that has been filed in the Department and recorded in an applicable office for recording transfers of real property has the effect provided for recorded statements in this Act. A recorded statement that is not a certified copy of a statement filed in the Department does not have the effect provided for recorded statements in this Act.

C. A statement filed by a partnership must be executed by at least two partners. Other statements must be executed by a partner or any other person authorized by this Act. An individual who executes a statement as, or on behalf of, a partner or other person named as a partner in a statement shall personally declare under penalty of perjury that the contents of the statements are accurate.

D. A person authorized by this Act to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the partnership, identifies the statement and states the substance of the amendment or cancellation.

F. A person who files a statement pursuant to this Section shall promptly send a copy of the statement to every non-filing partner and to any other person named as a partner in the statement. Failure to send a copy of a statement to a partner or any other person does not limit the effectiveness of the statement as to a person who is not a partner.

G. The Department may collect a fee for filing or providing a certified copy of a statement.

History

CJY-17-08, July 22, 2008.

§ 3806. Law governing internal affairs

A. Except as otherwise provided in Subsection (B). The law of a jurisdiction in which a partnership has its chief executive office governs relations among the partners and between the partners and the partnership.

B. The law of the Navajo Nation governs relations among the partner and between the partners and the partnership and the liability of partners for an obligation of a limited liability partnership.

History

CJY-17-08, July 22, 2008.

§ 3807. Partnership subject to amendment or repeal

A partnership governed by this Act is subject to any amendment to or repeal of this Act.

History

CJY-17-08, July 22, 2008.

Article 2. Nature of Partnership

§ 3810. Partnership as entity

A. A partnership is an entity distinct from its partners.

B. A limited liability partnership continues to be the same entity that existed before the filing of the statement of qualification under Section 3890.

History

CJY-17-08, July 22, 2008.

§ 3811. Formation of partnership

A. Except as otherwise provided in Subsection (B), the association of two or more persons to carry on as co-owners of a business for profit forms a partnership, whether or not the persons intend to create a partnership.

B. An association created under a statute other than this Act, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership.

C. In determining whether a partnership is created, the following rules apply:

1. Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

2. The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

3. A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

a. Of a debt by installments or otherwise;

b. For services as an independent contractor or of wages or other compensation to an employee;

c. Of rent;

d. Of an annuity or any other retirement benefit to a beneficiary, representative or designee of a deceased or retired partner;

e. Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds or increase in value derived from the collateral;

f. For the sale of the goodwill of any business or other property by installments or otherwise.

History

CJY-17-08, July 22, 2008.

§ 3812. Partnership property

Property acquired by a partnership is property of the partnership and not of the partners individually.

History

CJY-17-08, July 22, 2008.

§ 3813. When property is partnership property

A. Property is partnership property if acquired in the name of:

1. The partnership; or

2. One or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.

B. Property is acquired in the name of the partnership by a transfer to:

1. The partnership in its name; or

2. One or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

C. Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

D. Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purpose.

History

CJY-17-08, July 22, 2008.

Article 3. Relations of Partners to Persons Dealing With Partnership

§ 3820. Partner agent of partnership

Subject to the effect of a statement of partnership authority under Section 3822:

1. Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

2. An act of a partner that is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.

History

CJY-17-08, July 22, 2008.

§ 3821. Transfer of partnership property

A. Partnership property may be transferred as follows:

1. Subject to the effect of a statement of partnership authority under Section 3822, partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by a partner in the partnership name.

2. Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

3. Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

B. A partnership may recover partnership property from a transferee only if it proves that execution of the instrument of initial transfer did not bind the partnership under Section 3820 and:

1. As to a subsequent transferee who gave value for property transferred under Subsection (A)(1) or (2), proves that the subsequent transferee knew or had received a notification that the person who executed the instrument of initial transfer lacked authority to bind the partnership; or

2. As to a transferee who gave value for property transferred under Subsection (A)(3), proves that the transferee knew or had received a notification that the property was partnership property and that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

C. A partnership may not recover partnership property from a subsequent transferee if the partnership would not have been entitled to recover the property, under Subsection B, from any earlier transferee of the property.

D. If a person holds all of the partners' interests in the partnership, all of the partnership property vests in that person. The person may execute a document in the name of the partnership to evidence vesting of the property in that person and may file or record the document.

History

CJY-17-08, July 22, 2008.

§ 3822. Statement of partnership authority

A. A partnership may file a statement of partnership authority that:

1. Must include:

a. The name of the partnership;

b. The street and mailing address and phone number of its chief executive office and of one office in the Navajo Nation, if there is one;

c. The names, street and mailing addresses and phone numbers of all of the partners or of an agent appointed and maintained by the partnership for the purpose of Subsection (B); and

d. The names of the partners authorized to execute an instrument transferring real property interest held in the name of the partnership.

2. May state the authority, or limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter.

B. If a statement of partnership authority names an agent, the agent shall maintain a list of the names, street and mailing addresses and phone numbers of all of the partners and make it available to any person on request for good cause shown.

C. If a filed statement of partnership authority is executed pursuant to Section 3805(C) and states the name of the partnership but does not contain all of the other information required by Subsection (A), the statement nevertheless operates with respect to a person who is not a partner as provided in Subsections (D) and (E).

D. Except as otherwise provided in Subsection (G), a filed statement of partnership authority supplements the authority of a partner to enter into transactions on behalf of the partnership as follows:

1. Except for transfers of real property interest, a grant of authority contained in a filed statement of partnership authority is conclusive in favor of a person who gives value without knowledge to the contrary, as long as and to the extent that a limitation on that authority is not then contained in another filed statement. A filed cancellation of a limitation on authority revives the previous grant of authority.

2. A grant of authority to transfer real property held in the name of the partnership contained in a certified copy of a filed statement of partnership authority recorded in the office for recording transfers of that real property interest is conclusive in favor of a person who gives value without knowledge to the contrary, as long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then of record in the office for recording

transfers of that real property interest. The recording in the office for recording transfers of that real property interest of a certified copy of a filed cancellation of a limitation on authority revives the previous grant of authority.

E. A person who is not a partner is deemed to know of a limitation on the authority of a partner to transfer real property interest held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is of record in the office for recording transfers of that real property interest.

F. Except as otherwise provided in Subsections (D) and (E) and Sections 3863 and 3874, a person who is not a partner is not deemed to know of a limitation on the authority of a partner merely because the limitation is contained in a filed statement.

G. Unless earlier cancelled, a filed statement of partnership authority is cancelled by operation of law five years after the date on which the statement, or the most recent amendment, was filed with the Department.

History

CJY-17-08, July 22, 2008.

§ 3823. Statement of denial

A partner or any other person named as a partner in a filed statement of partnership authority or in a list maintained by an agent pursuant to Section 3822(B) may file a statement of denial stating the name of the partnership and the fact that is being denied, including denial of a person's authority or status as a partner. A statement of denial is a limitation on authority as provided in Section 3822 (D) and (E).

History

CJY-17-08, July 22, 2008.

§ 3824. Partnership liable for partner's actionable conduct

A. A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.

B. If, in the course of the partnership's business or while acting with authority of the partnership, a partner receives or causes the partnership to receive money or property of a person who is not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss.

History

CJY-17-08, July 22, 2008.

§ 3825. Partner's liability

A. Except as otherwise provided in Subsection (B), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

B. A person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as a partner.

C. An obligation of the partnership incurred while the partnership is a limited liability partnership whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation by reason of being or so acting as a partner. This Subsection applies notwithstanding anything inconsistent in the partnership agreement that existed immediately before the vote required to become a limited liability partnership under Section 3890(B).

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection C corrected to replace "A partners" with "A partner".

§ 3826. Actions by and against partnership and partners

A. A partnership may sue and be sued in the name of the partnership.

B. Except as otherwise provided in Subsection (F), action may be brought against the partnership and any or all of the partners in the same action or in separate actions.

C. A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

D. A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless the partner is personally liable for the claim under Section 3825 and:

1. A judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part; or

2. The partnership is a debtor in bankruptcy;

3. The partner has agreed that the creditor need not exhaust partnership assets;

4. A court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to

satisfy the judgment, that exhaustion of partnership assets is excessively burdensome or that the grant of permission is an appropriate exercise of the court's equitable powers; or

5. Liability is imposed on the partner by law or contract independent of the existence of the partnership.

E. This Section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 3827.

F. A partner is not a proper party to an action against a partnership if that partner is not personally liable for the claim under Section 3825.

History

CJY-17-08, July 22, 2008.

§ 3827. Liability of purported partner

A. If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons who are not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies on the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

B. If a person pursuant to Subsection (A) is represented to be a partner in an existing partnership, or with one or more persons who are not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance on the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or partnership obligation results. If fewer than all of the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

C. A person is not a partner in a partnership merely because the person is named by another in a statement of partnership authority.

D. A person does not continue to be liable as a partner merely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to indicate the partner's dissociation from the partnership.

E. Except as otherwise provided in Subsections (A) and (B), persons who are not partners as to each other are not liable as partners to other persons.

History

CJY-17-08, July 22, 2008.

Article 4. Relations of Partners to Each Other and to Partnership

§ 3830. Partner's rights and duties

A. Each partner is deemed to have an account that is:

1. Credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and

2. Charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

B. Each partner is entitled to an equal share of the partnership profits and chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

C. A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership or for the preservation of its business or property.

D. A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute.

E. A payment or advance made by a partner which gives rise to a partnership obligation under Subsection (C) or (D) constitutes a loan to the partnership that accrues interest from the date of the payment or advance.

F. Each partner has equal rights in the management and conduct of the partnership business.

G. A partner may use or possess partnership property only on behalf of the partnership.

H. A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

I. A person may become a partner only with the consent of all of the partners.

J. A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.

K. This Section does not affect the obligations of a partnership to other persons under Section 3820.

History

CJY-17-08, July 22, 2008.

§ 3831. Distributions in kind

A partner has no right to receive, and may not be required to accept, a distribution in kind.

History

CJY-17-08, July 22, 2008.

§ 3832. Partner's rights to information

A. A partnership shall keep its books and records, if any, at its chief executive office.

B. A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.

C. Each partner and the partnership shall furnish to a partner, and the legal representative of a deceased partner or partner under legal disability, to the extent just and reasonable, complete and accurate information concerning the partnership.

1. Without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this Act; and

2. On demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

History

CJY-17-08, July 22, 2008.

§ 3833. General standards of partner's conduct

A. The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in Subsections (B) and (C).

B. A partner's duty of loyalty to the partnership and the other partners is limited to the following:

1. To account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

2. To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

3. To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

C. A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.

D. A partner shall discharge the duties to the partnership and the other partners under this Act or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

E. A partner does not violate a duty or obligation under this Act or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

F. A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

G. This Section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

History

CJY-17-08, July 22, 2008.

§ 3834. Actions by partnership and partners

A. A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

B. A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

1. Enforce the partner's rights under the partnership agreement;

2. Enforce the partner's rights under this Act, including:

a. The partner's rights under Section 3830, 3832 or 3833;

b. The partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to Section 3860 or enforce any other right under Articles 6 or 7; or

c. The partner's right to compel a dissolution and winding up of the partnership business under Section 3870 or enforce any other right under Article 8; or

3. Enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

C. The accrual of, and any time limitation on, a right of action for a remedy under this Section is governed by other law. A right to an accounting on a dissolution and winding up does not revive a claim barred by law.

History

CJY-17-08, July 22, 2008.

§ 3835. Continuation of partnership beyond definite term or particular undertaking

A. If a partnership for a definite term or particular undertaking is continued, without an express agreement, after the expiration of the term or completion of the undertaking, the rights and duties of the partners remain the same as they were at the expiration or completion, as far as is consistent with a partnership at will.

B. If the partners, or those of them who habitually acted in the business during the term or undertaking, continue the business without any settlement or liquidation of the partnership, they are presumed to have agreed that the partnership will continue.

History

CJY-17-08, July 22, 2008.

Article 5. Transferees and Creditors of Partner

§ 3840. Partner not co-owner of partnership property

A partner is not a co-owner of partnership property and has no interest in partnership property that can be transferred, either voluntarily or involuntarily.

History

CJY-17-08, July 22, 2008.

§ 3841. Partner's transferable interest in partnership

The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. The interest is personal property.

History

CJY-17-08, July 22, 2008.

§ 3842. Transfer of partner's transferable interest

A. A transfer, in whole or in part, of a partner's transferable interest in the partnership:

1. Is permissible;

2. Does not by itself cause the partner's dissociation or a dissolution and winding up of the partnership business; and

3. Does not, as against the other partners or the partnership, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information concerning partnership transactions or to inspect or copy the partnership books or records.

B. A transferee of a partner's transferable interest in the partnership has a right:

1. To receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;

2. To receive on the dissolution and winding up of the partnership business, in accordance with the transfer, the net amount otherwise distributable to the transferor; and

3. Seek under Section 3870(6) a judicial determination that it is equitable to wind up the partnership business.

C. In a dissolution and winding up, a transferee is entitled to an account of partnership transactions only from the date of the latest account agreed to by all of the partners.

D. On transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred.

E. A partnership need not give effect to a transferee's rights under this Section until it has notice of the transfer.

F. A transfer of a partner's transferable interest in the partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer.

History

CJY-17-08, July 22, 2008.

§ 3843. Partner's transferable interest subject to charging order

A. On application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and may make all other orders, directions, accounts and inquiries the judgment debtor might have made or that the circumstances of the case may require.

B. A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

C. At any time before foreclosure, an interest charged may be redeemed:

1. By the judgment debtor; or

2. With property other than partnership property, by one or more of the other partners; or

3. With partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.

D. This Act does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.

E. This Section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.

History

CJY-17-08, July 22, 2008.

Article 6. Partner's Dissociation

§ 3850. Events causing partner's dissociation

A partner is dissociated from a partnership on the occurrence of any of the following events:

1. The partnership's having notice of the partner's express will to

withdraw as a partner or on a later date specified by the partner;

2. An event agreed to in the partnership agreement as causing the partner's dissociation;

3. The partner's expulsion pursuant to the partnership agreement;

4. The partner's expulsion by the unanimous vote of the other partners if:

a. It is unlawful to carry on the partnership business with that partner;

b. There has been a transfer of all or substantially all of that partner's transferable interest in the partnership, other than a transfer for security purposes, or a court order charging the partner's interest, that has not been foreclosed;

c. Within 90 days after the partnership notifies a corporate partner that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

d. A partnership or limited partnership that is a partner has been dissolved and its business is being wound up;

5. On application by the partnership or another partner, the partner's expulsion by judicial determination because:

a. The partner engaged in wrongful conduct that adversely and materially affected the partnership business;

b. The partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 3833; or

c. The partner engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with the partner;

6. The partner's:

a. Becoming a debtor in bankruptcy;

b. Executing an assignment for the benefit of creditors;

c. Seeking, consenting to or acquiescing in the appointment of a trustee, receiver or liquidator of that partner or of all or substantially all of that partner's property; or

d. Failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or fails within 90 days after the expiration of a stay to have the appointment vacated;

7. In the case of a partner who is an individual:

a. The partner's death;

b. The appointment of a guardian or general conservator for the partner; or

c. A judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;

8. In the case of a partner that is a trust or is acting as a partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor trustee;

9. In the case of a partner that is an estate or that is acting as a partner by virtue of being a personal representative of an estate, distribution of the estate's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor personal representative; or

10. Termination of a partner who is not an individual, partnership, corporation, trust, or estate.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection 5(b) corrected to replace citation to Section 3832 with Section 3833.

§ 3851. Partner's power to dissociate; wrongful dissociation

A. A partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to Section 3850(1).

B. A partner's dissociation is wrongful only if:

1. It is in breach of an express provision of the partnership agreement; or

2. In the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:

a. The partner withdraws by express will, unless the withdrawal follows within 90 days after another partner's dissociation by death or otherwise under Section 3850(6) through (10) or wrongful dissociation under this Subsection;

b. The partner is expelled by judicial determination under Section 3850(5); or

c. In the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.

C. A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the partner to the partnership or to the other partners.

History

CJY-17-08, July 22, 2008.

§ 3852. Effect of partner's dissociation

A. If a partner's dissociation results in a dissolution and winding up of the partnership business, Article 8 applies; otherwise, Article 7 applies.

B. Upon a partner's dissociation:

1. The partner's right to participate in the management and conduct of the partnership business terminates, except as otherwise provided in Section 3872;

2. The partner's duty of loyalty under Section 3833(B)(3) terminates; and

3. The partner's duty of loyalty under Section 3833(B)(1) and (2) and duty of care under Section 3833(C) continue only with regard to matters arising and events occurring before the partner's dissociation, unless the partner participates in winding up the partnership's business pursuant to Section 3872.

History

CJY-17-08, July 22, 2008.

Note. Typographical errors at Subsection B(2) corrected to replace citation to Section 3832(B)(3) with Section 3833(B)(3); Subsection B(3) corrected to replace citation to Section 3832(B)(1) with Section 3833(B)(1); and Subsection B(3) corrected to replace citation to Section 3832(C) with Section 3833(C).

Article 7. Partner's Dissociation When Business Not Wound Up

§ 3860. Purchase of dissociated partner's interest

A. If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under Section 3870, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to Subsection (B).

B. The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under Section 3876(B) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the continuing services of any of the partners and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

C. Damages for wrongful dissociation under Section 3851(B), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

D. A partnership shall indemnify a dissociated partner whose interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 3861.

E. If no agreement for the purchase of a dissociated partner's interest is reached within 120 days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under Subsection (C).

F. If a deferred payment is authorized under Subsection (H), the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under Subsection (C), stating the time of payment, the amount and type of security for payment and the other terms and conditions of the obligation.

G. The payment or tender required by Subsection (E) or (F) must be accompanied by the following:

1. A statement of partnership assets and liabilities as of the date of dissociation;

2. The latest available partnership balance sheet and income statement, if any;

3. An explanation of how the estimated amount of the payment was calculated; and

4. Written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days after the written notice, the dissociated partner commences an action to determine the buyout price, any offsets under Subsection (C), or other terms of the obligation to purchase.

H. A partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause material hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

I. A dissociated partner may maintain an action against the partnership, pursuant to Section 3834(B)(2)(b), to determine the buyout price of that partner's interest, any offsets under Subsection (C), or other terms of the obligation to purchase. The action must be commenced within 120 days after the partnership tenders payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner's interest, any offset due under Subsection (C), and accrued interest and enter judgment for any additional payment or refund. If deferred payment is authorized under Subsection (H), the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay or to comply with Subsection (G).

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection I corrected to replace citation to Section 3833(B)(2)(b) with Section 3834(B)(2)(b).

§ 3861. Dissociated partner's power to bind and liability to partnership

A. For two years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership, including a surviving partnership under Article 9, is bound by an act of the dissociated partner that would have bound the partnership under Section 3820 before dissociation only if at the time of entering into the transaction the other party:

1. Reasonably believed that the dissociated partner was then a partner;

2. Did not have notice of the partner's dissociation; and

3. Is not deemed to have had knowledge under Section 3822(E) or notice under Section 3863(C).

B. A dissociated partner is liable to the partnership for any damage caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation for which the partnership is liable under Subsection (A).

History

CJY-17-08, July 22, 2008.

§ 3862. Dissociated partner's liability to other persons

A. A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation. A dissociated partner is not liable for a partnership obligation incurred after dissociation, except as otherwise provided in Subsection (B).

B. A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership, or a surviving partnership under Article 9, within two years after the partner's dissociation, only if at the time of entering into the transaction the other party:

1. Reasonably believes that the dissociated partner was then a partner;

2. Did not have notice of the partner's dissociation; and

3. Is not deemed to have had knowledge under Section 3822(E) or notice under Section 3863(C).

C. By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation.

D. A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.

History

CJY-17-08, July 22, 2008.

§ 3863. Statement of dissociation

A. A dissociated partner or the partnership may file a statement of dissociation stating the name of the partnership and that the partner is dissociated from the partnership.

B. A statement of dissociation is a limitation on the authority of a dissociated partner for the purposes of Section 3822(D) and (E).

C. For the purposes of Section 3861(A)(3) and 3862(B)(3), a person who is not a partner is deemed to have notice of the dissociation 90 days after the statement of dissociation is filed.

History

CJY-17-08, July 22, 2008.

§ 3864. Continued use of partnership name

Continued use of a partnership name, or a dissociated partner's name as part thereof, by partners continuing the business does not of itself make the dissociated partner liable for an obligation of the partners or the partnership continuing the business.

History

CJY-17-08, July 22, 2008.

Article 8. Winding Up Partnership Business

§ 3870. Events causing dissolution and winding up of partnership business

A partnership is dissolved, and its business must be wound up, upon the occurrence of any of the following events:

1. In a partnership at will, the partnership's having notice from a partner, other than a partner who is dissociated under Section 3850(2) through (10), of that partner's express will to withdraw as a partner, or on a later date specified by the partner;

2. In a partnership for a definite term or particular undertaking:

a. Within 90 days after a partners disassociation by death or other wise under Section 3850(6) through (10) or wrongful dissociation under 3851(B), the express will of at least half of the remaining partners to wind up the partnership business, for which purpose a partner's rightful disassociation pursuant to Section 3851(B)(2)(a) constitutes the expression of that partner's will to wind up business:

(1). The express will of all of the partners to wind up the partnership business; or

(2). The expiration of the term or the completion of the undertaking;

3. An event agreed to in the partnership agreement resulting in the winding up of the partnership business;

4. An event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but a cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this Section;

5. On application by a partner, a judicial determination that:

a. The economic purpose of the partnership is likely to be unreasonably frustrated;

b. Another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner; or

c. It is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement; or

6. On application by a transferee of a partner's transferable interest, a judicial determination that it is equitable to wind up the partnership business:

a. After the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; or

b. At any time, if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer.

History

CJY-17-08, July 22, 2008.

§ 3871. Partnership continues after dissolution

A. Subject to Subsection (B), a partnership continues after dissolution only for the purpose of winding up its business. The partnership is terminated when the winding up of its business is completed.

B. At any time after the dissolution of a partnership and before the winding up of its business is completed, all of the partners, including any dissociating partner other than a wrongfully dissociating partner, may waive the right to have the partnership's business wound up and the partnership terminated. In that event:

1. The partnership resumes carrying on its business as if dissolution had never occurred, and any liability incurred by the partnership or a partner after the dissolution and before the waiver is determined as if the dissolution had never occurred; and

2. The rights of a third party accruing under Section 3873(1) or arising out of conduct in reliance on the dissolution before the third party knew or received a notification of the waiver may not be adversely affected.

History

CJY-17-08, July 22, 2008.

§ 3872. Right to wind up partnership business

A. After dissolution, a partner who has not wrongfully dissociated may participate in winding up the partnership's business, but on application of any partner, partner's legal representative or transferee, the Navajo district court, for good cause shown, may order judicial supervision of the winding up.

B. The legal representative of the last surviving partner may wind up a partnership's business.

C. A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to Section 3876, settle disputes by mediation, arbitration or otherwise and perform other necessary acts.

History

CJY-17-08, July 22, 2008.

§ 3873. Partner's power to bind partnership after dissolution

Subject to Section 3874, a partnership is bound by a partner's act after dissolution that:

1. Is appropriate for winding up the partnership business; or

2. Would have bound the partnership under Section 3820 before dissolution, if the other party to the transaction did not have notice of the dissolution.

History

CJY-17-08, July 22, 2008.

§ 3874. Statement of dissolution

A. After dissolution, a partner who has not wrongfully dissociated may file a statement of dissolution stating the name of the partnership and that the partnership has dissolved and is winding up its business.

B. A statement of dissolution cancels a filed statement of partnership authority for the purposes of Section 3822(D) and is a limitation on authority for the purposes of Section 3822(E).

C. For the purposes of Sections 3820 and 3872, a person who is not a partner is deemed to have notice of the dissolution and the limitation on the partners' authority as a result of the statement of dissolution 90 days after it is filed.

D. After filing and, if appropriate, recording a statement of dissolution, a dissolved partnership may file and, if appropriate, record a statement of partnership authority that operates with respect to a person who is not a partner as provided in Section 3822(D) and (E) in any transaction, whether or not the transaction is appropriate for winding up the partnership business.

History

CJY-17-08, July 22, 2008.

§ 3875. Partner's liability to other partners after dissolution

A. Except as otherwise provided in Subsection (B) and Section 3825, after dissolution a partner is liable to the other partners for the partner's share of any partnership liability incurred under Section 3873.

B. A partner who, with knowledge of the dissolution, incurs a partnership liability under Section 3873(2) by an act that is not appropriate for winding up the partnership business is liable to the partnership for any damage caused to the partnership arising from the liability.

History

CJY-17-08, July 22, 2008.

§ 3876. Settlement of accounts and contributions among partners

A. In winding up a partnership's business, the assets of the partnership, including the contributions of the partners required by this section, must be applied to discharge its obligations to creditors, including, to the extent permitted by law, partners who are creditors. Any surplus must be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions under Subsection (B).

B. Each partner is entitled to a settlement of all partnership accounts on winding up the partnership business. In settling accounts among the partners, the profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership must make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account but excluding from the calculation charges attributable to an obligation for which the partner is not personally liable under Section 3825.

C. If a partner fails to contribute, all of the other partners shall contribute, in the proportion in which those partners share partnership losses, the additional amount necessary to satisfy any partnership obligations. A partner or partner's legal representative may recover from the other partners any contributions the partner makes to the extent the amount contributed exceeds that partner's share of the partnership obligations for which the partner is personally liable under Section 3825.

D. After the settlement of accounts, each partner shall contribute, in the proportion in which the partner shares partnership losses, the amount necessary to satisfy partnership obligations or the amounts of obligations that were not known at the time of the settlement and for which the partner is personally liable under Section 3825.

E. The estate of a deceased partner is liable for the partner's obligation to contribute to the partnership.

F. An assignee for the benefit of creditors of a partnership or a partner, or a person appointed by a court to represent creditors of a partnership or a partner, may enforce a partner's obligation to contribute to the partnership.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection B corrected to replace citation to Section 3835 with Section 3825.

Article 9. Conversions and Mergers

§ 3880. Definitions

In this Article:

A. "General partner" means a partner in a partnership and a general partnership in a limited partnership.

B. "Limited partner" means a limited partner in a limited partnership.

C. "Limited partnership" means a limited partnership created under the Navajo Nation Limited Partnership Act, predecessor law, or comparable law of another jurisdiction.

D. "Partner" includes both a general partner and a limited partner.

History

CJY-17-08, July 22, 2008.

§ 3881. Conversion of partnership to limited partnership

A. A partnership may be converted to a limited partnership pursuant to this Section.

B. The terms and conditions of a conversion of a partnership to a limited partnership must be approved by all of the partners or by a number or percentage specified for conversion in the partnership agreement.

C. After the conversion is approved by the partners, the partnership shall file a certificate of limited partnership in the jurisdiction in which the limited partnership is to be formed. The certificate must include:

1. A statement that the partnership was converted to a limited partnership from a partnership;

2. Its former name; and

3. A statement of the number of votes cast by the partners for and against the conversion and, if the vote is less than unanimous, the

number or percentage required to approve the conversion under the partnership agreement.

D. The conversion takes effect when the certificate of limited partnership is filed or at any later date specified in the certificate.

E. A general partner who becomes a limited partner as a result of the conversion remains liable as a general partner for an obligation incurred by the partnership before the conversion takes effect. If the other party to a transaction with the limited partnership reasonably believes when entering the transaction that the limited partner is a general partner, the limited partner is liable for an obligation incurred by the limited partnership within 90 days after the conversion takes effect. The limited partner's liability for all other obligations of the limited partnership incurred after the conversion takes effect is that of a limited partner as provided in the Navajo Nation Limited Partnership Act.

History

CJY-17-08, July 22, 2008.

§ 3882. Conversion of limited partnership to partnership

A. A limited partnership may be converted to a partnership pursuant to this Section.

B. Notwithstanding a provision to the contrary in a limited partnership agreement, the terms and conditions of a conversion of a limited partnership to a partnership must be approved by all of the partners.

C. After the conversion is approved by the partners, the limited partnership shall cancel its certificate of limited partnership.

D. The conversion takes effect when the certificate of limited partnership is canceled.

E. A limited partner who becomes a general partner as a result of the conversion remains liable only as a limited partner for an obligation incurred by the limited partnership before the conversion takes effect. The partner is liable as a general partner for an obligation of the partnership incurred after the conversion takes effect. Except as otherwise provided in Section 3825, the partner is liable as a general for an obligation of the partnership incurred after the conversion takes effect.

History

CJY-17-08, July 22, 2008.

§ 3883. Effect of conversion; entity unchanged

A. A partnership or limited partnership that has been converted pursuant to this Article is for all purposes the same entity that existed before the conversion.

B. When a conversion takes effect:

1. All property owned by the converting partnership or limited partnership remains vested in the converted entity;

2. All obligations of the converting partnership or limited partnership continue as obligations of the converted entity; and

3. An action or proceeding pending against the converting partnership or limited partnership may be continued as if the conversion had not occurred.

History

CJY-17-08, July 22, 2008.

§ 3884. Merger of partnerships

A. Pursuant to a plan of merger approved as provided in Subsection (C), a partnership may be merged with one or more partnerships, or limited partnerships.

B. The plan of merger must set forth:

1. The name of each partnership or limited partnership that is a party to the merger;

2. The name of the surviving entity into which the other partnerships or limited partnerships will merge;

3. Whether the surviving entity is a partnership, or a limited partnership and the status of each partner;

4. The terms and conditions of the merger;

5. The manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity, or into money or other property in whole or part; and

6. The street and mailing address and phone number of the surviving entity's chief executive office.

C. The plan of merger must be approved:

1. In the case of a partnership that is a party to the merger, by all of the partners, or a number or percentage specified for merger in the partnership agreement; and

2. In the case of a limited partnership that is a party to the merger, by the vote required for approval of a merger by the law of the Navajo Nation or foreign jurisdiction under which the limited partnership is organized and, in the absence of such a specifically applicable law, by all of the partners, in the partnership agreement.

D. After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

E. The merger takes effect on the later of:

1. The approval of the plan of merger by all parties to the merger, as provided in Subsection (C).

2. The filing of all documents required by law to be filed as a condition to the effectiveness of the merger; or

3. Any effective date specified in the plan of merger.

History

CJY-17-08, July 22, 2008.

§ 3885. Effect of merger

A. When a merger takes effect:

1. The separate existence of every partnership or limited partnership that is a party to the merger, other than the surviving entity, ceases;

2. All property owned by each of the merged partnerships or limited partnerships vests in the surviving entity;

3. All obligations of every partnership or limited partnership that is a party to the merger become the obligations of the surviving entity; and

4. An action or proceeding pending against a partnership or a limited partnership that is a party to the merger may be continued as if the merger had not occurred, or the surviving entity may be substituted as a party to the action or proceeding.

B. The Department is the agent for service of process in an action or proceeding against a surviving foreign partnership or limited partnership to enforce an obligation of a domestic partnership or limited partnership that is a party to a merger. The surviving entity shall promptly notify the Department of the street and mailing address and phone number of its chief executive office and of any change of address. Upon receipt of process, the Department shall mail a copy of the process to the surviving foreign partnership or limited partnership.

C. A partner of the surviving partnership or limited partnership is liable for:

1. All obligations of a party to the merger for which the partner was personally liable before the merger;

2. All other obligations of the surviving entity incurred before the merger by a party to the merger, but those obligations may be

satisfied only out of property of the entity; and

3. All obligations of the surviving entity incurred after the merger takes effect, but those obligations may be satisfied only out of property of the entity if the partner is a limited partner.

D. If the obligations incurred before the merger by a party to the merger are not to be satisfied out of the property of the surviving partnership or limited partnership, the general partners of that party immediately before the effective date of the merger shall contribute the amount necessary to satisfy that party's obligations to the surviving entity, in the manner provided in Section 3876 or in the Limited Partnership Act of the jurisdiction in which the party was formed, as if the merged party were dissolved.

E. A partner of a party to a merger who does not become a partner of the surviving partnership or limited partnership is dissociated from the entity, of which that partner was a partner, as of the date the merger takes effect. The surviving entity shall cause the partner's interest in the entity to be purchased under Section 3860 or another statute specifically applicable to that partner's interest with respect to a merger. The surviving entity is bound under Section 3861 by an act of a general partner dissociated under this Subsection, and the partner is liable under Section 3862 for transactions entered into by the surviving entity after the merger takes effect.

History

CJY-17-08, July 22, 2008.

§ 3886. Statement of merger

A. After a merger, the surviving partnership or limited partnership may file a statement that one or more partnerships or limited partnerships have merged into the surviving entity.

B. A statement of merger must contain:

1. The name of each partnership or limited partnership that is a party to the merger;

2. The name of the surviving entity into which the other partnerships or limited partnerships were merged;

3. The street and mailing address and phone number of the surviving entity's chief executive office and of an office in the Navajo Nation, if any; and

4. Whether the surviving entity is a partnership or limited partnership.

C. Except as otherwise provided in Subsection (D), for the purposes of Section 3821, property of a surviving partnership or limited partnership that before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon filing a statement of merger.

D. For the purposes of Section 3821, real property interest of the surviving partnership or limited partnership that before the merger was held in the name of another party to the merger is property held in the name of the surviving entity on recording a certified copy of the statement of merger in the applicable recording government agency, department, or office in which the real property interest should be recorded.

E. A filed and, if appropriate, recorded statement of merger, executed and declared to be accurate pursuant to Section 3805(C), stating the name of a partnership or limited partnership that is a party to the merger in whose name property was held before the merger and the name of the surviving entity, but not containing all of the other information required by Subsection (B), operates with respect to the partnerships or limited partnerships named to the extent provided in Subsections (C) and (D).

History

CJY-17-08, July 22, 2008.

§ 3887. Nonexclusive

This Article is not exclusive. Partnerships or limited partnerships may be converted or merged in any other manner provided by law.

History

CJY-17-08, July 22, 2008.

Article 10. Limited Liability Partnership

§ 3890. Statement of qualification

A. A partnership may become a limited partnership pursuant to this Section.

B. The terms and conditions on which a partnership becomes a limited liability partnership must be approved by the vote necessary to amend the partnership agreement except, in the case of a partnership agreement that expressly considers obligations to contribute to the partnership, the vote necessary to amend those provisions.

C. After the approval required by the Subsection (B), a partnership may become a limited liability partnership by filing the statement of qualification. The statement must contain:

1. The name of the partnership;

2. The street and mailing address and phone number of its chief executive office and of one office in the Navajo Nation, if there is one;

3. If the partnership does not have an office in the Navajo Nation, the name, street and mailing address and phone number of the

partnership's agent for service of process;

4. A statement that the partnership elects to be a limited liability partnership; and a deferred effective date, if any.

D. The agent of a limited liability partnership for service of process must be an individual who is a resident of the Navajo Nation or other person authorized to do business in the Navajo Nation.

E. The status of a partnership as a limited liability partnership is effective on the later of the filing of the statement or a date specified in the statement. The status remains effective, regardless of changes in the partnership, until it is cancelled pursuant to Section 3805(D) or revoked pursuant to Section 3892.

F. The status of a partnership as a limited liability partnership and the liability of its partners is not affected by errors or later changes in the information required to be contained in the statement of qualification under Subsection (C).

G. The filing of a statement of qualification establishes that a partnership has satisfied all conditions precedent to the qualification of the partnership as a limited liability partnership.

H. An amendment or cancellation of a statement of qualification is effective when filed or on a deferred effective date specified in the amendment or cancellation.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection E corrected to replace citation to Section 3803(D) with Section 3805(D).

§ 3891. Name

The name of a limited liability partnership must end with "Registered Limited Liability Partnership," "Limited Liability Partnership," "R.L.L.P.," "L.L.P.," "RLLP," or "LLP".

History

CJY-17-08, July 22, 2008.

§ 3892. Annual report

A. A limited liability partnership and a foreign limited liability partnership authorized to transact business in the Navajo Nation, shall file an annual report in the Department which contains:

1. The name of the limited liability partnership and the state or other jurisdiction under whose laws the foreign limited liability partnership is formed;

2. The street and mailing address and phone number of its chief executive office and of an office in the Navajo Nation, if there is one;

3. If the partnership does not have an office in the Navajo Nation, the name, street and mailing address and phone number of the partnership's agent for service of process.

B. An annual report must be filed after the first year of the partnership's operating year in which a partnership files a statement of qualification or a foreign partnership becomes authorized to transact business in the Navajo Nation.

C. The Department may administratively revoke the statement of qualification of a partnership that fails to file an annual report when due or pay the required filing fee. The Department shall provide the partnership with at least 90 written notice of intent to revoke the statement. The notice must be mailed to the partnership at its chief executive office set forth in the last filed statement of qualification or annual report. The notice must specify the annual report that has not been filed, the fee that has not been paid, and the effective date of the revocation. The revocation is not effective if the annual report is filed and the fee is paid before the effective date of the revocation.

D. The revocation under Subsection (C) only affects a partnership's status as a limited liability partnership and is not an event of dissolution of the partnership.

E. A partnership whose statement of qualification has been revoked may apply to the Department for reinstatement within two years after the effective date of the revocation. The application must state:

1. The name of the partnership and the effective date of the revocation, and:

2. That the ground for revocation either did not exist or has been corrected.

3. A reinstatement under Subsection (E) relates back to and takes effect as of the effective date of the revocation, and the partnership's status as a limited liability partnership continues as if the revocation had never occurred.

History

CJY-17-08, July 22, 2008.

Article 11. Foreign Limited Liability Partnership

§ 3900. Law governing foreign limited liability partnership

A. The law under which a foreign limited liability partnership is formed governs relations among the partners and between the partners and the partnership and the liability of the partners for obligations of the partnership.

B. A foreign limited liability partnership may not be denied a statement of foreign qualification by reason of any difference between the laws under which the partnership was formed and the laws of the Navajo Nation.

C. A statement of foreign qualification does not authorize a foreign limited liability partnership to engage in any business or exercise any power that a partnership may not engage in ir exercise in the Navajo Nation as a limited liability partnership.

History

CJY-17-08, July 22, 2008.

§ 3901. Statement of foreign qualification

A. Before transacting business in the Navajo Nation, a foreign limited liability partnership must file a statement of foreign qualification. The statement must include:

1. The name of the foreign limited liability partnership which satisfies the requirements of the state or other jurisdiction under whose law it is formed and ends with "Registered Limited Liability Partnership," "Limited Liability Partnership," "R.L.L.P.," "L.L.P.," "RLLP," or "LLP";

2. The street and mailing address and phone number of its chief executive office and of an office in the Navajo Nation, if there is one;

3. If the partnership does not have an office in the Navajo Nation, the name, street and mailing address and phone number of the partnership's agent for service of process;

4. The deferred effective date, if any.

B. The agent of a foreign limited liability partnership for service of process must be an individual who is a resident of the Navajo Nation or other person authorized to do business in the Navajo Nation.

C. The status of a partnership as a foreign limited liability partnership is effective on the later of the filing of the statement of foreign qualification or a date specified in the statement. The status remains effective, regardless of changes in the partnership, until it is cancelled pursuant to Section 3805(D) or revoked pursuant to Section 3892.

D. An amendment or cancellation of a statement of foreign qualification is effective when it is filed or on a deferred effective date specified in the amendment or cancellation.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection C corrected to replace citation to Section 3803(D) with Section 3805(D).

§ 3902. Effect of failure to qualify

A. A foreign limited liability partnership transacting business in the Navajo Nation may not maintain an action or proceeding in the Navajo Nation unless it has in effect a statement of foreign qualification.

B. The failure of a foreign limited liability partnership to have in effect a statement of foreign qualification does not impair the validity of a contract or act of the foreign limited liability partnership or preclude it from defending an action or proceeding in the Navajo Nation.

C. A limitation on personal liability of a partner is not waived solely by transacting business in the Navajo Nation without a statement of foreign qualification.

D. If a foreign limited liability partnership transacts business in the Navajo Nation without a statement of foreign qualification, the Department is its agent for service of process with respect to a right of action arising out of the transaction of business in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 3903. Activities not constituting transacting business

A. Activities of a foreign limited liability partnership which do not constitute transacting business for the purpose of this Article include:

1. Maintaining, defending or settling an action or proceeding;

2. Holding a meeting of its partners or carrying on any other activity concerning its internal affairs;

3. Maintaining bank accounts;

4. Maintaining offices or agencies for the transfer, exchange, and registration of the partnership's own securities or maintaining trustees or depositories with respect to those securities;

5. Selling through independent contractors;

6. Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside the Navajo Nation before they become contracts

7. Creating or acquiring indebtedness, with or without a mortgage, or other security interest in property;

8. Collecting debts or foreclosing mortgages or other security

interests in property securing debts, and holding, protecting and maintaining property so acquired;

9. Conducting an isolated transaction that is completed within 30 days and is not in the course of similar transactions; and

10. Transacting business in interstate commerce.

B. For purposes of this Article, the ownership in the Navajo Nation of income-producing real property or tangible personal property other than the property excluded under Subsection (A). constitutes transacting business in the Navajo Nation.

C. This Section does not apply in determining the contacts or activities that may subject a foreign limited liability partnership to service of process, taxation, or regulation under any other law of the Navajo Nation.

History

CJY–17–08, July 22, 2008.

§ 3904. Action by the Attorney General

The Attorney General may maintain an action to restrain a foreign limited liability partnership from transacting business in the Navajo Nation in violation of this Article.

History

CJY–17–08, July 22, 2008.

Article 12. Miscellaneous Provisions

§ 3910. Jurisdiction of Navajo Nation court

The Navajo Nation courts shall have original jurisdiction over any action against, or by, any partnership, partner, or other parties mentioned in this Act, for actions arising under this Act including actions by an aggrieved party contesting acts or omissions by the Department, under this Act.

History

CJY–17–08, July 22, 2008.

§ 3911. Consent to jurisdiction

A. Any partnership created pursuant to this Act or any partner or other parties mentioned therein or thereafter its formation shall be deemed to have consented to legislative, executive and judicial jurisdiction of the Navajo Nation in connection with all activities conducted by the partnership within the Navajo Nation.

B. Nothing contained in the partnership agreement and other applicable partnership documents shall be construed to reduce or impair this Section.

History

CJY-17-08, July 22, 2008.

§ 3912. Sovereign immunity

Nothing in this Act shall be construed as an exception to or repeal of the provisions of the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, as may be amended from time to time.

History

CJY-17-08, July 22, 2008.

§ 3913. Uniformity of application and construction

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among governments enacting it.

History

CJY-17-08, July 22, 2008.

§ 3914. Name of Act

This Act shall be cited as the "Navajo Nation Uniform Partnership Act."

History

CJY-17-08, July 22, 2008.

§ 3915. Severability

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

History

CJY-17-08, July 22, 2008.

§ 3916. Effective date

This Act takes effect 30 days after approval by the Navajo Nation Council.

History

CJY-17-08, July 22, 2008. Approved by the Navajo Nation Council on July 22,

2008. Signed into law by the Navajo Nation President on August 8, 2008.

§ 3917. Application to existing relationships

A. Except as provided in Subsection (B), this Act applies to all partnerships in existence on its effective date that were formed prior to its enactment or any predecessor law providing for the formation, operation, and liquidation of partnership.

B. A judgment against a partnership or a partner in an action commenced before the effective date of this Act may be enforced in the same manner as a judgment rendered before the effective date of this Act.

History

CJY-17-08, July 22, 2008.

§ 3918. Saving clause

The repeal of any statutory provision by this Act does not impair or otherwise affect the organization or continued existence of a partnership existing on the effective date of this Act or any contract existing or rights accrued before the effective date of this Act.

History

CJY-17-08, July 22, 2008.

Chapter 25. Navajo Nation Limited Partnership Act

Article 1. General Provisions

§ 4100. Policy and purpose

The Navajo Nation Limited Partnership Act is hereby enacted:

A. The purpose of this Act is to permit the formation of various limited partnership entities and require registration of foreign limited partnerships; and to regulate such entities so as to promote economic growth and further exercise Navajo Nation sovereignty in the governance of its territory, and citizens.

B. This Act is based upon the revised Uniform Limited Partnership (1985) and general principles of limited partnerships. The interpretation of this Act shall be based on Navajo Nation court interpretation and such interpretation that shall give the utmost respect in deciding the meaning and purpose of this Act to the unique traditions and customs of the Navajo People. General decisional law interpreting similar provisions of other limited partnership laws in other jurisdictions may be used as guidance.

C. Unless as otherwise expressly stated by law, the sovereign immunity of the Navajo Nation shall not extend to partnership entities organized under this Act, nor shall such entities be considered a subdivision, entity, or enterprises of the Navajo Nation, nor shall the Navajo Nation be liable for the debts or obligations or any kind of such entities.

D. The Division of Economic Development through its Business Regulatory Department shall administer the provisions of the Act. The Business Regulatory Department shall promulgate rules and regulations to implement this Act. All proposed rules and regulations shall be published for public comments at least 90 days prior to submission to the Economic Development Committee of the Navajo Nation Council for final review and approval. The Division of Economic Development is directed to prepare an appropriate supplemental budget for carrying out its responsibilities under this Act.

History

CJY-17-08, July 22, 2008.

§ 4101. Definitions

In this Chapter, unless the context otherwise requires:

A. "Certificate of limited partnership" means the certificate referred to in Section 4108, and the certificate as amended or restated.

B. "Department" means the Business Regulatory Department within the Division of Economic Development or its designate successor.

C. "Contribution" means any cash, property, services rendered, or promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes to a limited partnership in his capacity as a partner.

D. "Event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in Section 4123.

E. "Foreign limited partnership" means a partnership formed under the laws of any state or another jurisdiction other than the Navajo Nation and having as partners one or more general partners and one or more limited partners.

F. "General partner" means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited partnership as a general partner.

G. "Limited partner" means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement.

H. "Limited partnership" and "domestic limited partnership" means a partnership formed by two or more persons under the laws of the Navajo Nation and having one or more general partners and one or more limited partners.

I. "Navajo Nation" means:

1. When referring to the body politic, the Navajo Nation government, including its Council and applicable standing committees and

boards;

2. When referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, including:

a. All land within the exterior boundaries of the Navajo Indian Reservation, including the Navajo Partitioned Land, or of the Eastern Navajo portion of the Navajo Nation, including Alamo, Tóhajiilee, and Ramah, or of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments;

b. All lands held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for, the use or benefit of the Navajo Nation, the Navajo Nation, any Band of Navajo Indians, or any individual Navajo Indian as such; and

c. All other land over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

J. "Partner" means a limited or general partner.

K. "Partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.

L. "Partnership interest" means a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets.

M. "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal commercial entity.

N. "State" means a state of the United States, a federally-recognized Indian tribe, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession of the United States subject to the jurisdiction of the United States.

History

CJY-17-08, July 22, 2008.

Note. Reorganized Subsection I for consistency.

§ 4102. Name

The name of each limited partnership as set forth in its certificate of limited partnership:

1. Shall contain the words "limited partnership" or the initials "L.P." or "LP", in upper or lower case;

2. May not contain the name of a limited partner unless:

a. It is also the name of a general partner or the corporate name of a corporate general partner; or

b. The business of the limited partnership had been carried on under that name before the admission of that limited partner;

3. May not be the same as, or deceptively similar to, the name of any corporation or limited partnership organized under the laws of the Navajo Nation or licensed or registered as a foreign corporation or limited partnership in the Navajo Nation.

4. Shall not contain the words "Navajo Nation" or "Navajo Tribe," nor in anyway imply that it is associated with the Navajo Nation government or a Navajo Nation entity, unless the Navajo Nation government or a Navajo Nation entity is the general partner.

History

CJY-17-08, July 22, 2008.

§ 4103. Reservation of name

A. The exclusive right to the use of a name may be reserved by:

1. Any person intending to organize a limited partnership under this Act and to adopt that name;

2. Any domestic limited partnership or any foreign limited partnership registered in the Navajo Nation which, in either case, intends to adopt that name;

3. Any foreign limited partnership intending to register in the Navajo Nation and adopt that name; and

4. Any person intending to organize a foreign limited partnership and intending to have it registered in the Navajo Nation and adopt that name.

B. The reservation shall be made by filing with the Department an application, executed by the applicant, to reserve a specified name. If the Department finds that the name is available for use by a domestic or foreign limited partnership, he shall reserve the name for the exclusive use of the applicant for a period of 120 days. Once having so reserved a name, the same applicant may not again reserve the same name until more than 60 days after the expiration of the last 120 day period for which that applicant reserved that name. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the Department a notice of the transfer, executed by the applicant for whom the name was reserved and specifying the name, street and mailing address and phone number of the transferee.

History

CJY-17-08, July 22, 2008.

§ 4104. Specified office and agent

A. Each limited partnership shall continuously maintain in the Navajo Nation:

1. An office, which may but need not be a place of its business in the Navajo Nation, at which shall be kept the records required by Section 4105 to be maintained; and

2. An agent for service of process on the limited partnership.

B. An agent for service of process must be an individual whose residence is in the Navajo Nation, a domestic corporation, or a foreign corporation authorized to do business in the Navajo Nation.

C. If a limited partnership fails to appoint or maintain an agent for service of process in the Navajo Nation or the agent for service of process cannot with reasonable diligence be found at the agent's street and mailing address, the Department is an agent of the limited partnership on whom process, notice or demand may be served.

D. If the Department accepts service of process, notice or demand pursuant to Subsection (C), the Department shall forward by certified mail, the summons and the complaint to the limited partnership at the street and mailing address on file with the Department at the time of service.

E. The Navajo Nation is not liable for any damages incurred by the limited partnership if the limited partnership does not receive the summons and complaint.

History

CJY-17-08, July 22, 2008.

§ 4105. Records to be kept

A. Each limited partnership shall keep at the office referred to in Section 4104, the following:

1. A current list of the full name and last known business address of each partner, separately identifying in alphabetical order the general partners and the limited partners;

2. A copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed;

3. Copies of the limited partnership's federal, state and local income tax returns and reports, if any, for the three most recent years;

4. Copies of any then effective written partnership agreements and of any financial statements of the limited partnership for the three most

recent years; and

5. Unless contained in a written partnership agreement, a writing setting out:

a. The amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and that each partner has agreed to contribute;

b. The times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;

c. Any right of a partner to receive, or of a general partner to make, distributions to a partner that include a return of all or any of the partner's contribution; and

d. Any events on the happening of which the limited partnership is to be dissolved and its affairs wound up.

B. Records kept under this Section are subject to inspection and copying at the reasonable request, and at the expense, of any partner during ordinary business hours.

History

CJY-17-08, July 22, 2008.

§ 4106. Nature of business

A limited partnership may carry on any business that a partnership without limited partners may carry on except banking and insurance.

History

CJY-17-08, July 22, 2008.

§ 4107. Business transactions of partner with partnership

Except as provided in the partnership agreement, a partner may lend money to and transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.

History

CJY-17-08, July 22, 2008.

Article 2. Formation: Certificate of Limited Partnership

§ 4110. Certificate of limited partnership

A. In order to form a limited partnership, a certificate of limited partnership shall be executed and filed in the Department. The certificate shall set forth:

1. The name of the limited partnership;

2. The street and mailing address of the office and the name, street and mailing address, and phone number of the agent for service of process required to be maintained by Section 4104;

3. The name, business address and phone number of each general partner;

4. The latest date on which the limited partnership is to dissolve; and

5. Any other matters the general partners determine to include therein.

B. A limited partnership is formed at the time of the filing of the certificate of limited partnership in the Department or at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.

History

CJY-17-08, July 22, 2008.

§ 4111. Amendment to certificate; restatement

A. A certificate of limited partnership is amended by filing a certificate of amendment thereto in the Department. The certificate shall set forth:

1. The name of the limited partnership;

2. The date of filing the certificate of limited partnership; and

3. The amendment to the certificate of limited partnership.

B. Within 30 days after the happening of any of the following events, an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be filed:

1. The admission of a new general partner;

2. The withdrawal of a general partner; or

3. The continuation of the business under Section 4170 after an event of withdrawal of a general partner.

C. A general partner who becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, shall promptly amend the certificate.

D. A certificate of limited partnership may be amended at any time for any other proper purpose the general partners determine.

E. If an amendment to a certificate of limited partnership is filed in compliance with Subsection (B), no person is subject to liability because the amendment was not filed earlier.

F. A restated certificate of limited partnership may be executed and filed in the same manner as a certificate of amendment.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection B(3) corrected to replace citation to Section 4144 with Section 4170.

§ 4112. Cancellation of certificate

A certificate of limited partnership shall be cancelled upon the dissolution and the commencement of winding up of the partnership or when there are no limited partners. A certificate of cancellation shall be filed in the Department and set forth:

1. The name of the limited partnership;

2. The date of filing of its certificate of limited partnership;

3. The reason for filing the certificate of cancellation;

4. The effective date of cancellation, which shall be a date certain unless it is effective upon the filing of the certificate; and

5. Any other information the general partners filing the certificate determine.

History

CJY-17-08, July 22, 2008.

§ 4113. Execution of certificates

A. Each certificate required by this Article to be filed in the Department shall be executed in the following manner:

1. An original certificate of limited partnership shall be signed by all general partners;

2. A certificate of amendment shall be signed by at least one general partner and by each other general partner designated in the certificate as a new general partner; and

3. A certificate of cancellation shall be signed by all general

partners.

B. Any person may sign a certificate by an attorney-in-fact, but a power of attorney to sign a certificate relating to the admission of a general partner shall specifically describe the admission.

C. The execution of a certificate by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true.

History

CJY-17-08, July 22, 2008.

§ 4114. Execution by judicial act

If a person required by Section 4113 to execute a certificate fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the Navajo Nation courts to direct the execution of the certificate. If the Court finds that it is proper for the certificate to be executed and that any person so designated has failed or refused to execute the certificate, it shall order the Department to record an appropriate certificate.

History

CJY-17-08, July 22, 2008.

§ 4115. Filing in department

A. Two signed copies with original signatures of the certificate of limited partnership and of any certificates of amendment or cancellation or of any judicial decree of amendment or cancellation shall be delivered to the Department. A person who executes a certificate as an agent or fiduciary need not exhibit evidence of his authority as a prerequisite to filing. Unless the Department finds that any certificate does not conform to law, upon receipt of all filing fees required by law, he shall:

1. Endorse on each duplicate original the word "Filed" and the day, month and year of the filing thereof;

2. File one duplicate original or a copy of the original in his office; and

3. Return the other duplicate original to the person who filed it or his representative.

B. Upon the filing of a certificate of amendment or judicial decree of amendment or restated certificate of limited partnership containing an amendment in the Department, the certificate of limited partnership shall be amended as set forth therein, and upon the effective date of a certificate of cancellation or a judicial decree thereof, the certificate of limited partnership is canceled.

History

CJY-17-08, July 22, 2008.

§ 4116. Liability for false statement in certificate

If any certificate of limited partnership or certificate of amendment or cancellation contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from:

1. Any person who executes the certificate, or causes another to execute it on his behalf, and knew, and any general partner who knew or should have known, the statement to be false at the time the certificate was executed; and

2. Any general partner who thereafter knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any respect within a sufficient time before the statement was relied upon reasonably to have enabled that general partner to cancel or amend the certificate, or to file a petition for execution of certificate under Section 4114.

History

CJY-17-08, July 22, 2008.

§ 4117. Scope of notice

The fact that a certificate of limited partnership is on file in the Department is notice that the partnership is a limited partnership and the persons designated therein as general partners are general partners, but it is not notice of any other fact.

History

CJY-17-08, July 22, 2008.

§ 4118. Delivery of certificates to limited partners

Upon the return by the Department pursuant to Section 4115 of a certificate marked "Filed", the general partners shall promptly deliver or mail a copy of the certificate of limited partnership and each certificate of amendment or cancellation to each limited partner unless the partnership agreement provides otherwise.

History

CJY-17-08, July 22, 2008.

Note. Typographical error corrected to replace citation to Section 4113 with Section 4115.

Article 3. Limited Partners

§ 4120. Admission of limited partners

A. A person becomes a limited partner on the later of:

1. The date the original certificate of limited partnership is filed; or

2. The dated stated in the records of the limited partnership as the date that person becomes a limited partner.

B. After the filing of a limited partnership's original certificate of limited partnership, a person may be admitted as an additional limited partner:

1. In the case of a person acquiring a partnership interest directly from the limited partnership, upon the compliance with the partnership agreement or, if the partnership agreement does not so provide, upon the written consent of all partners; and

2. In the case of an assignee of a partnership interest of a partner who has the power, as provided in Section 4142, to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power.

History

CJY-17-08, July 22, 2008.

§ 4121. Voting

Subject to Section 4122, the partnership agreement may grant to all or a specified group of the limited partners the right to vote upon any matter on a per capita or other basis.

History

CJY-17-08, July 22, 2008.

§ 4122. Liability to third parties

A. Except as provided in Subsection (D), a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he participates in the control of the business. However, if the limited partner participates in the control of the business, he is liable only to persons who transact business with the limited partnership reasonably believing, based on the limited partner's conduct, that the limited partner is a general partner.

B. A limited partner does not participate in the control of the business within the meaning of Subsection (A) of this Section solely by doing one or more of the following:

1. Being a contractor for or an agent or employee of the limited partnership or of a general partner or being an officer, director, or shareholder of a general partner that is a corporation or other business entity;

2. Consulting with and advising a general partner with respect to the business of the limited partnership;

3. Acting as surety for the limited partnership or guaranteeing or assuming one or more specific obligations of the limited partnership;

4. Taking any action required or permitted by law to bring or pursue a derivative action in the right of a limited partnership;

5. Requesting or attending a meeting of partners;

6. Proposing, approving or disapproving, by voting or otherwise, one or more of the following matters:

a. The dissolution and winding up of the limited partnership;

b. The sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the limited partnership;

c. The incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;

d. A change in the nature of the business;

e. The admission or removal of a general partner;

f. The admission or removal of a limited partner;

g. A transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners;

h. An amendment to the partnership agreement or certificate of limited partnership; or

i. Matters related to the business of the limited partnership not otherwise enumerated in this Subsection, which the partnership agreement states in writing may be subject to the approval or disapproval of limited partners;

7. Winding up the limited partnership pursuant to Section 4172; or

8. Exercising any right or power permitted to limited partners under this Act and not specifically enumerated in this Subsection.

C. The enumeration in Subsection (B) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him in the business of the limited partnership.

D. A limited partner who knowingly permits his name to be used in the name of the limited partnership, except under circumstances permitted by Section 4102(2) is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

History

CJY-17-08, July 22, 2008.

§ 4123. Person erroneously believing himself limited partner

A. Except as provided in Subsection (B), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that he has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise or exercising any rights of a limited partner if, on ascertaining the mistake, he:

1. Causes an appropriate certificate of limited partnership or a certificate of amendment to be executed and filed; or

2. Withdraws from future equity participation in the enterprise by executing and filing in the Department a certificate declaring withdrawal under this Section.

B. A person who makes a contribution of the kind described in Subsection (A) is liable as a general partner to any third party who transacts business with the enterprise:

1. Before the person withdraws and an appropriate certificate is filed to show withdrawal; or

2. Before an appropriate certificate is filed to show that he is not a general partner, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

History

CJY-17-08, July 22, 2008.

§ 4124. Information

A limited partner may:

1. Inspect and copy any of the partnership records required to be maintained by Section 4105; and

2. Obtain from the general partners from time to time upon reasonable demand:

a. True and full information regarding the state of the business and financial condition of the limited partnership;

b. Promptly after becoming available, a copy of the limited partnership's federal, state and local income tax returns for each year; and

c. Other information regarding the affairs of the limited partnership as is just and reasonable.

History

CJY-17-08, July 22, 2008.

Article 4. General Partners

§ 4130. Admission of additional general partners

After the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted as provided in writing in the partnership agreement or, if the partnership agreement does not provide in writing for the admission of additional general partners, with the written consent of all partners.

History

CJY-17-08, July 22, 2008.

§ 4131. Events of withdrawal

Except as approved by the specific written consent of all partners at the time, a person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

1. The general partner withdraws from the limited partnership as provided in Section 4151;

2. The general partner ceases to be a member of the limited partnership as provided in Section 4161;

3. The general partner is removed as a general partner in accordance with the partnership agreement;

4. Unless otherwise provided in writing in the partnership agreement, the general partner:

a. Makes an assignment for the benefit of creditors;

b. Files a voluntary petition in bankruptcy;

c. Is adjudicated bankrupt or insolvent;

d. Files a petition or answer seeking for himself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation;

e. Files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him in any proceeding of this nature; or

f. Seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the general partner or of all or any substantial part of his properties;

5. Unless otherwise provided in writing in the partnership agreement, 120 days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without his consent or acquiescence of a trustee, receiver or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed or within 90 days after the expiration of any such stay, the appointment is not vacated;

6. In the case of a general partner who is a natural person;

a. His death; or

b. The entry by a court of competent jurisdiction adjudicating him incompetent to manage his person or his estate;

7. In the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust but not merely the substitution of a new trustee;

8. In the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

9. In the case of a general partner that is a corporation, the filing of articles of dissolution for the corporation or the revocation of its charter; or

10. In the case of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership.

History

CJY-17-08, July 22, 2008.

Note. Typographical errors at Subsection 1 corrected to replace citation to Section 4152 with Section 4151; and Subsection 4(c) corrected to delete the word "a" previously placed between the words "adjudicated" and "bankrupt".

§ 4132. General powers and liabilities

A. Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.

B. Except as provided in this Act, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

History

CJY-17-08, July 22, 2008.

§ 4133. Contributions by general partner

A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his participation in the partnership as a limited partner.

History

CJY-17-08, July 22, 2008.

§ 4134. Voting

The partnership agreement may grant to all or certain identified general partners the right to vote on a per capita or any other basis, separately or with all or any class of the limited partners, on any matter.

History

CJY-17-08, July 22, 2008.

Article 5. Finance

§ 4140. Form of contribution

The contribution of a partner may be in cash, property or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

History

CJY-17-08, July 22, 2008.

§ 4141. Liability for contribution

A. A promise by a limited partner to contribute to the limited partnership is not enforceable unless set out in a writing and signed by the limited partner.

B. Except as provided in the partnership agreement, a partner is obligated to the limited partnership to perform any enforceable promise to contribute cash or property or to perform services, even if he is unable to perform because of death, disability or any other reason. If a partner does not make the required contribution of property or services, he is obligated at the option of the limited partnership to contribute cash equal to that portion of the value as stated in the partnership records required to be kept pursuant to Section 4105 of the stated contribution that has not been made.

C. Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this Chapter may be compromised only by consent of all the partners. Notwithstanding the compromise, a creditor of a limited partnership who extends credit or otherwise acts in reliance on that obligation after the partner signs a writing which reflects the obligation and before the amendment or cancellation thereof to reflect the compromise may enforce the original obligation.

History

CJY–17–08, July 22, 2008.

§ 4142. Sharing of profits and losses

The profits and losses of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, profits and losses shall be allocated on the basis of the value as stated in the partnership records required to be kept pursuant to Section 4105 of the contributions made by each partner to the extent they have been received by the partnership and have not been returned.

History

CJY–17–08, July 22, 2008.

§ 4143. Sharing of distributions

Distributions of cash or other assets of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, distributions shall be made on the basis of the value as stated in the partnership records required to be kept pursuant to Section 4105 of the contributions made by each partner to the extent they have been received by the partnership and have not been returned.

History

CJY-17-08, July 22, 2008.

Article 6. Distributions and Withdrawal

§ 4150. Interim distributions

Except as provided in this Article, a partner is entitled to receive distributions from a limited partnership before his withdrawal from the limited partnership and before the dissolution and winding up thereof to the extent and at the times or upon the happening of the events specified in the partnership agreement.

History

CJY-17-08, July 22, 2008.

§ 4151. Withdrawal of general partner

A general partner may withdraw from a limited partnership at any time by giving written notice to the other partners, but if the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement and offset the damages against the amount otherwise distributable to him.

History

CJY-17-08, July 22, 2008.

§ 4152. Withdrawal of limited partner

A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in writing in the partnership agreement. If the agreement does not specify in writing the time or the events upon the happening of which a limited partner may withdraw or a definite time for the dissolution and winding up of the limited partnership, a limited partner may withdraw upon not less than six months prior written notice to each general partner at his street and mailing address on the books of the limited partnership at its office in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 4153. Distribution upon withdrawal

Except as provided in this Article and in Subsection (B) of this Section, upon withdrawal any withdrawing partner is entitled to receive any distribution to which he is entitled under the partnership agreement and, if not otherwise provided in the agreement, he is entitled to receive, within a reasonable time after withdrawal, the fair value of his interest in the limited partnership as of the date of withdrawal based upon his right to share in distributions from the limited partnership.

History

CJY-17-08, July 22, 2008.

§ 4154. Distribution in-kind

Except as provided in writing in the partnership agreement, a partner, regardless of the nature of his contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. Except as provided in writing in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited partnership.

History

CJY-17-08, July 22, 2008.

§ 4155. Right to distribution

At the time a partner becomes entitled to receive a distribution, he has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution.

History

CJY-17-08, July 22, 2008.

§ 4156. Limitations on distribution

A partner may not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of the partnership assets.

History

CJY-17-08, July 22, 2008.

§ 4157. Liability on return of contribution

A. If a partner has received the return of any part of his contribution without violation of the partnership agreement or this Act, he is liable to the limited partnership for a period of one year thereafter for the amount of the returned contribution, but only to the extent necessary to discharge the limited partnership's liabilities to creditors who extended credit to the limited partnership during the period the contribution was held by the partnership.

B. If a partner has received the return of any part of his contribution in violation of the partnership agreement or this Chapter, he is liable to the limited partnership for a period of five years thereafter for the amount of the contribution wrongfully returned.

C. A partner receives a return of his contribution to the extent that a distribution to him reduces his share of the fair value of the net assets of the limited partnership below the value as set forth in the partnership records required to be kept pursuant to Section 4105 of his contribution which has not been distributed to him.

History

CJY-17-08, July 22, 2008.

Article 7. Assignment of Partnership Interests

§ 4160. Nature of partnership interest

A partnership interest is personal property.

History

CJY-17-08, July 22, 2008.

§ 4161. Assignment of partnership interest

Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his partnership interest.

History

CJY-17-08, July 22, 2008.

§ 4162. Rights of creditor

On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This Chapter does not deprive any partner of the benefit of any exemption laws applicable to his partnership interest.

History

CJY-17-08, July 22, 2008.

§ 4163. Right of assignee to become limited partner

A. An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that:

1. The assignor gives the assignee that right in accordance with authority described in the partnership agreement; or

2. All other partners consent.

B. An assignee who has become a limited partner has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a limited partner under the partnership agreement and this Act. An assignee who becomes a limited partner also is liable for the obligations of his assignor to make and return contributions as provided in Articles 5 and 6 of this Chapter. However, the assignee is not obligated for liabilities unknown to the assignee at the time he became a limited partner.

C. If an assignee of a partnership interest becomes a limited partner, the assignor is not released from his liability to the limited partnership under Sections 4116 and 4141.

History

CJY-17-08, July 22, 2008.

§ 4164. Power of estate of deceased or incompetent partner

If a partner who is an individual dies or a court of competent jurisdiction adjudges him to be incompetent to manage his person or his property the partner's executor, administrator guardian, conservator or other legal representative may exercise all the partner's rights for the purpose of settling his estate or administering his property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.

History

CJY-17-08, July 22, 2008.

Article 8. Dissolution

§ 4170. Nonjudicial dissolution

A limited partnership is dissolved and its affairs shall be wound up upon the first of the following to occur:

1. At the time specified in the certificate of limited partnership;

2. Upon the occurrence of events specified in writing in the partnership agreement;

3. Written consent of all partners;

4. An event of withdrawal of a general partner unless at the time there is at least one other general partner and the written provisions of

the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partnership and that partner does so, but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal if, within 90 days after the withdrawal, all partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners if necessary or desired; or

5. Entry of a decree of judicial dissolution under Section 4171.

History

CJY-17-08, July 22, 2008.

§ 4171. Judicial dissolution

On application by or for a partner or assignee or any other successor in interest of a partner, the Navajo Nation District Courts may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

History

CJY-17-08, July 22, 2008.

§ 4172. Winding up

Except as provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners may wind up the limited partnership's affairs, but the Navajo Nation District Courts may wind up the limited partnership's affairs upon application of any partner, his legal representative or assignee.

History

CJY-17-08, July 22, 2008.

§ 4173. Distribution of assets

Upon the winding up of a limited partnership, the assets shall be distributed as follows:

1. To creditors, including partners who are creditors, to the extent permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under Section 4150 or Section 4153;

2. Except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under Section 4150 or Section 4153; and

3. Except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in

distributions.

History

CJY-17-08, July 22, 2008.

Article 9. Foreign Limited Partnerships

§ 4180. Law governing

Subject to the laws of the Navajo Nation:

1. The laws of the foreign jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners; and

2. A foreign limited partnership may not be denied registration by reason of any difference between those laws and the laws of the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 4181. Registration

Before transacting business in the Navajo Nation, a foreign limited partnership shall register with the Department. In order to register, a foreign limited partnership shall submit to the Department, in duplicate, an application for registration as a foreign limited partnership, signed and sworn to by a general partner and setting forth:

1. The name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in the Navajo Nation;

2. The state and date of its formation;

3. The name, street and mailing address and phone number of any agent for service of process on the foreign limited partnership whom the foreign limited partnership elects to appoint. The agent shall be an individual resident of the Navajo Nation, a domestic corporation or a foreign corporation having a place of business in, and authorized to do business in the Navajo Nation;

4. A statement that the Department is appointed the agent of the foreign limited partnership for service of process if no agent has been appointed under paragraph 3 or, if appointed, the agent's authority has been revoked or if the agent cannot be found or served with the exercise of reasonable diligence;

5. The street and mailing address of the office required to be maintained in the Navajo Nation of its organization by the laws of that

state or, if not so required, of the principal office of the foreign limited partnership;

6. The name, business address and phone number of each general partner; and

7. The street and mailing address of the office at which is kept a list of the names, street and mailing addresses and phone numbers of the limited partners and their capital contributions and an undertaking by the foreign limited partnership to keep those records until the foreign limited partnership's registration in the Navajo Nation is canceled or withdrawn.

History

CJY-17-08, July 22, 2008.

§ 4182. Issuance of registration

A. If the Department finds that an application for registration conforms to law and all requisite fees have been paid, it shall:

1. Endorse on the application the word "Filed", and the month, day and year of the filing thereof;

2. File in his office a duplicate original of the application; and

3. Issue a certificate of registration to transact business in the Navajo Nation.

B. The certificate of registration, together with a duplicate original of the application, shall be returned to the person who filed the application or his representative.

History

CJY-17-08, July 22, 2008.

Note. Typographical error at Subsection A corrected to replace "he shall" with "it shall".

§ 4183. Name

A foreign limited partnership may register with the Department under any name, whether or not it is the name under which it is registered in its state of organization, that includes without abbreviation the words "limited partnership" and that could be registered by a domestic limited partnership.

History

CJY-17-08, July 22, 2008.

§ 4184. Changes and amendments

If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in the Department a certificate, signed and sworn to by a general partner, correcting such statement.

History

CJY-17-08, July 22, 2008.

§ 4185. Cancellation of registration

A foreign limited partnership may cancel its registration by filing with the Department a certificate of cancellation signed and sworn by a general partner. A cancellation does not terminate the authority of the Department to accept service of process on the foreign limited partnership with respect to causes of action arising out of the transactions of business in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 4186. Transaction of business without registration

A. A foreign limited partnership transacting business in the Navajo Nation may not maintain any action, suit or proceeding in any Navajo Nation court until it has registered in the Navajo Nation.

B. The failure of a foreign limited partnership to register in the Navajo Nation does not impair the validity of any contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending any action, suit or proceeding in any Navajo Nation court.

C. A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of having transacted business in the Navajo Nation without registration.

D. By transacting business in the Navajo Nation without registration, a foreign limited partnership appoints the Department as its agent for service of process with respect to causes of action arising out of the transaction of business in the Navajo Nation.

History

CJY-17-08, July 22, 2008.

§ 4187. Action by Attorney General

The Attorney General of the Navajo Nation may bring an action to restrain a foreign limited partnership from transacting business in the Navajo Nation in violation of this Act.

History

CJY-17-08, July 22, 2008.

Article 10. Derivative Actions

§ 4190. Right of action

A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

History

CJY-17-08, July 22, 2008.

§ 4191. Proper plaintiff

In a derivative action, the plaintiff shall be a partner at the time of bringing the action and:

1. Shall have been a partner at the time of the transaction of which he complains; or

2. His status as a partner shall have devolved upon him by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction.

History

CJY-17-08, July 22, 2008.

§ 4192. Pleading

In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.

History

CJY-17-08, July 22, 2008.

§ 4193. Expenses

If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him.

History

CJY-17-08, July 22, 2008.

Article 11. Miscellaneous

§ 4200. Application to existing limited partnership

This Act shall be so applied and construed to effectuate its general purpose to make uniform law with respect to the subject of this Act among governments enacting it.

History

CJY-17-08, July 22, 2008.

§ 4201. Short title

This Act may be cited as the Navajo Nation Uniform Limited Partnership Act.

History

CJY-17-08, July 22, 2008.

§ 4202. Severability

If any provision of this Chapter, or its application to any person or class of person, or to any lands or to any circumstances, is held invalid for any reason by a court of competent jurisdiction, the remainder of this Chapter shall not be affected thereby and shall remain in full force and effect.

History

CJY-17-08, July 22, 2008.

§ 4203. Effective date

The effective date of this Act shall be 30 days after approval by the Navajo Nation Council.

History

CJY-17-08, July 22, 2008. Approved by the Navajo Nation Council on July 22, 2008. Signed into law by the Navajo Nation President on August 8, 2008.

§ 4204. Saving clause

The repeal of any statutory provision by this Act does not impair, or otherwise affect, the organization or the continued existence of a limited partnership existing at the effective date of this Act, nor does the repeal of any existing statutory provision by this Act impair any contract or affect any right accrued before the effective date of this Act.

History

CJY-17-08, July 22, 2008.

§ 4205. Jurisdiction of Navajo Nation courts

The Navajo Nation courts shall have original jurisdiction over any action against, or by, any domestic or foreign limited partnership, or for actions arising under this Act including actions by an aggrieved party contesting acts or omissions by the Department, under this Act.

History

CJY-17-08, July 22, 2008.

§ 4206. Consent to jurisdiction

A. Any partnership created pursuant to this Act or any partner or other parties mentioned therein or thereafter its formation shall be deemed to have consented to legislative, executive and judicial jurisdiction of the Navajo Nation in connection with all activities conducted by the partnership within the Navajo Nation.

B. Nothing contained in the partnership agreement and other applicable partnership documents shall be construed to reduce or impair this Section.

C. Nothing in this Section shall be construed as an exception to or repeal of the provisions of the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, as may be amended from time to time.

History

CJY-17-08, July 22, 2008.

§ 4207. Rules for cases not provided for in this Act

In any case not provided for in this Act the provisions of the Model Uniform Limited Partnership Act (1985) govern.

History

CJY-17-08, July 22, 2008.

Nation law.

History

CM-39-56, 1956 Res. p. 123, May 25, 1956.

Revision note. Section 5(E), "this section" has been deleted, and in lieu thereof, "Navajo Nation Law" has been inserted pursuant to CD-68-89, Resolve 4, which "repeals and declares null and void rules, regulations and laws or parts thereof which are inconsistent with the provisions of Title Two, Navajo Nation Code, as amended herein". Previous reference to the "Government Services Committee" is changed to "appropriate oversight Committee" pursuant to CN-67-89, Resolved clause 2, November 30, 1989. (2004)

Cross References

Acquisition of land generally, see 16 N.N.C. § 1 *et seq*.

Committee approval of Navajo Nation agreements, see Committee powers: generally, 2 N.N.C. § 185(B); Resources Committee, 2 N.N.C. § 695; Economic Development Committee, 2 N.N.C. § 724(D); and Intergovernmental Relations Committee, 2 N.N.C. § 824(B)(6).

Chapter 2. Navajo Nation Business Opportunity Act

History

CAP-37-02, April 19, 2002.

CJY-59-85, July 30, 1985.

§ 201. Title; Findings; Legislative Purpose and Intent

A. This Act shall be known and cited as the Navajo Nation Business Opportunity Act; Title 5, Navajo Nation Code, §§ 201 through 215.

B. Whereas the Navajo Nation Council finds:

1. The Navajo Nation is comprised of more than 25,000 square miles of land;

2. The Navajo Nation population now exceeds 250,000 members, of which over 175,000 members reside within the Navajo Nation. In addition, residents of the Navajo Nation include approximately 8,000 non-Navajos;

3. The unemployment rate of the Navajo Nation is approximately fifty percent (50%);

4. In 1996, the United States Congress enacted the Personal Responsibility and Work Reconciliation Act of 1996 (P.L. 104-193 "Welfare Reform Act"). This Act will impact thousands of Navajo people. As a result, there is a need to accelerate the development of privately owned businesses and provide more employment opportunities;

5. There is a need within the Navajo Nation to accelerate business development and economic growth within the Navajo Nation;

6. Although the Navajo Nation has a population that is approximately 90% Navajo, approximately 76% of the contracts by the Navajo Nation between the years 1994 and 2003 were awarded to non-Navajos, according to the Navajo Nation award data; and

7. The Navajo Nation's sovereign status is directly related to its ability and authority to regulate all commercial activities within the Navajo Nation, including those of non-Indians and non-member Indians. In addition, the Treaty of 1868 between the Navajo Nation and the United States recognizes the inherent authority of the Navajo Nation to exclude non-Indians from the Navajo Nation. Pursuant to this authority, engaging in business within the Navajo Nation is a privilege granted by the Navajo Nation and is subject to such conditions as the Navajo Nation may require, subject to applicable federal law. The privilege of entering into the Navajo Nation for the purpose of engaging in business is therefore conditioned upon, among other things, compliance with this Act.

C. The purpose of this Act is to:

1. Promote the economic self-sufficiency of the Navajo Nation by granting "first opportunity" and/or preference in contracting to Navajo and/or Indian owned and operated businesses;

2. Promote competitive bidding and contracting opportunities among Navajo businesses;

3. Develop a dynamic and self-sustaining private sector for the Navajo Nation;

4. Increase Navajo business and employment opportunities for the Navajo people;

5. Provide for business certification in accordance with current Navajo Nation laws; and

6. Regulate the conduct of those engaging in business within the Navajo Nation in order to protect and promote the economic security and welfare of the Navajo Nation.

D. It is not the intent of this Act to require the Navajo Nation or any other public entities or private entities to contract with non-qualified Navajo businesses.

E. It is the intent of this Act to grant first opportunity and contracting preference to qualified Navajo-owned or Indian-owned businesses for all contracts, subcontracts, grants and subgrants issued by public and private entities within the Navajo Nation.

F. The provisions of this Act should be liberally interpreted to promoteeconomic development and the growth of Navajo-owned businesses within the Navajo Nation.

G. The Navajo Nation shall determine the nature, composition, qualification, and preference certification of all businesses subject to the provisions of this Act.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 1, July 30, 1985.

§ 202. Definitions

For all purposes of this Act, the following definitions shall be applicable:

A. "Bid Shopping" is defined herein as any practice involving the solicitation or communication of any competitor's bid prior to and after bid opening, thereby providing an unfair advantage and opportunity to underbid any competitor.

B. "Bidders" is defined as buyers and sellers of goods and services who offer to perform a contract for work and labor or to supply services and goods at a specified price.

C. "Broker" is defined as buyers and sellers of goods and services including agents/negotiators between buyer and seller, who do not have custody of property or will not personally perform the contract to provide the goods or services.

D. "Dealer" is defined as one who buys to sell for resale, not one who buys to keep, or makes to sell.

E. "Established Business" is defined as a for-profit economic entity, firm or other organization, engaged in business activities with ownership, custody and control of an existing adequate inventory or providing professional services with a published address and telephone number and making significant contributions to the Navajo economy.

F. "Front" is defined as a business claiming to have fifty-one percent (51%) or more Navajo or other Indian ownership of any commercial, industrial, or other economic entity or organization, but without the Navajo or other Indian owner or owners exercising the major role in decision-making for operations, profit-sharing and actual management control.

G. "Navajo Indian" or "Navajo" is defined as a person who is an enrolled member of the Navajo Nation.

H. "Navajo Nation" shall have the same definition as used at 1 N.N.C. § 552 including:

1. When referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, including:

a. All lands within the exterior boundaries of the Navajo Indian Reservation, including the Navajo Partitioned Land, or of the Eastern Navajo portion of the Navajo Nation, including Alamo, Tohajiilee, and Ramah, or of Navajo-dependent Indian Communities;

b. All lands held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for the use or benefit of the Navajo Nation, the Navajo Tribe, any Band of Navajo Indians, or any individual Navajo Indian; and

c. All other lands over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law or to which the Navajo Nation has ownership through the Treaty of 1868.

I. "Other Indian" is defined as an Indian other than Navajo who is an enrolled member of a federally recognized Indian Tribe within the United States.

J. "Owned and Controlled" is defined as having at least fifty-one percent (51%) or more ownership of any commercial, industrial, or other economic entity, firm or organization, provided that such ownership shall consist of active participation in decision-making role in operations, profit-sharing and actual management control.

K. "Prime Contractor" is defined as any party, or entity which undertakes, offers to undertake or purports to have the capacity to undertake contracting of a project for a specified price and is authorized and responsible for the management, coordination, completion, supervision or subcontracting for the contracted project.

L. "Procuring Party" is defined as the party that initiates the proceeding to cause a project to be bid for contracting.

M. "Prospective bidders" is defined as potential buyers or sellers of goods and services who offer to perform a contract for work and labor or supply services and goods at a specific price.

N. "Private entity" is defined as a privately-owned business entity doing business on the Navajo Nation, including corporations which are wholly-owned by the Navajo Nation.

O. "Public entity" is defined as an entity which is a part of the Navajo Nation government.

P. "Subcontractor" is defined as any party or entity to which any contract is let by the prime contractor or its subcontractor for materials, equipment, transportation or other goods and services on that prime contract, regardless of tier.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 2, July 30, 1985.

Revision note. The Commerce Department was discontinued pursuant to the 1981 Budget and replaced by the Business Regulatory Department within the Division of Economic Development.

§ 203. Jurisdiction; Application; Compliance Requirements and Violations

A. General Jurisdiction. The Navajo Nation has the inherent sovereign authority to authorize and regulate business activities of business entities within the jurisdiction of the Navajo Nation, as defined in 7 N.N.C. § 254.

B. Application. This Act shall apply uniformly to all public and private entities engaging in business on the Navajo Nation and to the Navajo Nation itself. This Act shall apply to all procurement contracts exceeding fifty thousand dollars ($50,000) and on a limited basis to those procurement contracts less than fifty thousand dollars ($50,000).

C. Inapplicability to Lease and Other Transactions. This Act shall not apply to the negotiation, execution, award, transfer, assignment or approval of business site leases, homesite leases, office space leases, shopping center leases, mineral or non mineral leases, subleases, permits, licenses and transactions that are governed by other applicable laws and regulations of the Navajo Nation and the United States. This Act shall not apply to activities of private persons who contract for goods or services for their individual use or benefit.

D. Implementing Federal Indian Preference Laws and Regulations. To the fullest extent possible, this Act and its rules and regulations shall be construed in accordance with applicable federal Indian preference laws and regulations. Specifically, with respect to any self-determination contract or portion of a self-determination contract intended to benefit the Navajo Nation, this Act and any other applicable tribal employment or contract preference laws shall govern with respect to the administration of the contract or portion of the contract in accordance with the Indian Self Determination and Education Assistance Act, 25 U.S.C §§ 450(e)(c). If federal or state funded contracts specifically provide for the application of Indian preference rather than Navajo preference, the procuring party shall attempt to negotiate with such party in order to apply the provisions of this Act. In the event federal or state law expressly precludes the application of this Act, then Indian preference laws shall be applied and shall not constitute a violation of this Act.

E. Falsification or Concealment of Information; Sanctions and Penalties. Any person who authorizes, or knowingly or recklessly omits, or allows, or falsifies, or otherwise misrepresents any fact or matter material to any determination required by this Act, shall be subject to all applicable sanctions and penalties provided under this Act and any other applicable laws or regulations of the Navajo Nation.

F. Bid–Shopping. Bid shopping shall be prohibited.

G. Conflicts of Interest: Disqualification. No official or employee of the Navajo Nation government or entity of the Navajo Nation which is authorized to implement this Act shall promote, approve or participate in any matter pending before that agency or entity, in which such official or employee or any member of his or her immediate family has an economic or other special interest pursuant to the Navajo Nation Ethics in Government Law. The failure or refusal of such official or employee to abstain from such participation as required thereunder, shall render void any approval or action taken by the Navajo Nation Government or entity in which such official or employee participated, to the extent such action is favorable to the business entity in which such official or employee had an interest. The official(s) or employee(s) in conflict shall be subject to all applicable sanctions and penalties provided by law.

History

CJA–07–05, January 28, 2005.

CAP–37–02, April 19, 2002.

CJY–59–85, Exhibit C, § 3, July 30, 1985.

Revision note. CJY–59–85 inadvertently omitted the first Paragraph of § 203(D). See ACJN–112–85, Exhibit B, § 3.4, and Exhibit C, which recommended an "addition to § 3.4 [§ 203(D)]", not a substitution.

§ 204. Required Business and Contracting Preference Priorities; Certification Requirements

A. Preference Priorities. The Navajo Nation shall certify all businesses pursuant to the following Navajo business opportunity priority classification:

1. Priority #1. Certification shall be granted to any one hundred percent (100%) Navajo-owned and controlled business, having its principal place of business on or off the Navajo Nation.

2. Priority #2. Certification shall be granted to any fifty-one percent (51%) to ninety-nine percent (99%) Navajo or fifty-one percent (51%) to one hundred percent (100%) other Indian owned and controlled business or one hundred percent (100%) Navajo Nation owned and controlled economic enterprise having its principal place of business on or off the Navajo Nation.

B. Obtaining a Priority Certification and Required Compliance. To receive a priority certification under this Act, the business must satisfactorily demonstrate that the business meets the requirements of § 204(A)(1) or (2).

C. Appeal of Priority Certification Determination. Any business denied a priority classification may appeal the determination pursuant to § 211 hereof.

D. Conditions and Requirements for Broker and Dealer Certification;

Established Businesses. Brokers and dealers as defined in § 202 of this Act shall be certified for those activities which brokers and dealers normally conduct throughout the United States, subject to pre-qualification by the contract-letting, purchasing or procuring entity requesting such broker and/or dealer's services. Certification of brokers and dealers shall further be limited to those having an established business as defined in § 202 herein and certified only for the services being performed. Certification of any broker or dealer shall not qualify any other entity, firm or organization thereof. Such other entities, firms or organizations shall be individually subject to the provisions and conditions herein.

E. Partnership Certification. To be certified as eligible for any Navajo Business Opportunity hereunder, Navajo or other Indian ownership and control must be at least fifty-one percent (51%) of the entire partnership business, as well as the project or transaction for which Navajo Business Opportunity is sought, regardless of the number of general or limited partners.

F. Joint Venture Certification. To be eligible for any Navajo Business Opportunity hereunder, Navajo or other Indian ownership and control must be at least fifty-one percent (51%) of the overall combined joint venture, as well as the project or transaction for which Navajo Business Opportunity is sought, with profits to be divided from each venture in proportion to such respective interest.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 4, July 30, 1985.

Revision note. The Commerce Department was discontinued by the 1981 Budget and organization chart. See § C.

§ 205. Navajo Business Opportunity Procedures in Bidding and Procurement

A. Initial Determination of Maximum Feasible Price or Cost by Contracting or Procuring Party. The determination of the maximum feasible price or cost, in accordance with appropriate Business Regulatory Department rules and regulations, shall be made by the contracting or procuring party prior to soliciting bids and proposals. The maximum feasible price or cost may take into account market price, budgetary constraints and prototype cost and may not be revealed until the award of the contract.

B. Notice to the Business Regulatory Department. Prior to bid openings, the procuring party shall provide to the Business Regulatory Department:

1. A copy of the bid solicitation;

2. A copy of the notice published in the newspaper; and

3. A list of all businesses notified, including the dates and manner of such notices.

C. Bid Opening Procedures and Requirements. The following procedures shall be used at bid openings when there is more than one priority business submitting a bid:

1. All bids submitted by Priority #1 businesses shall be opened first.

2. The procuring entity shall determine the qualifications of the bidders based on qualifications established in accordance § 205(A)(2). Bids submitted by businesses deemed non-qualified or non-responsive shall not be considered.

3. The award shall be made to the qualified Priority #1 bidder with the lowest responsive bid among the Priority #1 bidders provided the bid does not exceed the maximum feasible price or cost.

4. If there is no qualified Priority #1 bidder, or if there is no qualified Priority #1 bidder with a bid less than or equal to the maximum feasible price or cost, the bids of the Priority #2 businesses shall then be opened and award shall be given to the qualified Priority #2 bidder with the lowest responsive bid provided the bid is less than or equal to the maximum feasible price or cost.

5. If no qualified Priority #1 or Priority #2 bidder is entitled to award, bidding may then be open to all other bidders, subject to the same specifications, qualifications and maximum feasible price or cost.

6. Any modifications of the specifications, qualifications or maximum feasible cost or price made subsequent to bid opening and which does not result in a contract award shall be rebid pursuant to the above procedures.

7. Notwithstanding any provision of this Act, in the event that federal law prohibits bid or procurement opportunity or preference as provided herein or prohibits negotiations with a bidder other than the bidder with the lowest bid or price offer, the initial bidding shall be opened to all Priority #1 and #2 businesses; and award shall be made to the bidder offering the lowest price, provided that the bid is less than or equal to the maximum feasible cost or price.

D. Subcontracting Requirements. Prior to the bid opening, prime contractors shall submit to the Business Regulatory Department a subcontracting plan listing the following:

1. Subcontractors and suppliers to be used by the prime contractor;

2. Procedures used in selecting subcontractors and suppliers; and

3. Subcontracts or lease agreements for equipment to be used in performance of the contract.

E. Prime and Subcontractor Performance Bonding: Permitted Alternatives. The prime contractor shall obtain surety bonding or other performance security from subcontractors to secure their performance and wage obligations including, but not limited to cash bonds, letters of credit and cash monitoring systems such as retention, escrow and/or assignment of construction accounts. The prime contractor shall determine the form of performance security. The prime contractor shall maintain guaranteed security and be ultimately liable for performance of subcontractors.

F. Minimum Subcontract and Procurement Percentage Requirements. The Business Regulatory Department shall have the authority to require all procurement entities and prime contractors to comply with current minimum percentages for procurement and subcontract awards to Navajo-owned and controlled entities, firms and organizations, based upon availability and qualifications of such entities to provide specific products and services.

G. Prior Approval of Modifications. Any contract modification that results in a higher cost or price in excess of twenty percent (20%) of the original amount of the contract or if the procuring party substantially modifies such project, activity or transaction, shall be subject to review and approval by the Business Regulatory Department, to ensure that such modifications are not contrary to the purposes, intent or other provisions of other applicable laws.

H. Required Adherence to Priority Certification. Procuring entities shall not award contracts to non-Navajo owned and controlled entities at a price equal to or greater than the price offered by an equally qualified Priority #1 or #2 business.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 5, July 30, 1985.

Cross References

Contracts, see 2 N.N.C. § 223.

§ 206. Waivers

No Waiver of any requirement of this Act shall be granted except by valid resolution of the Navajo Nation Council.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 6, July 30, 1985.

§ 207. Implementation and Compliance with Navajo Nation Business Opportunity Provisions; Specific Duties and Responsibilities

A. Economic Development Committee. The Economic Development Committee of the Navajo Nation Council shall have the responsibility and authority to review, amend, modify and approve proposed rules and regulations for implementation of this Act.

B. Division of Economic Development. The Division of Economic Development of the Navajo Nation shall be responsible for administering, enforcing and implementing the provisions herein.

C. Business Regulatory Department. The Business Regulatory Department within the Division of Economic Development, shall be responsible for:

1. Developing and maintaining a certification program to determine the appropriate certification priority of business entities.

2. Promulgating rules and regulations to implement this Act. All proposed rules and regulations shall be published for public comments at least 90 days prior to submission to the Economic Development Committee of the Navajo Nation Council for final review and approval.

3. Publishing, maintaining and making available approved rules, regulations, guidelines and forms including provisions of this Act, to ensure that all Navajo Nation entities, all business entities and the Navajo People are kept fully informed of all current laws, rules, regulations and procedures for compliance hereto.

4. Regularly reviewing such rules and regulations in coordination with other Navajo Nation entities and agencies for applicability to economic and market conditions and their relevance to the interests of the Navajo People and the Navajo Nation and the intent of this Act.

5. Enforcing compliance with this Act, pursuant to the intent of this Act and the rules and regulations adopted hereto; requiring applicability of this Act to any proposed contract, subcontract or other transaction to be performed within the Navajo Nation by or on behalf of the Navajo Nation, as part of required clearance procedures, prior to approval by the appropriate oversight committee or authority; and requiring prebid, preconstruction or pre-qualification requirements as needed and appropriate to comply with this Act.

6. Coordinating efforts with federal agencies that require Indian preference or maximum utilization of minority business enterprises.

7. Maintaining and publishing a current Source List of all certified Priority #1 and #2 business entities, persons, firms, enterprises or organizations. By including an entity on such a Source List, the Business Regulatory Department in no way certifies that the entity is qualified to perform in the category in which it is listed. The purpose of this Source List is to utilize such list as a source document only for contract-letting and procuring parties required to determine and notify available Navajo and other Indian-owned entities in the respective areas of commerce which are subject to the provisions of this Act.

8. Providing, in accordance with its responsibilities, capabilities and available resources, in coordination with those of other responsible and appropriate Navajo Nation departments and entities, such community, governmental and business sector educational programs, information and advice as may be necessary and appropriate from time to time, to the continued understanding and awareness by such entities of the policies, objectives, and current procedural requirements for compliance with all provisions of this Act and the current rules and regulations adopted hereunder.

9. Recommend disciplinary action for Navajo Nation employees or officials found to be in violation or noncompliance with this Act pursuant to the applicable Executive, Judicial, or Legislative Navajo Nation Personnel Policies Manual, or the Ethics in Government Law.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 7, July 30, 1985.

CD-68-89, December 15, 1989.

Cross References

Contracts, generally, see 2 N.N.C. § 185(B).

Contract signatures, see 2 N.N.C. § 222.

§ 208. Certification of Eligible Entities and Authorization of Business Activities

Establishment of Procedure. The Business Regulatory Department shall have the following duties, responsibilities and authority:

A. Require timely submission of information and documentation on percentage of ownership and organization structure as required herein for certification or recertification eligibility;

B. Deny certification if required information is not provided in a timely manner;

C. Renew, suspend or decertify certifications. Annual, temporary or conditional certifications may be issued based on the circumstances. Certifications shall be reviewed based on new information or changes in organization or operations which materially affect eligibility for certification. Reviews shall be conducted in a manner so as to avoid any loss of eligibility to entities entitled hereto;

D. Certified businesses entities shall be required to disclose changes in organization and/or ownership that may materially affect the eligibility for preference priority certification; and

E. All confidential certification information shall be kept confidential and shall not be disclosed except as necessary in a proceeding under this Act and other applicable laws.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 8, July 30, 1985.

§ 209. Monitoring and Enforcement

A. Navajo Nation Review and Approval Process. All proposed professional services, procurement and construction contracts shall be reviewed by the Business Regulatory Department for compliance with the Act.

B. Procedure Upon Alleged Violation. To investigate alleged violations or noncompliance of this Act, the Business Regulatory Department shall:

1. Investigate any alleged violation and/or complaint under this Act upon receipt of a written document;

2. Prepare a written summary of facts constituting a violation of the Act or applicable rules, and provide all statements of witnesses along with the summary thereof; and

3. Initially seek voluntary compliance and appropriate remedial action pursuant to this Act.

4. If voluntary compliance or remediation is not possible, the Department shall render a decision pursuant to this Act.

5. A decision by the Business Regulatory Department may be appealed pursuant to § 211 of this Act.

C. Interim Project Suspension; Temporary Restraining Orders and Permanent Injunctive Relief from Navajo Nation Court.

1. In the event of a violation of or noncompliance with this Act presenting a probability of continuing material and irreparable harm which is greater than the harm from suspension of performance, the Executive Director of the Division of Economic Development shall, with assistance from the Navajo Nation Department of Justice, on behalf of the threatened interests of the Navajo Nation and of innocent third parties, immediately apply to the District Court of the Navajo Nation for a temporary restraining order and an order to show cause why permanent injunctive relief should not be granted (including orders to permanently cease and desist such performance as determined appropriate) according to the Navajo Nation Rules of Appellate Procedure.

2. If a Navajo Nation Court orders suspension of performance, the Division of Economic Development shall take immediate remedial action as authorized by said Court to prevent or minimize material harm and damage to innocent third parties and to the interests of the Navajo Nation resulting or likely to result from such suspension of performance.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 9, July 30, 1985.

Note. § 209(C)(1) reference to Navajo Nation Rules of Civil Appellate Procedure changed to the Navajo Nation Rules of Civil Procedure.

§ 210. Imposition of sanctions

Upon opportunity for hearing and determination as provided herein, the Administrative Hearing Officer may impose any and all of the following sanctions for violation of this Act or the rules and regulations lawfully promulgated hereunder:

A. Civil monetary fines not to exceed five hundred dollars ($500.00) per day, per violation.

B. Suspension or termination of a party's authorization to engage in business activity on the Navajo Nation; provided that the party shall be given a reasonable time to remove its equipment and other property it may have on the Navajo Nation and to take such measures to facilitate the satisfaction or assumption of any contractual obligations it has.

C. Prohibit the party from engaging in future business activity on the Navajo Nation for a specified period or permanently, pursuant to applicable laws of the Navajo Nation.

D. Require the party to make such changes in its performance, organization or operations to comply with this Act.

E. Impose other sanctions as appropriate to ensure compliance and to remedy any harm or damages from violation of this Act pursuant to applicable laws.

F. Recommend corrective or remedial action to the President of the Navajo Nation, or the Navajo Nation Council or its appropriate standing committee for Navajo Nation entities in violation or noncompliance with this Act.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 10, July 30, 1985.

§ 211. Appeals

A. Appeals to Business Regulatory Department. Appeals can be made by those businesses who are denied priority certification or parties that are adversely affected by a decision with the Act. Appeals shall not include those matters which are found through an investigation conducted under § 208 (b) of this Act to be private contractual disputes between parties. If a business is denied priority certification, the business may appeal the decision for administrative resolution to the Director of the Business Regulatory Department (or successor agency or designee) by filing with the Director a notice of appeal within 10 days of the date of the written adverse decision. The written notice of appeal shall:

1. Identify the business that was denied certification or license or adversely affected by a decision made pursuant to this Act;

2. Provide a short statement indicating the nature and circumstances of the denial or decision;

3. State the basis for the appeal; and,

4. State the remedial action being sought by the business or party.

B. Appeals to the Hearing Officer. If the Director upholds the Department's decision to deny certification to the affected business, the appealing party may appeal the Director's decision to the Navajo Office of Hearings and Appeals for assignment to an Administrative Hearing Officer.

1. The hearing officer shall hear the appeal within 30 days of receipt of the notice of appeal.

2. Upon mutual agreement with the appealing party, time extensions in increments of not more than 15 days may be granted.

3. Notice shall be provided to the parties at least 10 days in advance of hearing date.

4. Each party at the hearing may be represented by legal counsel and shall have the opportunity to subpoena witnesses and documents, present evidence and examine witnesses.

5. After the hearing each party shall have 10 days to submit in writing proposed findings of facts and conclusions of law. The hearing officer may uphold or reverse the appealed decision(s) or any part thereof, but may not grant any other relief.

6. The hearing officer shall issue written findings of facts and conclusions of law that shall state the decision and grounds thereof.

C. Appeals to the Courts. The decision of the hearing officer may be appealed by the party adversely affected to the Navajo Nation Supreme Court pursuant to the Navajo Nation Rules of Civil Appellate Procedure. The court shall review the decision of the hearing officer and the administrative record only. The decision shall not be subject to de novo review on appeal. The court may substitute its judgment on those questions of law within its special competence but shall otherwise uphold the decision of the hearing officer where reasonable.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 11, July 30, 1985.

§ 212. Other Navajo Nation Entities and Associated Agencies

All Navajo Nation entities, departments and other agencies involved in any stage of contracting, subcontracting or other procurement process shall comply with this Act in accordance with applicable law.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 12, July 30, 1985.

§ 213. Severability

If any provision of this Act or any rule or regulation adopted hereto is found invalid, the remainder of this Act and of the rules and regulations adopted hereto shall not be affected thereby.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 13, July 30, 1985.

§ 214. Effective Date

The effective date of this Act shall be the date of its approval by the Navajo Nation Council.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 15, July 30, 1985.

§ 215. Periodic Review and Amendments

This Act may be amended from time to time only by the Navajo Nation Council upon the recommendation of the Economic Development Committee.

History

CJA-07-05, January 28, 2005.

CAP-37-02, April 19, 2002.

CJY-59-85, Exhibit C, § 18, July 30, 1985.

Note. Previously numbered Section 216. Former Section 215 deleted.

Chapter 3. Control of Businesses within the Navajo Nation

History

Redesignated. Signs, Billboards, and Advertising Devices was moved from Title 5, Chapter 21, §§ 3401-3412 to Title 5, Chapter 3, Subchapter 3, §§ 421-432. (1995)

Subchapter 1. General Provisions

§ 401. Privilege of doing business—Authority to grant, deny or withdraw

The Navajo Nation Council, in order to promote the further economic development of the Navajo people, and in order to clearly establish and exercise the Navajo Nation's authority to regulate the conduct and operations of business within the Navajo Nation, hereby declares that the Navajo Nation has the sole and exclusive authority to grant, deny, or withdraw the privilege of doing business within the Navajo Nation, except where such authority is withdrawn from the Navajo Nation by the Constitution and applicable laws of the United States.

History

CMY-33-70, § 1, May 12, 1970.

§ 402. Businesses presently operating within the Navajo Nation

The privilege of doing business is hereby expressly granted to those businesses presently operating within the Navajo Nation pursuant to leases or permits for the use of land, or pursuant to contractual agreements with the Navajo Nation, its enterprises, and agencies subject to the control or supervision of the Navajo Nation Council or the Economic Development Committee, or with the lessees of the Navajo Nation.

History

CMY-33-70, § 2, May 12, 1970.

NAVAJO NATION CODE ANNOTATED

Title 5A

Navajo Uniform Commercial Code

Note. The numbering of Navajo Uniform Commercial Code sections remains as close to the original Uniform Commercial Code as possible to maintain the principle of uniformity.

Description of Articles

Article 1

Article 1 of the UCC is a general article which defines terms which are used throughout the UCC. (This section of the Navajo UCC has been substantially unchanged with the exception of the addition of § 1-110 which excludes certain types of barter transactions from the Navajo UCC.)

Article 2

Article 2 of the UCC governs the sale of personal property ("goods"). Goods means all things which are moveable at the time of their identification in the contract of sale. Goods do not include: (i) intangibles, such as patent rights; (ii) real property, such as houses and land; or (iii) services such as legal or accounting work.

Article 2 codifies contract law as applied to the sales of personal property. It deals with the four basic questions of contract law: (1) Is there sufficient agreement to be a contract?; (2) What are the terms of the contract?; (3) Have the parties properly performed their duties under the contract?; and (4) What are the remedies for breach of those duties? Although Article 2 establishes some rules which apply to all sales contracts, for the most part the rules in Articles 2 apply only where the parties themselves have not made their intentions clear. For example, one rule which applies to all contracts under Article 2 is that contracts for goods valued at more than five hundred dollars ($500.00) must be in writing to be enforceable (the Navajo UCC exempts certain barter transactions from this requirement under § 1-110).

Article 2 governs the formation of the contract, such as when an offer to sell or purchase has been made, how to change such an offer and how to accept it. For example, if a business makes an offer by mail to sell shoes and does not specify how the offer can be accepted, the offer can be accepted by any "reasonable means". Thus, the offer could be accepted by mail, telegram or even a telephone call if those methods were found to be reasonable.

Article 2 governs certain of the terms in a contract if the parties have not agreed on that term or have failed to provide for a situation. These terms include price, time of delivery, the point at which the risk of loss passes, warranties concerning the goods and remedies for failure to perform. For example, if the parties fail to agree upon or forget to include the place and time of delivery for the goods, the UCC states that the goods will be delivered at the seller's place of business and the time allowed for delivery will be "a reasonable time" as determined by prior dealings between the parties and industry custom.

Article 2 also governs the performance of the obligations under the contract. The questions which arise in this area concern the seller's obligation to deliver "conforming" goods, the buyer's obligation to accept "conforming" goods, the buyer's right to inspect the goods and the buyer's obligation to pay for the goods. For example, unless the parties agree otherwise, the buyer is obligated to pay for the goods at the time and place the goods are received.

Finally, Article 2 sets out the remedies for either party upon the failure of the other party to adequately perform its obligations. The remedies must deal with situations, for the seller, in which the buyer refuses to accept delivery, cancels the order, refuses to pay or becomes insolvent. For the buyer, these situations include those in which the seller has failed to deliver, has delivered "non-conforming" goods, or has delivered goods which causes an injury. For example, unless otherwise agreed by the parties, if during the course of several shipments the buyer refuses to make a payment when due: (i) the seller may withhold future delivery; (ii) may resell the remaining goods and sue to recover damages; or (iii) may sue to recover the full purchase price.

Article 3

Article 3 of the UCC deals with negotiable instruments, which include drafts, business and personal checks, certificates of deposits and promissory notes. Article 3 does not apply to money, documents of title or investment securities such as stocks and bonds. Commercial paper is frequently used as a cash substitute. Thus, a check could be used as a medium of payment instead of cash or a note maybe used as a deferred methods of payment.

Article 3 sets out the obligations and liabilities of the persons who issue negotiable instruments and those who are involved in their transfer. In the case of a check, they would include the person who writes the check, his bank, the banks who process the check, the bank which finally accepts the check and the person or company to whom the check is written. The type of situations for which Article 3 sets out rules include those in which the check is drawn on insufficient funds or the signature is forged.

Article 9

Article 9 of the UCC governs the creation and enforcement of security interests. A security interest is an interest of a creditor in specific property ("collateral") owned by a debtor. A security interest permits the secured creditor after default to sell particular collateral and to apply the proceeds of its sales to the payment of his secured debt. In contrast to a secured creditor, an "unsecured" creditor (i.e., a creditor without a security interest) has only general rights against the property of the debtor after the secured creditors have been paid, and an unsecured creditor has no rights against any particular property of a debtor. The most common examples of a security interest arise from the purchase of a vehicle such as a car or tractor by an individual. However, security interests are very important for business in financing the acquisition of capital equipment, such as machines, as well as the purchasing of inventory and selling goods on credit.

Article 9 facilitates the purchase of goods by improving the chances of a creditor's being repaid and thus encouraging him to sell goods on credit or, in the case of a bank, to lend money. It represents a comprehensive scheme of regulation of security interests in personal property. Article 9 does not regulate transactions in land or improvements. The Article establishes a central filing system so that creditors can determine the extent of the obligations of a debtor to other creditors and establishes procedures for a creditor to enforce a security interest in the case of a debtor's failure to pay. (The enactment of this article does not affect Navajo repossession law.)

A large part of Article 9 is concerned with establishing the priority of secured parties against each other or other creditors of the debtor. For example, if two creditors are depending on the same "collateral" of the debtor to "secure" their loans, then, generally, the first creditor to "file" a notice of his interest will have the right to have his loan repaid first from the sale of the collateral. However, Article 9 establishes special priority rules for secured parties who loan the money to "purchase" the collateral. This rule encourages the purchase of capital equipment by giving priority protection to loans or credit extended for the initial purchase of goods.

History

CJA-1-86 January 29, 1986.

Note. A "Background and Executive Summary of the Proposed NUCC" which included "The NUCC Development Process" and "The Purpose of the NUCC" was incorporated in CJA-1-86. However, for codification purposes, only the "Description of Articles 1, 2, 3 and 9" has been provided.

Article 1. General Provisions

Part 1. Short Title, Construction, Application, and Subject Matter of the Code

§ 1-101. Short title

This Navajo Uniform Commercial Code (5A N.N.C. § 1-101 *et seq.*) shall be known and may be cited as the "Navajo Uniform Commercial Code".

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. The Code makes no substantive change to this section except deleting references to Articles not adopted by the Navajo Nation.

Commentary. Each Article of the Code (except this article) may also be cited by its own short title. See §§ 2-101, 3-101 and 9-101.

Special Plain Language Comment

This provision provides a method of naming parts of the Navajo Uniform Commercial Code (the "Code").

§ 1-102. Purposes; rules of construction; variation by agreement

A. The Code shall be liberally construed and applied to promote its underlying purposes and policies.

B. Underlying purposes and policies of the Code are:

1. To simplify, clarify and modernize the law governing commercial transactions;

2. To permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and

3. To make uniform the law of commercial transactions throughout the Navajo Nation.

C. The effect of provisions of this Code may be varied by agreement, except as otherwise provided in this Code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Code may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

D. The presence in certain provisions of this Code of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under Subsection (C).

E. In this Code unless the context otherwise requires:

1. Words in the singular number include the plural, and in the plural include the singular; and

2. Words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

F. The "Official Comments" and the "Special Plain Language Comments" are informational only and not binding on the courts, since they do not purport to be comprehensive statements of the meaning and effect of the statute to which they refer.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. The Code adds a new section, "Special Plain Language Comments", to facilitate use of the Code, but new Subsection (F) makes clear that such comments and the Official Comments are not the law.

Commentary. 1. Subsections (A) and (B) are intended to make it clear that:

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

The 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 well as of the 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. Subsection (C) states affirmatively at the outset that freedom of contract is a principle of the Code: "the effect" of its provisions may be varied by "agreement". The meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement. But the Code seeks to avoid the type of interference with evolutionary growth found in *Manhattan Co. v. Morgan*, 242 N.Y. 38, 150 N.E. 594 (1926). Thus, private parties cannot make an instrument negotiable within the meaning of Article 3 except as provided in § 3-104; nor can they change the meaning of such terms as "bona fide purchaser", "holder in due course", or "due negotiation", as used in this Code. But an agreement can change the legal consequences which would otherwise flow from the provisions of the Code. "Agreement" here includes the effect given to course of dealing, usage of trade and course of performance by §§ 1-201, 1-205 and 2-208; the effect of an agreement on the rights of third parties is left to specific provisions of this Code and to supplementary principles applicable under the next section. The rights of third parties under § 9-301 when a security interest is unperfected, for example, cannot be destroyed by a clause in the security agreement.

This principle of freedom of contract is subject to specific exceptions found elsewhere in the Code and to the general exception stated here. The specific exceptions vary in explicitness: the Statute of Frauds found in § 2-201, for example, does not explicitly include 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; § 9-501(C), on the other hand, is quite explicit. Under the exception for "the obligations of good faith, diligence, reasonableness and care prescribed by this Code", provisions of the 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, § 1-205 incorporating into the agreement prior course of dealing and usages of trade is of particular importance.

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

4. Subsection (F) is intended to clarify the status of the "Special Plain Language Comments". These comments are only to assist the lay reader and are not to be used by parties to interpret the Code. The Official Comments have been adapted from the "Official Comments" of the Commissioners On Uniform State Laws to the corresponding sections of the Uniform Commercial Code as adopted by the States. The Official Comments to this Code do not attempt to describe the respects in which they depart from those other "Official Comments".

Special Plain Language Comment

This section describes the basic principles of the Code and how it relates to other laws. The section also describes generally the extent to which the Code may be varied by agreement by the parties to a contract.

Cross References

N.U.C.C. § 1-110.

§ 1-103. Supplementary general principles of law applicable

Unless displaced by the particular provisions of this Code or other applicable Navajo law, 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. The adoption of the Code does not preempt the consumer protection laws of the states which continue to apply to appropriate transactions pursuant to 7 N.N.C. § 204 to the extent that such laws would be applicable.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. Except as stated in this paragraph, this section is intended to have the same meaning and effect as § 1-103 of the Uniform Commercial Code as adopted by the states. In addition, since the Uniform Sales Code was never adopted by the Navajo Nation, the Navajo Nation has adopted certain statutory provisions regarding capacity to contract. The final sentence has been added to clarify the status of consumer protection laws after the adoption of the Code.

Commentary. 1. This section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Code.

2. The general law of capacity will be limited by any Navajo statute or ordinance which limits the capacity of a non-complying person to sue. These limits are equally applicable to contracts of sale to which such person is a party.

3. The listing given in this section is merely illustrative; no listing could be exhaustive. Nor is the fact that in some sections particular circumstances have led to express reference to other fields of law intended at any time to suggest the negation of the general application of the principles of this section.

4. Except as provided in § 1-110, the Code does not preempt the consumer protection laws of the states which apply to a transaction pursuant to 7 N.N.C § 204. However, the application of such state laws to transactions governed by this Code may be varied or preempted by subsequent Navajo legislation.

Special Plain Language Comment

The Code does not settle all questions in commercial law. A person or a court must depend on other bodies of law to aid in the interpretation of its provisions.

§ 1-104. Construction against implicit repeal

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

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-104 of the Uniform Commercial Code as adopted by the states.

Commentary. This section is intended to express the policy that no Code which bears evidence of carefully considered permanent regulative intention should lightly be regarded as impliedly repealed by subsequent legislation. This 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.

Special Plain Language Comment

The Code should not be considered repealed by later laws unless no other interpretation is possible.

§ 1-105. Territorial application of the Code: parties' power to choose applicable law

A. Except as provided hereafter in this section, when a transaction bears a reasonable relation to the Navajo Nation and also to another state or nation, the parties may agree that the law either of the Navajo Nation or of such state or nation shall govern their rights and duties. Failing such agreement, this Code applies to transactions bearing an appropriate relation to the Navajo Nation.

B. Where one of the following provisions of this Code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified: Rights of creditors against sold goods. Section 2-402. Perfection provisions of the Article on Secured Transactions. Section 9-103.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-105 of the Uniform Commercial Code as adopted by the states, except that deletions were made to conform the Code to the legal status of the Navajo Nation.

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

2. Where there is no agreement as to the governing law, the Code is applicable to any transaction having an "appropriate" relation to the Navajo Nation. Of course, the Code applies to any transaction which takes place in its entirety in the Navajo Nation. But the mere fact that suit is brought in the Navajo Nation does not make it appropriate to apply the substantive law of the Navajo Nation. Cases where a relation to the Navajo Nation 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 the Navajo Nation 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-jurisdiction 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 Navajo Nation, 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. Choice of law decisions often appropriately rest on policies of giving effect to agreements and of uniformity of result, regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (B) 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 filing.

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

Special Plain Language Comment

Persons who make a commercial agreement may choose the law of either the Navajo Nation or another state or nation if their agreement has sufficient connection to the place they choose. Where the parties do not choose which law to use, the Code will apply if the transaction has enough contacts with the Navajo Nation.

What constitutes "reasonable" or "appropriate" relation to a transaction within the meaning of Uniform Commercial Code § 1-105(1), 63 A.L.R.3d 341 (1975).

§ 1-106. Remedies to be liberally administered

A. The remedies provided by this Code shall 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 nor special nor penal damages may be had except as specifically provided in this Code or by other rule of law.

B. Any right or obligation declared by this Code is enforceable by action unless the provision declaring it specifies a different and limited effect.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-106 of the Uniform Commercial Code as adopted by the states.

Commentary. Subsection (A) is intended to effect three things:

1. First, to negate the unduly narrow or technical interpretation of some remedial provisions of prior commercial statutes in other States by providing that the remedies in this Code are to be liberally administered to the end stated in the section. Second, to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the Code elsewhere makes it clear that damages must be minimized. Cf. §§ 1-203, 2-706(A), and 2-217(B). 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. § 2-204(C).

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

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

Cross References

5A N.N.C. §§ 1-103, 1-203, 2-204(C), 2-701, 2-706(A), 2-712(B), and 2-716.

Definitional Cross References

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Rights". Section 1-201.

Special Plain Language Comment

Remedies for breaking an agreement or failing to perform a promise under the Code should be applied in a way which puts both parties, as much as possible, in the same position as they would have been if the agreement had not been breached. The Code also limits the ability to recover damages greater than the loss.

§ 1-107. Waiver or renunciation of claim or right after breach

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-107 of the Uniform Commercial Code as adopted by the states.

Commentary. 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 such renunciation is in writing and signed and delivered by the aggrieved party. Its provisions, however, must be read in conjunction with the section imposing an obligation of good faith (§ 1-203). There may, of course, also be an oral renunciation or waiver sustained by consideration but subject to Statute of Frauds provisions and to the section of Article 2 on Sales dealing with the modification of signed writings (§ 2-209). As is made express in the latter Section, this Code fully recognizes the effectiveness of waiver and estoppel.

Cross References

5A N.N.C. §§ 1-203, 2-201 and 2-209. And see 5A N.N.C. § 2-719.

Definitional Cross References

"Aggrieved party". Section 1-201.

"Rights". Section 1-201.

"Signed". Section 1-201.

"Written". Section 1-201.

§ 1-108. Severability

If any provision or clause of this Code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-108 of the Uniform Commercial Code adopted by the states.

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

Definitional Cross References

"Person". Section 1-201

§ 1-109. Section captions

Section captions are parts of the Code.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-109 of the Uniform Commercial Code adopted by the states.

Commentary. To make explicit in all jurisdictions that section captions are a part of the text of this Code and not mere surplusage.

§ 1-110. Special limitations on application of Code

Notwithstanding any other provision of this Code to the contrary, this Code shall not apply to any exclusively barter transaction in which the aggregate market value of all the goods and services involved in the transaction does not exceed ten thousand dollars ($10,000) at the time of the transaction. Such transactions shall be governed by the customs and usages of the Navajo Nation.

History

CJA-1-86 January 29, 1986.

Official Comment

Changes. This section does not appear in the Uniform Commercial Code as adopted by the states. It has been added in order to prevent the Code from interfering in the types of transactions found in the traditional Navajo economy. This section preempts state law, including state consumer protection statutes, for these transactions which will be governed solely by the customs and usages of the Navajo Nation. See § 1-103, Comment 4.

Special Plain Language Comment

This section exempts certain transactions in the traditional Navajo economy from the Code.

§ 1–111. Administration of the NUCC; regulations

A. The Department of Commerce within the Division of Economic Development, or its designated successor, shall be charged with the administration of this Code. Said Department is authorized to employ such personnel as may be necessary for the administration of this Code.

B. The Department of Commerce within the Division of Economic Development, or its designated successor, is authorized to promulgate, upon the review and approval of the Attorney General and the Economic Development Committee of the Navajo Nation Council, regulations regarding those matters designated to be set by regulation herein. Provided, the Department shall set forth in such regulations the specific section herein to which they relate.

History

CD–61–86, December 11, 1986.

Note. Slightly reworded for purposes of statutory form.

Part 2. General Definitions and Principles of Interpretation

§ 1–201. General definitions

Subject to additional definitions contained in the subsequent Articles of this Code which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Code:

A. "Action" in the sense of a judicial proceeding including recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

B. "Aggrieved party" means a party entitled to resort to a remedy.

C. "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Code (§§ 1–205 and 2–208). Whether an agreement has legal consequences is determined by the provisions of this Code, if applicable; otherwise by the law of contracts (§ 1–103). (Compare "Contract".)

D. "Bank" means any person engaged in the business of banking.

E. "Barter" means to exchange goods without exchanging money.

F. "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

G. "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air way bill.

H. "Branch" includes a separately incorporated foreign branch of a bank.

I. "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.

J. "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind, but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale, but does not include a transfer in bulk or as security for, or in total or partial satisfaction of a money debt.

K. "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

L. "Contract" means the total legal obligation which results from the parties' agreement as affected by this Code and any other applicable rules of law. (Compare "Agreement".)

M. "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.

N. "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

O. "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

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

Q. "Fault" means wrongful act, omission or breach.

R. "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Code to the extent that under a particular agreement or document unlike units are treated as equivalents.

S. "Genuine" means free of forgery or counterfeiting.

T. "Good faith" means honesty in fact in the conduct or transaction concerned.

U. "Holder" means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or his order or to bearer or in blank.

V. To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

W. "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

X. A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

Y. "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

Z. "Navajo Indian Country" means the territory defined in 7 N.N.C. § 254. Certain communities within the exterior boundaries of "Navajo Indian Country" are excepted from the definition of "Navajo Indian Country" if they are predominantly non-Indian in character. 7 N.N.C. § 254(D).

AA. A person has "notice" of a fact when:

1. He has actual knowledge of it; or

2. He has received a notice or notification of it; or

3. From all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Code.

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

1. It comes to his attention; or

2. It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

CC. Notice, knowledge or a notice of notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his 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 he has reason to know of the transaction and that the transaction would be materially affected by the information.

DD. "Organization" includes a corporation, government or governmental subdivision, agency or tribal enterprise, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

EE. "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this Code.

FF. "Person" includes an individual or an organization (see § 1-102).

GG. "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.

HH. "Purchase" includes taking by sale, barter, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

II. "Purchaser" means a person who takes by purchase.

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

KK. "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

LL. "Rights" includes remedies.

MM. "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (§ 2-401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under § 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (§ 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (1) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (2) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

NN. "Send" in connection with any writing or notice means 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. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

OO. "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

PP. "Surety" includes guarantor.

QQ. "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

RR. "Term" means that portion of an agreement which relates to a particular matter.

SS. "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes forgery.

TT. "Value". Except as otherwise provided with respect to negotiable instruments (§ 3-303), a person gives "value" for rights if he acquires them:

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

2. As security for or in total or partial satisfaction of a pre-existing claim: or

3. By accepting delivery pursuant to a pre-existing contract for purchase; or

4. Generally, in return for any consideration sufficient to support a simple contract.

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

VV. "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. Except as stated in this paragraph, this section is intended to have the same meaning and effect as § 1-201 of the Uniform Commercial Code as adopted by the states. The phrase "tribal enterprise" has been added to the definition of "Organization". The word "barter" has been added to the definition of "Purchase". The definitions of the words "Barter" and "Navajo Indian Country" have been added.

Commentary. A-B. [Omitted]

C. "Agreement". As used in this 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 Code to displace a stated rule of law.

D-I. [Omitted]

J. "Buyer in ordinary course of business". The definition clarifies the type of person protected. Its major significance lies in § 2-403 and in the Articles on Secured Transactions (Article 9).

The reference to minerals and the like makes clear that a buyer in ordinary course buying minerals under the circumstances described takes free of a prior mortgage created by the sellers. See Comment to § 9-103.

A pawnbroker cannot be a buyer in ordinary course of business because the person from whom he buys goods (or acquires ownership after foreclosing an initial pledge) is typically an ordinary user and not a person engaged in selling goods of that kind.

K. "Conspicuous". This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it.

L-N. [Omitted]

O. "Delivery" refers to physical possession.

P. "Document of title". By making it explicit that the obligation of designation of a third party as "bailee" is essential to a document of title, this definition clearly rejects any such result which treats 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 (1) 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.

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.

Q. [Omitted]

R. "Fungible". Fungibility of goods "by agreement" has been added for clarity and accuracy.

S. [Omitted]

T. "Good faith". "Good faith", whenever it is used in the Code, means at least what is here stated. In certain Articles, by specific provision, additional requirements are made applicable. See, e.g., § 2-103(A)(2). To illustrate, in the Article on Sales, § 2-103, good faith is expressly defined as including in the case of a merchant observance of reasonable commercial standards of fair dealing in the trade, so that throughout that Article wherever a merchant appears in the case an inquiry into his observance of such standards is necessary to determine his good faith.

U-W. [Omitted]

X. "Insolvent". The three tests of insolvency—"ceased to pay his debts in the ordinary course of business", "cannot pay his 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.

Y. "Money". The test adopted 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.

Z. "Navajo Indian Country". This definition was added to clarify the scope of the Code.

AA. "Notice". Under the definition a person has notice when he has received a notification of the fact in question. But by the last sentence the Code leaves open the time and circumstances under which notice or notification may cease to be effective. Therefore, such cases as *Graham v. White-Phillips Co.*, 296 U.S.

27, 56 S.Ct. 21, 80 LEd. 20 (1935), are not overruled.

BB. "Notifies". This is the word 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. The second sentence states when a notification is received.

CC. This makes clear that reason to know, 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 P only from the time when it was or should have been communicated to the individual conducting that transaction.

DD. "Organization". This is the definition of every type of entity or association, excluding an individual, acting as such. The definition of "organization" given here includes a number of entities or associations not specifically mentioned in prior definition of "person", namely, government, governmental subdivision (including tribal enterprise) or agency, business trust, trust and estate.

EE. "Party". Mention of a party includes, of course, a person acting through an agent. However, where an agent comes into opposition or contrast to his principal, particular account is taken of that situation.

FF. "Person". See Comment to definition of "Organization". The reference to § 1-102 is to Subsection (E) of that section.

GG. [Omitted]

HH. "Purchase" includes acquisition of property by barter. Barter transfers of property within the "traditional economy" of the Navajo People are purchases under this Code. See also § 1-110.

II. [Omitted]

JJ. "Remedy". The purpose is to make it clear that both remedy and rights (as defined) include those remedial rights of "self help" which are among the most important bodies of rights under this Code, remedial rights being those to which an aggrieved party can resort on his own motion.

KK. [Omitted]

LL. "Rights". See Comment to "Remedy".

MM. "Security Interest". The present definition is elaborated, in view especially of the complete coverage of the subject in Article 9. Notice that in view of the Article the term includes the interest of certain outright buyers of certain kinds of property. The last two sentences give guidance on the question whether reservation of title under a particular lease of personal property is or is not a security interest.

NN. "Send". Compare "notifies".

OO. "Signed". The inclusion of authentication in the definition of "signed" is to make clear that as the term is used in this Code a complete signature is not necessary. Authentication maybe printed, stamped or written; it maybe 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 authentications 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 authenticate the writing.

PP–RR. [Omitted]

SS. "Value". Commercial usage has tended to define value as 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 (A), (B) and (D) in substance continue the definitions of "value" in such commercial usage. Subsection (C) makes explicit that "value" is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingency into a fixed obligation.

This definition is not applicable to Article 3. 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.

TT. "Warehouse receipt". Receipts issued by a field warehouse are included, provided the warehouseman and the depositor of the goods are different persons.

Special Plain Language Comment

When reading any sections in this Code, it is very important to check to see if any of the terms are defined and to read the definitions of those terms. Unless one reads the definitions, the full meaning of a statute may not be understood.

§ 1–202. 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 shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-202 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. This section is designed to supply judicial recognition for documents which have traditionally been relied upon as trustworthy by participants in commercial dealings.

2. This section is concerned only with documents which 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 which authorized or required the document. The documents listed are intended to be illustrative and not all inclusive.

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.

Definitional Cross References

"Bill of lading". Section 1-201.

"Contract". Section 1-201.

"Genuine". Section 1-201.

Special Plain Language Comment

Certain types of documents have special meaning and are presumed to be what they look like. Reliance on such documents is generally presumed to be reasonable.

§ 1-203. Obligation of good faith

Every contract or duty within this Code imposes an obligation of good faith in its performance or enforcement.

History

CJA-1-86 January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-203 of the Uniform Commercial Code as adopted by the states.

Commentary. This section sets forth a basic principle running throughout this Code. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. Particular applications of this general principle appear in specific provisions of the Code such as the option to accelerate at will (§ 1-208), the right to cure a defective delivery of goods (§ 2-508), the duty of a merchant buyer who has rejected goods to effect salvage operations (§ 2-603), substituted performance (§ 2-614), and failure of presupposed conditions (§ 2-615). The concept, however, is broader then any of these illustrations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Code. It is further implemented by § 1-205 on course of dealing and usage of trade.

It is to be noted that under the Sales Article definition of good faith (§ 2-103), contracts made by a merchant have incorporated in them the explicit standard not only of honesty in fact (§ 1-201), but also of observance by the merchant of reasonable commercial standards of fair dealing in the trade.

Cross References

Sections 1-201, 1-205, 1-208, 2-103, 2-508, 2-603, 2-614, and 2-615.

Definitional Cross References

"Contract". Section 1-201.

"Good faith". Section 1-201; 2-103.

§ 1-204. Time; reasonable time; "seasonably"

A. Whenever this Code requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable maybe fixed by agreement.

B. What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

C. An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-204 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. Subsection (A) 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. Under the section, the agreement which fixes the time need not be part of the main agreement, but may occur separately. Notice also that under the definition of "agreement" (§ 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.

Definitional Cross References

"Agreement". Section 1-201.

§ 1-205. Course of dealing and usage of trade

A. A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

B. 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 are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing, the interpretation of the writing is for the court.

C. A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

D. The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other, but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

E. An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

F. Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-205 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. This 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 under Subsection (A) is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the Code on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning (§ 2-208).

3. "Course of dealing" may enter the agreement either by explicit provisions of the agreement or by tacit recognition.

4. This Code deals with "usage of trade" as a factor in reading the commercial meaning of the agreement which 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' " this 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.

5. A usage of trade under Subsection (B) 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 (B), 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.

6. The policy of this Code controlling explicit unconscionable contracts and clauses (§§ 1-203, 2-302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable". However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

7. Subsection (C), giving the prescribed effect to usages of which the parties "are or should be aware", reinforces the provision of Subsection (B) requiring not universality but only the described "regularity of observance" of the practice or method. This Subsection also reinforces the point of Subsection

(B) that such usages may be either general to trade or particular to a special branch of trade.

8. Although the terms in which this Code defines "agreement" include the elements of 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 § 1-102(D).

9. In cases of a well established line of usage varying from the general rules of this 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.

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

Cross References

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

Point 2: Section 2-208.

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

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

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

Point 9: Section 2-204(C).

Definitional Cross References

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Term". Section 1-201.

Special Plain Language Comment

This section recognizes that words in a contract acquire meaning from the way the parties have acted toward each other as well as by how people in that type of situation usually deal with each other.

§ 1-206. Statute of Frauds for kinds of personal property not otherwise covered

A. Except in the cases described in Subsection (B) of this section, a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars ($5,000) in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

B. Subsection (A) of this section does not apply to contracts for the sale of goods (§ 2-201) nor to security agreements (§ 9-203).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-206 of the Uniform Commercial Code as adopted by the states.

Commentary. To fill the gap left by the Statute of Frauds provisions for goods (§ 2-201) and security interests (§ 9-203). The principal gap relates to sale of the "general intangibles" defined in Article 9 (§ 9-106) and to transactions excluded from Article 9 by § 9-104. Typical are the sale of bilateral contracts, royalty rights or the like. The informality normal to such transactions is recognized by lifting the limit for oral transactions to five thousand dollars ($5,000). In such transactions there is often no standard of practice by which to judge, and values can rise or drop without warning; troubling abuses are avoided when the dollar limit is exceeded by requiring that the subject matter be reasonably identified in a signed writing which indicates that a contract for sale has been made at a defined or stated price.

Definitional Cross References

"Action". Section 1-201.

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Sale". Section 2-106.

"Signed". Section 1-201.

"Writing". Section 1-201.

§ 1-207. Performance or acceptance under reservation of rights

A party who 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.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-207 of the Uniform Commercial Code as adopted by the states.

Commentary. 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 he makes or concurs in any interim adjustment in the course of performance. It does not affect or impair the provisions of this Code 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 feels to be unwarranted.

Cross References

Section 2-607.

Definitional Cross References

"Party". Section 1-201.

"Rights". Section 1-201.

Special Plain Language Comment

If there is a dispute about a deal, the person who wants to object will not lose the right to do so, if he states that he makes payment or otherwise performs "without prejudice" or "under protest".

§ 1-208. Option to accelerate at will

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he 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 whom the power has been exercised.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-208 of the Uniform Commercial Code as adopted by the states.

Commentary. The increased use of acceleration clauses either in the case of sales on credit or in time paper or in security transactions has led to some confusion in the cases as to the effect to be given to a clause which seemingly grants the power of an acceleration at the whim and caprice of the party. This section is intended to make clear that despite language which can 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 clause means that 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 agreement or to paper which in the first instance is payable at a future date.

Definitional Cross References

"Burden of establishing". Section 1-201.

"Good faith". Section 1-201.

"Party". Section 1-201.

"Term". Section 1-201.

Special Plain Language Comment

Some contract forms provide that one party has the power to demand that the other act or pay quicker than normally contemplated, relying upon words like those used in the statute. This section somewhat limits that right to avoid abuse of that power.

§ 1-209. Subordinated obligations

An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 1-209 of the Uniform Commercial Code as adopted by the states.

Commentary. 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 "intended to create a security interest", a "sale of accounts, contract rights or chattel paper", or a "security interest credit by contract", within the meaning of § 9-102. 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 last sentence of this section is intended to negate any implication that the section changes the law. It is intended to be declaratory of pre-existing law. Both the history and the test of Article 9 make it clear that it was not intended to cover subordination agreements. The provisions of § 9-203 for signature by the "debtor" would be entirely unworkable if read to require signature by public holders of subordinated investment securities. The priorities, filing provisions and remedies on default provided by Article 9 would also be largely inappropriate in many situations. The precautionary language § 9-316 preserving subordination of priority by agreement between secured parties points to the conclusion that similar arrangements among unsecured lenders are not covered unless otherwise within the scope of the Article.

4. The enforcement of subordination agreements is largely left to supplementary principles under § 1-103. If the fact of subordination is noted on a negotiable instrument, a holder under §§ 3-302 and 3-306 is subject to the term because notice precludes him from taking free of the subordination. Section 3-302(C)(1) and 3-306 severely limit the rights of levying creditors of a subordinated creditor in such cases.

Definitional Cross References

"Agreement". Sections 1-201.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Person". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

Special Plain Language Comment

This section recognizes that two or more creditors may agree among themselves who should be paid first, who has first rights to collateral, and who should have the greatest risk of loss, if the debtor is unable to pay all of them. Such agreements are not subject to regulation under Article 9 as security interests.

Article 2. Sales

Part 1. Short Title, General Construction, and Subject Matter

§ 2-101. Short title

This article shall be known and may be cited as the Navajo Uniform Commercial Code—Sales.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-101 of the Uniform Commercial Code adopted by the states.

Commentary. The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men and women turn upon the location of an intangible something, the passing of which no man or woman can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

§ 2-102. Scope; certain security and other transactions excluded from this article

Unless the context otherwise requires, this article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-102 of the Uniform Commercial Code adopted by the states. Certain federal and Navajo statutes regulating trade with Indians should be reviewed to determine their applicability. Transactions with Indians or Indian tribes may also require approval under certain federal and tribal statutes. See 25 U.S.C. §§ 81, 196, 261, 396 *et seq*. (1976); 25 C.F.R. § 162 (1984); 7 N.N.C. § 204; and titles 3, 5, 18, and 24 of the Navajo Nation Code. "Security transaction" is used in the same sense as in the Article on Secured Transactions (Article 9).

Cross References

NUCC, Article 9.

Definitional Cross References

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Present sale". Section 2-106.

"Sale". Section 2-106.

Special Plain Language Comment

This section limits the scope of this article to transactions in "goods" (see § 2-105 for the definition of "goods") and distinguishes it from Article 9 which governs "secured transactions" or contracts for services. It also clearly states that special statutes relating to consumers and other groups are not repealed by the Code although the Code may effect such transactions governed by such statutes in areas not regulated by specific statutes.

§ 2-103. Definitions and index of definitions

A. In this article unless the context otherwise requires:

1. "Buyer" means a person who buys or contracts to buy goods.

2. "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.

3. "Receipt" of goods means taking physical possession of them.

4. "Seller" means a person who sells or contracts to sell goods.

5. "Consignee" means the person named in a bill to whom or to whose order the bill promises delivery.

6. "Consignor" means the person named in a bill as the person from whom the goods have been received for shipment.

B. Other definitions applying to this article or to specified parts thereof, and the sections in which they appear are:

"Acceptance". Section 2-606.

"Banker's credit". Section 2-325.

"Between merchants". Section 2-104.

"Cancellation". Section 2-106(D).

"Commercial unit". Section 2-105.

"Confirmed credit". Section 2-325.

"Conforming to contract". Section 2-106.

"Contract for sale". Section 2-106.

"Cover". Section 2-712.

"Entrusting". Section 2-403.

"Financing agency". Section 2-104.

"Future goods". Section 2-105.

"Goods". Section 2-105.

"Identification". Section 2-501.

"Installment contract". Section 2-612.

"Letter of Credit". Section 2-325.

"Lot". Section 2-105.

"Merchant". Section 2-104.

"Overseas". Section 2-323.

"Person in position of seller". Section 2-707.

"Present sale". Section 2-106.

"Sale". Section 2-106.

"Sale on approval". Section 2-326.

"Sale or return". Section 2-326.

"Termination". Section 2-106.

C. The following definitions in other Articles apply to this article:

"Check". Section 3-104.

"Consumer goods". Section 9-109.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

D. In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. The Definitions of "consignee" and "consignor" have been added to the definitions in this section since they are used in Article 2, but normally defined in Article 7 of the Uniform Commercial Code which has not been adopted by the Navajo Nation.

Commentary. 1. The phrase "any legal successor in interest of such person" is not included in the definition of buyer and seller since § 2-210 of this article, which limits some types of delegation of performance on assignment of a sales contract, makes it clear that not every such successor can be safely included in the definition. In every ordinary case, however, such successors are as of course included.

2. "Receipt" must be distinguished from delivery particularly in regard to the problems arising out of shipment of goods, whether or not the contract calls for making delivery by way of documents of title, since the seller may frequently fulfill his obligations to "deliver" even though the buyer may never "receive" the goods. Delivery with respect to documents of title is defined in

Article 1 and requires transfer of physical delivery. Otherwise the many divergent incidents of delivery are handled incident by incident.

Cross References

Point 1: See Section 2-210 and Comment thereon.

Point 2: Section 1-201.

Definitional Cross References

"Person". Section 1-201.

§ 2-104. Definitions: "merchant"; "between merchants"; "financing agency"

A. "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill maybe attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. The definition of merchant shall not include individual artists.

B. "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (§ 2-707).

C. "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-104 of the Uniform Commercial Code adopted by the states except that individual artists are not considered merchants. The official comments establish standards for determining whether a farmer or rancher is a merchant.

Commentary. 1. This article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. It thus adopts a policy of expressly stating rules applicable "between merchants" and "as against a merchant", wherever they are needed instead of making them depend upon the circumstances of each case as in the statutes cited above. This section lays the foundation of this Policy by defining those who are to be regarded as professionals or "merchants" and by stating when a transaction is deemed to be "between merchants".

2. The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

The special provisions as to merchants appear only in this article and they are of three kinds. Sections 2-201(B), 2-205, 2-207 and 2-209 dealing with the Statute of Frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language, "who ... by his occupation holds himself out as having knowledge or skill peculiar to the practices ... involved in the transaction ... ", since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants". But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.

On the other hand, in § 2-314 on the warranty of merchantability, such warranty is implied only "if the seller is a merchant with respect to goods of that kind". Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. Similarly in § 2-312(C) the warranty that the goods are delivered free of any rightful claim of a third party is limited to those who are dealing in the goods of that kind. The exception in § 2-402(B) for retention of possession by a merchant-seller falls in the same class; as does § 2-403(B) on entrusting of possession to a merchant "who deals in goods of that kind".

A third group of sections includes § 2-103(A)(2), which provides that in the case of a merchant, "good faith" includes observance of reasonable commercial standards of fair dealing in the trade; §§ 2-327(A)(3), 2-603 and 2-605, dealing with responsibilities of merchant buyers to follow seller's instructions, etc.; 2-509 on risk of loss, and 2-609 on adequate assurance of performance. This group of sections applies to persons who are merchants under either the "practices" or the "goods" aspect of the definition of merchant.

3. Individual artists generally do not have the familiarity with business customs such as firm offer (§ 2-205) and confirmatory memorandum (§ 2-207) which is assumed by § 2-104(A). Accordingly, individual artists are not considered merchants.

The determination of whether a farmer (or a rancher) is a merchant under the Code should consider the following factors: quantity and dollar amount of the transactions, the frequency and length of time which the farmer (or rancher) had engaged in selling the crops (or livestock) in the transaction, whether it was his principal crop (or type of livestock), and the farmer's (or rancher's) familiarity with the market in which the crop (or livestock) is sold. A farmer (or rancher) shall not be considered a merchant under the Code if the transaction involves the isolated sale of his own crops (or livestock). See

Fear Ranches, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972).

4. The "or to whom such knowledge or skill may be attributed by his employment of an agent or broker ... " clause of the definition of merchant means that even persons such as universities, for example, can come within the definition of merchant if they have regular purchasing departments or business personnel who are familiar with business practices and who are equipped to take any action required.

Cross References

Point 1: See Sections 1-102 and 1-203.

Point 2: See Sections 2-314, 2-315 and 2-320 to 2-325, of this article, and Article 9.

Definitional Cross References

"Bank". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Goods". Section 2-105.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

This section defines merchants as those who are either: (i) familiar with general business practices; or (ii) familiar with a particular good because they deal in it regularly. Merchants are generally held to higher standards of conduct. A person's status as a merchant depends on the type of transaction and the goods involved.

§ 2-105. Definitions: "transferability"; "goods"; "future goods"; "lot"; "commercial unit"

A. "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 2-107).

B. Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

C. There may be a sale of a part interest in existing identified goods.

D. An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

E. "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

F. "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit maybe a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-105 of the Uniform Commercial Code adopted by the states. In certain circumstances goods attached to the land may be considered trust property and thus subject to certain trusteeship obligations of the federal government.

Commentary. 1. The definition of "goods" is based on the concept of movability. It is not intended to deal with things which are not fairly identifiable as moveables before the contract is performed.

Growing crops are included within the definition of goods since they are frequently intended for sale. The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the provisions of the section of identification can apply as in the case of crops to be planted. The reason for this definition also leads to the inclusion of a wool crop or the like as "goods" subject to identification under this article.

The exclusion of "money in which the price is to be paid" from the definition of goods does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.

As to contracts to sell timber, minerals, or structures to be removed from the land § 2-107(A) controls.

The use of the word "fixtures" is avoided in view of the diversity of definitions of that term. This article in including within its scope "things attached to realty" adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition become "goods" upon the making of the contract for sale. "Things attached to realty" may be considered, in some instances, trust property and thus subject to certain limitations on transfer by the federal government. See 25 U.S.C. §§ 81, 196, 261, 396, 406, 407, 635, 2101 (1984) See also F. Cohen, Handbook of federal Indian Law (1982).

"Investment securities" are expressly excluded from the coverage of this article. It is not intended by this exclusion, however, to prevent the application of a particular section of this article by analogy to securities when the reason of that section makes such application sensible and the situation is not governed by Article 8 of the Uniform Commercial Code (Article 8 of the Uniform Commercial Code has not been adopted by the Navajo Nation); the rights of parties which would be governed under Article 8 are governed by Navajo law pursuant to 7 N.N.C. § 204.

2. References to the fact that a contract for sale can extend to future or contingent goods and that ownership in common follows the sale of apart interest have been omitted here as obvious without need for expression; hence no inference to negate these principles should be drawn from their omission.

3. Subsection (D) does not touch the question of how far an appropriation of a bulk of fungible goods may or may not satisfy the contract for sale.

4. Subsections (E) and (F) on "lot" and "commercial unit" are introduced to aid in the phrasing of later Sections.

5. The question of when an identification of goods takes place is determined by the provisions of § 2-501 and all that this section says is what kinds of goods may be the subject of a sale.

Cross References

Point 1: Section 2-107, 2-201 and 2-501.

Point 5: Section 2-501.

See also Section 1-201.

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Fungible". Section 1-201.

"Money". Section 1-201.

"Present sale". Section 2-106.

"Sale". Section 2-106.

"Seller". Section 2-103.

Special Plain Language Comment

This section defines "goods", which are the subject of Article 2. The definition is based on the "movability" of the goods. The Code distinguishes between goods presently in existence and identifiable and those either not presently in existence or not identifiable; the latter, "future" goods, are not insurable and may not be claimed by the buyer upon the seller's insolvency.

§ 2-106. Definitions: "contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming to contract"; "termination"; "cancellation"

A. In this article, unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (§ 2-401). A "present sale" means a sale which is accomplished by the making of the contract.

B. Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

C. "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

D. "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of termination except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-106 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A): "Contract for sale" is used as a general concept throughout this article, but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell unless the Article expressly so provides. See § 2-501.

2. Subsection (B): It is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer's part by the provisions of § 2-508 on seller's cure of improper tender or delivery. Moreover usage of trade frequently permits commercial leeway in performance and the language of the agreement itself must be read in the light of such custom or usage and also, prior course of dealing, and in a long term contract, the course of performance.

3. Subsections (C) and (D): These Subsections are intended to make clear the distinction carried forward throughout this article between termination and cancellation.

Cross References

Point 2: Sections 1-203, 1-205, 2-208 and 2-508.

Definitional Cross References

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

The definition of agreement and contract limit the application of Article 2 to contracts involving goods, rather than all contracts. The next definition, "conforming goods", expresses the rule that sellers must provide the goods exactly as ordered (although certain exceptions are later found in the Code).

§ 2-107. Goods to be severed from realty: recording

A. A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance, a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

B. A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in Subsection (A) or of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

C. The provisions of this section are subject to the trust responsibilities of the federal government. The provisions of this section are also subject to any third party rights provided by the law relating to realty records. The contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–107 of the Uniform Commercial Code adopted by the states. Contracts relating to this type of goods may require approval by the federal government as part its trust responsibilities.

Commentary. 1. Notice that Subsection (A) applies only if the minerals or structures "are to be severed by the seller". If the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of land rights apply to them. Therefore, the Statute of Frauds section of this article does not apply to such contracts though they must conform to the Statute of Frauds affecting the transfer of interests in land.

2. "Things attached" to the realty which can be severed without material harm are goods within this article regardless of who is to effect the severance. The word "fixtures" has been avoided because of the diverse definitions of this term, the test of "severance without material harm" being substituted. In some cases fixtures may be considered trust property and, thus, subject to the trust obligation and regulations of the federal government. The federal government may have to approve certain contracts relating to such goods. (For minerals see 25 U.S.C. §§ 396–400a, 635 and 2101 *et seq.,* and 18 N.N.C. § 1 *et seq.;* for timber see 25 U.S.C. §§ 196, 406 and 407) See generally 25 U.S.C. §§ 81, 261 (1976) See also § 9–313 and F. Cohen, *Handbook of federal Indian Law* (1982).

The provision in Subsection (C) for recording such contracts is within the purview of this article since it is a means of preserving the buyer's rights under the contract of sale.

3. The security phases of things attached to or to become attached to realty are dealt with in the Article on Secured Transactions (Article 9) and it is to be noted that the definition of goods in that Article differs from the definition of goods in this article. However, both Articles treat as goods

growing crops and also timber to be cut under a contract of severance.

Cross References

Point 1: Section 2-201.

Point 2: Section 2-105.

Point 3: Articles 9 and 9-105.

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Present sale". Section 2-106.

"Rights". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

This section provides that only minerals severed by the seller are subject to this article, but that timber and growing crops are subject to this article whether severed by the seller or buyer.

Part 2. Form, Formation and Readjustment of Contract

§ 2-201. Formal requirements; Statute of Frauds

A. Except as otherwise provided in this section a contract for sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

B. Between merchants if within reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (A) against such party unless written notice of objection to its contents is given within 10 days after it is received ..

C. A contract which does not satisfy the requirements of Subsection (A) but which is valid in other respects is enforceable:

1. If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

2. If the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

3. With respect to goods for which payment has been made and accepted or which have been received and accepted (§ 2-606).

D. This section does not apply to certain types of transactions involving solely barter (see § 1-110).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-201 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The required writing need not contain all the material terms of the contract and such materials terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller to accept a reasonable price which the trier of fact may well be trusted to determine. Again, frequently the price is not mentioned since the parties have based their agreement on a price list or catalogue known to both of them and this list serves as an efficient safeguard against perjury. Finally, "market" prices and valuations that are current in the vicinity constitute a similar check. Thus if the price is not stated in the memorandum it can normally be supplied without danger of fraud. Of course if the "price" consists of goods rather than money the quantity of goods must be stated.

Only three definite and invariable requirements as to the memorandum are made by this Subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed", a word which includes any authentication which identifies that party to be charged; and third, it must specify a quantity.

2. "Partial performance" as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

Part performance by the buyer requires the delivery of something by him that is accepted by the seller as such performance. Thus, part payment may be made by money or check, accepted by the seller. If the agreed price consists of goods or services, then they must also have been delivered and accepted.

3. Between merchants, failure to answer a written confirmation of a contract within 10 days of receipt is tantamount to a writing under Subsection (B) and is sufficient against both parties under Subsection (A). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under § 2-207.

4. Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract. For example, a buyer who takes possession of goods as provided in an oral contract which the seller has not meanwhile repudiated is not a trespasser. Nor would the Statute of Frauds provisions of this section be a defense to a third person who wrongfully induces a party to refuse to perform an oral contract, even though the injured party cannot maintain an action for damages against the party so refusing to perform.

5. The requirement of "signing" is discussed in the comment to § 1-201.

6. It is not necessary that the writing be delivered to anybody. It need not be signed or authenticated by both parties but it is, of course, not sufficient against one who has not signed it. Prior to a dispute no one can determine which party's signing of the memorandum may be necessary but from the time of contracting each party should be aware that to him it is signing by the other which is important.

7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection against fraud. Under this section it is no

longer possible to admit the contract in court and still treat the statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

8. Most transactions within the traditional Navajo culture are based on oral agreements. To maintain this tradition, certain barter transactions are exempted from the Code.

Cross References

See Sections 1-201, 2-202, 2-207, 2-209 and 2-304.

Definitional Cross References

"Action". Section 1-201.

"Between merchants". Section 2-104.

"Buyer ". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Notice". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Sale". Section 2-106.

"Seller". Section 2-103.

Special Plain Language Comment

This section is meant to reduce disputes over the existence of oral agreements by requiring that certain types of agreements be in writing to be enforceable in court. All contracts for the sale of goods with a price greater than five hundred dollars ($500.00) must have three characteristics to be enforceable in court: (1) they must be in writing, (2) they must be signed by the party against whom enforcement is sought, and (3) they must include the quantity of goods sold. The section also sets up a special rule to confirm transactions between merchants and two exceptions to the requirement of writing: (1) where there is partial performance of the contract and, (2) where goods have been "specially manufactured". Because of the oral traditions of the Navajo Nation, transactions involving only barter are not subject to this restriction.

§ 2-202. Final written expression: parol or extrinsic evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

A. By course of dealing or usage of trade (§ 1–205) or by course of performance (§ 2–208); and

B. By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–202 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section definitely rejects:

A. Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

B. The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

C. The requirement that a condition precedent to the admissibility of the type of evidence specified in Subsection (A) is an original determination by the court that the language used is ambiguous.

2. Subsection (A) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under Subsection (B), consistent additional terms not reduced to writing may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

Cross References

Point 3: Sections 1-205, 2-207, 2-302 and 2-316.

Definitional Cross References

"Agreed" and "agreement". Section 1-201.

"Course of dealing". Section 1-205.

"Parties". Section 1-201.

"Term". Section 1-201.

"Usage of trade". Section 1-205.

"Written" and "writing". Section 1-201.

Special Plain Language Comment

A written agreement which is agreed to be "final" will supersede any evidence of simultaneous oral agreements. This section also provides that written contracts will be interpreted in light of the customs or practices of the particular industry.

§ 2-203. Seals inoperative

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

History

CJA-1-86, January 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-203 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section makes it clear that every effect of the seal which relates to "sealed instruments" as such is wiped out insofar as contracts for sale are concerned. However, the substantial effects of a seal, except extension of the period of limitations, may be had by appropriate drafting as in the case of firm offers (see § 2-205).

2. This section leaves untouched any aspects of a seal which relate merely to signatures or to authentication of execution and the like. Thus, a statute providing that a purported signature gives prima facie evidence of its own authenticity or that a signature gives prima facie evidence of consideration is still applicable to sales transactions even though a seal may be held to be a signature within the meaning of such a statute. Similarly, the authorized affixing of a corporate seal bearing the corporate name to a contractual writing purporting to be made by the corporation may have effect as a signature without any reference to the law of sealed instrument.

Cross References

Point 1: Section 2-205.

Definitional Cross References

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Writing". Section 1-201.

§ 2-204. Formation in general

A. A contract for sale of goods maybe made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

B. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

C. Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is reasonably certain basis for giving an appropriate remedy.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-204 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) continues without change the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise. The legal effect of such an agreement is, of course, qualified by other provisions of this article.

2. Under Subsection (A) appropriate conduct by the parties may be sufficient to establish an agreement. Subsection (B) is directed primarily to the situation where the interchanged correspondence does not disclose the exact point at which the deal was closed, but the actions of the parties indicate that a binding obligation has been undertaken.

3. Subsection (C) states the principle as to "open terms" underlying later Sections of the Article. If the parties intend to enter into a binding agreement, this Subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough in itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are

intended to be applied, this Code making provision elsewhere for missing terms needed for performance, open price, remedies and the like.

4. The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions.

Cross References

Subsection (A): Sections 1-103, 2-201 and 2-302.

Subsection (B): Sections 2-205 through 2-209.

Subsection (C): See Part 3.

Definitional Cross References

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for Sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Term". Section 1-201.

Special Plain Language Comment

This section emphasizes that two parties may demonstrate an agreement in a variety of ways and that once an "agreement" is found to have been made the Code will attempt to resolve any unclear terms.

§ 2-205. Firm offers

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-205 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section is intended to modify the former rule which required that "firm offers" be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings.

2. The primary purpose of this section is to give effect to the deliberate intention of a merchant to make a current firm offer binding. The deliberation is shown in the case of an individualized document by the merchant's signature to the offer, and in the case of an offer included on a form supplied by the other party to the transaction by the separate signing of the particular clause which contains the offer. "Signed" here also includes authentication but the reasonableness of the authentication wherein allowed must be determined in the light of the purpose of the section. The circumstances surrounding the signing may justify something less than a formal signature or initialing but typically the kind of authentication involved here would consist of a minimum of initialing of the clause involved. A handwritten memorandum on the writer's letterhead purporting in its terms to "confirm" a firm offer already made would be enough to satisfy this section, although not subscribed, since under the circumstances it could not be considered a memorandum of mere negotiation and it would adequately show its own authenticity. Similarly, an authorized telegram will suffice, and this is true even though the original draft contained only a typewritten signature. However, despite settled courses of dealing or usages of the trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this article since authentication by a writing is the essence of this section.

3. This section is intended to apply to current "firm" offers and not to long term options, and an outside time limit of three months during which such offers remain irrevocable has been set. The three-month period during which firm offers remain irrevocable under this section need not be stated by days or by date. If the offer states that it is "guaranteed" or "firm" until the happening of a contingency which will occur within the three-month period, it will remain irrevocable until that event. A promise made for a longer period will operate under this section to bind the offeror only for the first three months of the period but may of course be renewed. If supported by consideration it may continue for a long as the parties specify. This section deals only with the offer which is not supported by consideration.

4. Protection is afforded against the inadvertent signing of a firm offer when contained in a form prepared by the offeree by requiring that such a clause be separately authenticated. If the offer clause is called to the offeror's attention and he separately authenticates it, he will be bound; § 2-302 may operate, however, to prevent an unconscionable result which otherwise would flow from other terms appearing in the form.

5. Safeguards are provided to offer relief in the case of material mistake by virtue of the requirement of good faith and the general law of mistake.

Cross References

Point 1: Section 1-102.

Point 2: Section 1-102.

Point 3: Section 2-201.

Point 5: Section 2-302.

Definitional Cross References

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Signed". Section 1-201.

"Writing". Section 1-201.

Special Plain Language Comment

Normally an offer may be revoked prior to acceptance unless something of value is received to keep the offer open. Merchants, however, are held to a higher standard of conduct and must keep their promise to keep an offer open even without consideration, if the offer is in writing and signed by the merchant. The section protects merchants making such offers by limiting the duration that the operation will remain open to a "reasonable period" but not more than three months.

§ 2-206. Offer and acceptance in formation of contract

A. Unless otherwise unambiguously indicated by the language or circumstances:

1. An offer or make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

2. An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

B. Where the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-206 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite dear that it will not be acceptable. Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected and a criterion that the acceptance be "in any manner and by any medium reasonable under the circumstances", is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time-saving present-day media come into general use.

2. Either shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment. In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship and rejects the artificial theory that only a single mode of acceptance is normally envisaged by an offer. This is true even though the language of the offer happens to be "ship at once" or the like. "Shipment" is here used in the same sense as in § 2-504; it does not include the beginning of delivery by the seller's own truck or by messenger. But loading on the seller's own truck might be a beginning of performance under Subsection (B).

3. The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree's intention to engage himself. For the protection of both parties it is essential that notice follow in due course to constitute acceptance. Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance

4. Subsection (A)(2) deals with the situation where a shipment made following an order is shown by a notification of shipment to be referable to that order but has a defect. Such a non-conforming shipment is normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach. However, the seller by stating that the shipment is non-conforming and is offered only as an accommodation to the buyer keeps the shipment or notification from operating as an acceptance.

Definitional Cross References

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

Special Plain Language Comment

To ensure maximum flexibility an offer may be accepted in any "reasonable" way unless the offer requires a specific method of acceptance. An order for goods maybe accepted by shipping or promising to ship the goods. If the goods requested are not available, the shipper may deliver other "non-conforming" goods as a substitute although no agreement is formed by such shipment and the person ordering goods may accept or reject the "non-conforming" goods. Where an offer invites acceptance by beginning performance, the person accepting the offer must notify the offeror of his acceptance by beginning the performance or the offeror will not be bound (offers which require completion of a certain performance are not governed by this rule and are only accepted upon completion of the performance).

§ 2-207. Additional terms in acceptance or confirmation

A. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

B. The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

1. The offer expressly limits acceptance to the terms of the offer;

2. They materially alter it; or

3. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

C. Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Code.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-207 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals such as "ship by Tuesday", "rush", "ship draft against bill of lading inspection allowed", or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction.

2. Under this article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within Subsection (B) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms.

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of Subsection (B). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

4. Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of ninety percent (90%) or one hundred percent (100%) deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

5. Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see §§ 2-718 and 2-719).

6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties

conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result, the requirement that there be notice of objection which is found in Subsection (B) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Code, including Subsection (B). The written confirmation is also subject to § 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement.

7. In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See § 2-204. The only question is what terms are included in the contract, and Subsection (C) furnishes the governing rule.

Cross References

See generally Section 2-302.

Point 5: Sections 2-513, 2-602, 2-607, 2-609, 2-612, 2-614, 2-615, 2-616, 2-718 and 2-719.

Point 6: Sections 1-102 and 2-104.

Definitional Cross References

"Between merchants". Sections 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Send". Section 1-201.

"Term". Section 1-201.

"Written". Section 1-201.

§ 2-208. Course of performance or practical construction

A. Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

B. The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (§ 1-205).

C. Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

History

CJA-1-86, January 19, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-208 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the "agreement" and therefore also of the "unless otherwise agreed" qualification to various provisions of this article.

2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of course of performance elsewhere in this article carries no contrary implication when there is a failure to refer to it in other Sections.

3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived (see § 2-209), is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

4. A single occasion of conduct does not fall within the language of this section but other sections such as the ones on silence after acceptance and failure to specify particular defects can affect the parties' rights on a single occasion (see §§ 2-605 an 2-607).

Cross References

Point 1: Section 1-201.

Point 2: Section 2-202.

Point 3: Sections 2-209, 2-601 and 2-607.

Point 4: Sections 2-605 and 2-607.

§ 2-209. Modification, rescission and waiver

A. An agreement modifying a contract within this article needs no consideration to be binding.

B. A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

C. The requirements of the Statute of Frauds section of this article (§ 2-201) must be satisfied if the contract as modified is within its provisions.

D. Although an attempt at modification or rescission does not satisfy the requirements of Subsection (B) or (C) it can operate as a waiver.

E. A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-209 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to technicalities.

2. Subsection (A) provides that an agreement modifying a sales contract needs no consideration to be binding.

However, modifications made thereunder must meet the test of good faith imposed by this Code. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (§ 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under §§ 2-615 and 2-616.

3. Subsections (B) and (C) are intended to protect against false allegations of oral modifications. "Modification or rescission" includes abandonment or other change by mutual consent, it does not include unilateral "termination" or

"cancellation" as defined in § 2-106.

The Statute of Frauds provisions of this article are expressly applied to modifications by Subsection (C). Under those provisions the "delivery and acceptance" test is limited to the goods which have been accepted, that is, to the past. "Modification" for the future cannot therefore be conjured up by oral testimony if the price involved is five hundred dollars ($500.00) or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it, there is safeguard against oral evidence.

Subsection (B) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.

4. Subsection (D) is intended, despite the provisions of Subsections (B) and (C), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct. The effect of such conduct as a waiver is further regulated in Subsection (E).

Cross References

Point 1: Section 1-203.

Point 2: Sections 1-201, 1-203, 2-615 and 2-616.

Point 3: Sections 2-106, 2-201 and 2-202.

Point 4: Sections 2-202 and 2-208.

Definitional Cross References

"Agreement". Section 1-201.

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Signed". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

§ 2-210. Delegation of performance: assignment of rights

A. A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party of delegating of any duty to perform or any liability for breach.

B. Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

C. Unless the circumstances indicate the contrary, a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

D. An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

E. The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (§ 2-609).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and, effect as § 2-210 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Generally, this section recognizes both delegation of performance and assignability as normal and permissible incidents of a contract for the sale of goods.

2. Delegation of performance, either in conjunction with an assignment or otherwise, is provided for by Subsection (A) where no substantial reason can be shown as to why the delegated performance will not be as satisfactory as personal performance.

3. Under Subsection (B) rights which are no longer executory such as a right to damages for breach or a right to payment of an "account" as defined in the Article on Secured Transactions (Article 9) may be assigned although the agreement prohibits assignment. In such cases no question of delegation of any performance is involved. The assignment of a "contract right" as defined in the Article on Secured Transactions (Article 9) is not covered by this Subsection.

4. The nature of the contract or the circumstances of the case, however, may

bar assignment of the contract even where delegation of performance is not involved. This article and this section are intended to clarify this problem, particularly in cases dealing with output requirement and exclusive dealing contracts. In the first, place the section on requirement and exclusive dealing removes from the construction of the original contract most of the "personal discretion" element by substituting the reasonably objective standard of good faith operation of the plant or business to be supplied. Secondly, the section on insecurity and assurances, which is specifically referred to in Subsection (E) of this section, frees the other party from the doubts and uncertainty which may afflict him under an assignment of the character in question by permitting him to demand adequate assurance of due performance without which he may suspend his own performance. Subsection (E) is not in any way intended to limit the effect of the section on insecurity and assurances and the word "performance" includes the giving of orders under a requirements contract. Of course, in any case where a material personal discretion is sought to be transferred, effective assignment is barred by Subsection (B).

5. Subsection (D) lays down a general rule of construction distinguishing between a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties, and a financing assignment in which only the assignor's rights are transferred.

This article takes no position on the possibility of extending some recognition or power to the original parties to work out normal commercial readjustments of the contract in the case of financing assignments even after the original obligor has been notified of the assignment. This question is dealt with in the Article on Secured Transactions (Article 9).

6. Subsection (E) recognizes that the non-assigning original party has a stake in the reliability of the person with whom he has closed the original contract, and is, therefore, entitled to due assurance that any delegated performance will be properly forthcoming.

7. This section is not intended as a complete statement of the law of delegation and assignment but is limited to clarifying a few points. Particularly, neither this section nor this article touches directly on such questions as the need or effect of notice of the assignment, the rights of successive assignees or any question of the form of an assignment, either as between the parties or as against any third parties. Some of these questions are dealt with in Article 9.

Cross References

Point 3: Article 9.

Point 4: Sections 2-306 and 2-609.

Point 5: Article 9, §§ 9-317 and 9-318.

Point 7: Article 9.

Definitional Cross References

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Party". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

Part 3. General Obligation and Readjustment of Contract

§ 2-301. General obligation of parties

The obligation of the Seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-301 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section uses the term "obligation" in contrast to the term "duty" in order to provide for the "condition" aspects of delivery and payment insofar as they are not modified by other sections of this article such as those on cure of tender and replaces the general provisions of that Code on the effect of conditions. In order to determine what is "in accordance with the contract" under this article, usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties.

Cross References

Sections 1-106.

See also §§ 1-205, 2-208, 2-209, 2-508 and 2-612.

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

§ 2-302. Unconscionable contractor clause

A. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

B. When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-302 of the Uniform Commercial Code adopted by the states.

Commentary. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (B) makes it dear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise *(Cf. Campbell Soup Co. v. Wentz,* 172 F.2d *80,* 3d Cir. *1948)* and not of disturbance of allocation of risks because of superior bargaining power.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in Subsection (B) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

Definitional Cross References

"Contract". Section 1-201.

Special Plain Language Comment

This section provides an exception to the general principle of freedom of contract under the Code. It recognizes that in some cases the lack of bargaining power of one party compared to that of the other party will result in an oppressive contract. In the past courts had refused to enforce such contracts or provisions by manipulating legal rules about contracts-this section allows courts to do openly what they had previously done under cover. Although "unconscionability" is not defined because of the variety of the behavior which can be unconscionable, provisions or contracts which are found to be unconscionable fall into certain categories: (1) the agreement of one party was obtained due to his ignorance or carelessness which was known to the other party; (2) the agreement was difficult to read or deceptively arranged, (3) parts of the agreement nullify the core duty of the contract; (4) the price is excessively high by several times the value of the goods; or (5) the seller has unduly enlarged or unduly restricted the remedies of the buyer. Unconscionability is determined at the time the contract was made-it does not apply to situations where the value of the goods has changed over time. A court has considerable freedom to act to rectify an unconscionable contract-it may refuse to enforce the whole contract, a part of the contract, cancel further payments or demand refund of certain payments. Although the scope of unconscionability is broad, it should not be seen as a way of avoiding contractual duties-it is used only to adjust the most oppressive and unjust contracts.

Annotations

1. Unconscionable arbitration clause

"Considering all of these principles together, the Court holds that the specific arbitration clause in the financing contract is unenforceable. Though arbitration generally is encouraged, clauses that mandate arbitration are not immune from scrutiny for unconscionability or consistency with Fundamental Law." *Green Tree Servicing, LLC v. Duncan*, No. SC-CV-46-05, slip op. at 12 (Nav. Sup. Ct. August 18, 2008).

§ 2-303. Allocation or division of risks

Where this article allocates a risk or a burden as between the parties "unless otherwise agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-303 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section is intended to make it dear that the parties may modify or allocate "unless otherwise agreed" risks or burdens imposed by this article as they desire, always subject, of course, to the provisions on unconscionability. Compare § 1-102(D).

2. The risk or burden may be divided by the express terms of the agreement or by the attending circumstances, since under the definition of "agreement" in this Code, the circumstances surrounding the transaction, as well as the express language used by the parties enter into the meaning and substance of the agreement.

Cross References

Point 1: Sections 1-102 and 2-302.

Point 2: Section 1-201.

Definitional Cross References

"Party". Section 1-201.

"Agreement". Section 1-201.

Special Plain Language Comment

The Code divides risks between the parties but the parties can alter this division of risks in the agreement in any manner they wish. However, the parties may not in their agreement change certain duties under the Code. Those duties include those of good faith, diligence, reasonableness and care, nor may the parties waive the application of the doctrine of unconscionability to their agreement.

§ 2-304. Price payable in money, goods, realty, or otherwise

A. The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

B. Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-304 of the Uniform Commercial Code adopted by the states. The transfer of real property on the Navajo Indian Country may be affected by the federal government's trust responsibilities.

Commentary. 1. Under Subsection (A) the provisions of this article are applicable to transactions where the "price" of goods is payable in something other than money. This does not mean, however, that this whole Article applies automatically and in its entirety simply because an agreed transfer of title to goods is not a gift. The basic purposes and reasons of the Article must always be considered in determining the applicability of any of its provisions.

2. Subsection (B) lays down the general principle that when goods are to be exchanged for realty, the provisions of this article apply only to those aspects of the transaction which concern the transfer of title to goods but do not affect the transfer of the realty since the detailed regulation of various particular contracts which fall outside the scope of this article is left to the courts and other legislation. However, the complexities of these situations may be such that each must be analyzed in the light of the underlying reasons in order to determine the applicable principles. Transactions involving real property on the Navajo Nation are affected by the trust responsibility of the federal government. See § 2-107. Navajo statutes dealing with realty are not to be lightly disregarded or altered by language of this article. In contrast, this article declares definite policies in regard to certain matters legitimately within its scope though concerned with real property situations, and in those instances the provisions of this article control.

Cross References

Point 2: Sections 1-102, 1-103, 1-104 and 2-107.

Definitional Cross References

"Goods". Section 2-105.

"Money". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

Article 2 governs not only the most common type of sale, goods exchanged for cash, but also goods exchanged for goods, goods exchanged for services and even goods exchanged for realty. In barter transactions a person may be both a buyer and seller; a "buyer" of the goods he or she obtains and a "seller" of the goods he or she exchanges. The status of a person as a "seller" is important for the purposes of warranties. See §§ 2-312 to 2-315.

§ 2-305. Open price term

A. The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if:

1. Nothing is said as to price; or

2. The price is left to be agreed by the parties and they fail to agree; or

3. The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

B. A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

C. When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

D. Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed, there is no contract. In such a case the buyer must return any goods already received or if unable to do so must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-305 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This article rejects in these instances the formula that "an agreement to agree is unenforceable" if the case falls within Subsection (A) of this section, and rejects also defeating such agreements on the ground of "indefiniteness". Instead this article recognizes the dominant intention of the parties to have the deal continue to be binding upon both. As to future performance, since this article recognizes remedies such as cover (§ 2-712), re-sale (§ 2-706) and specific performance (§ 2-716) which go beyond any mere arithmetic as between contract price and market price, there is usually a "reasonably certain basis for granting an appropriate remedy for breach" so that the contract need not fail for indefiniteness.

2. Under some circumstances the postponement of agreement on price will mean that no deal has really been concluded, and this is made express in the preamble of Subsection (A) (*"The parties if they so intend"*) and in Subsection (D). Whether or not this is so is, in most cases, a question to be determined by the trier of fact.

3. Subsection (B), dealing with the situation where the price is to be fixed by one party, rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish by the express qualification that the price so fixed must be fixed in good faith. Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. (§ 2-103). But in the normal case a "posted

price", or a future seller's or buyer's "given price", "price in effect", "market price", or the like satisfies the good faith requirement.

4. The section recognizes that there may be cases in which a particular person's judgment is not chosen merely as a barometer or index of a fair price but is an essential condition to the parties' intent to make any contract at all. For example, the case where a known and trusted expert is to "value" a particular painting for which there is no market standard differs sharply from the situation where a named expert is to determine the grade of cotton, and the difference would support a finding that in the one the parties did not intend to make a binding agreement if that expert were unavailable whereas in the other they did so intend. Other circumstances would of course affect the validity of such a finding.

5. Under Subsection (C), wrongful interference by one party with any agreed machinery for price fixing in the contract may be treated by the other party as a repudiation justifying cancellation, or merely as a failure to take cooperative action thus shifting to the aggrieved party the reasonable leeway in fixing the price.

6. Throughout the entire Section, the purpose is to give effect to the agreement which has been made. That effect, however, is always conditioned by the requirement of good faith action which is made an inherent part of all contracts within the Code. (§ 1-203).

Cross References

Point 1: Section 2-204(C), 2-706, 2-712 and 2-716.

Point 3: Section 2-103.

Point 5: Sections 2-311 and 2-610.

Point 6: Section 1-203.

Definitional Cross References

"Agreement". Section 1-201.

"Burden of establishing". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

"Term". Section 1-201.

Special Plain Language Comment

This section, along with 2-306, 2-309 and 2-310, fills in terms left undecided in the agreement by the two parties. This section provides a method of determining the price of goods if not specified in the agreement. The section protects parties to which price is a crucial term since it does not apply to situations where the parties did not intend to be bound by an agreement if the price was not fixed (§ 2-305(D)).

§ 2-306. Output, requirements and exclusive dealings

A. A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

B. A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes, unless otherwise agreed, an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-306 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) of this section, in regard to output and requirements, applies to this specific problem the general approach of this Code which requires the reading of commercial background and intent into the language of any agreement and demands good faith in the performance of that agreement. It applies to such contracts of nonproducing establishments such as dealers or distributors as well as to manufacturing concerns.

2. Under this article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements win approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even

when the variation may be such as to result in discontinuance. A shut-down by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section. One of the factors in an expansion situation would be whether the market price had risen greatly in a case in which the requirements contract contained a fixed price. This article takes no position as to whether a requirements contract is a provable claim in bankruptcy.

3. If an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur.

4. When an enterprise is sold, the question may arise whether the buyer is bound by an existing output or requirements contact. That question is outside the scope of this article, and is to be determined on other principles of law. Assuming that the contract continues, the output or requirements in the hands of the new owner continue to be measured by the actual good faith output or requirements under the normal operation of the enterprise prior to sale. The sale itself is not grounds for sudden expansion or decrease.

5. Subsection (B), on exclusive dealing, makes explicit the commercial rule embodied in this Code under which the parties to such contracts are held to have impliedly, even when not expressly, bound themselves to use reasonable diligence as well as good faith in their performance of the contract. Under such contracts the exclusive agent is required, although no express commitment has been made, to use reasonable effort and due diligence in the expansion of the market or the promotion of the product, as the case may be. The principal is expected under such a contract to refrain from supplying any other dealer or agent within the exclusive territory. An exclusive dealing agreement brings into play all of the good faith aspects of the output and requirement problems of Subsection (A). It also raises questions of insecurity and right to adequate assurance under this article.

Cross References

Point 4: Section 2–210

Point 5: Sections 1–203 and 2–609.

Definitional Cross References

"Agreement". Section 1–201.

"Buyer". Section 2–103.

"Contract for sale". Section 2–106.

"Good faith". Section 1–201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Term". Section 1-201.

"Seller". Section 2-103.

§ 2-307. Delivery in single lot or several lots

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender, but where the circumstances give either party the right to make or demand delivery in lots the price, if it can be apportioned, may be demanded for each lot.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-307 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section applies where the parties have not specifically agreed whether delivery and payment are to be by lots.

2. Where the actual agreement or the circumstances do not indicate otherwise, delivery in lots is not permitted under this section and the buyer is properly entitled to reject for a deficiency in the tender, subject to any privilege in the seller to cure the tender.

3. The "but" clause of this section goes to the case in which it is not commercially feasible to deliver or to receive the goods in a single lot as for example, where a contract calls for the shipment of ten carloads of coal and only three cars are available at a given time. Similarly, in a contract involving brick necessary to build a building the buyer's storage space may be limited so that it would be impossible to receive the entire amount of brick at once, or it may be necessary to assemble the goods as in the case of cattle on the range, or to mine them.

In such cases, a partial delivery is not subject to rejection for the defect in quantity alone, if the circumstances do not indicate a repudiation or default by the seller as to the expected balance or do not give the buyer ground for suspending his performance because of insecurity under the provisions of § 2-609. However, in such cases the undelivered balance of goods under the contract must be forthcoming within a reasonable time and in a reasonable manner according to the policy of § on manner of tender of delivery. This is reinforced by the express provisions of § 2-608 that if a lot has been accepted on the reasonable assumption that its nonconformity will be cured, the acceptance may be revoked if the cure does not seasonably occur. The section approves the result in *Lynn M. Ranger, Inc. v. Gildersleeve,* 106 Conn. 372, 138 A. 142 (1927) in which a contract was made for six carloads of coal then rolling from the mines and consigned to the seller but the seller agreed to divert the carloads to the buyer as soon as the car numbers became known to him. He arranged a diversion of two cars and then notified the buyer who then repudiated the contract. The seller was held to be entitled to his full remedy for the two cars diverted because simultaneous delivery of all the cars was not contemplated by either party.

4. Where the circumstances indicate that a party has a right to delivery in lots, the price may be demanded for each lot if it is apportionable.

Cross References

Point 1: Section 1-201.

Point 2: Sections 2-508 and 2-601.

Point 3: Sections 2-503, 2-608 and 2-609.

Definitional Cross References

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

§ 2-308. Absence of specified place for delivery

Unless otherwise agreed:

A. The place for delivery of goods is the seller's place of business or if he has none his residence; but

B. In a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

C. Documents of title maybe delivered through customary banking channels.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-308 of the Uniform Commercial Code adopted by the states. Since the Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code at this time, the obligations of banks relating to drafts and letters of credit which would be governed under such Articles will be governed by Navajo law under 7 N.N.C. § 204.

Commentary. 1. Subsections (A) and (B) provide for those non-commercial sales and for those occasional commercial sales where no place or means of delivery has been agreed upon by the parties. Where delivery by carrier is "required or authorized by the agreement", the seller's duties as to delivery of the goods are governed not by this section but by § 2-504.

2. Under Subsection (B) when the identified goods contracted for are known to both parties to be in some location other than the seller's place of business or residence, the parties are presumed to have intended that place to be the place of delivery. This Subsection also applies (unless, as would be normal, the circumstances show that delivery by way of documents is intended) to a bulk of goods in the possession of a bailee. In such a case, however, the seller has the additional obligation to procure the acknowledgment by the bailee of the buyer's right to possession.

3. Where "customary banking channels" call only for due notification by the banker that the documents are on hand, leaving the buyer himself to see to the physical receipt of the goods, tender at the buyer's address is not required under Subsection (C). But that paragraph merely eliminates the possibility of a default by the seller if "customary banking Channels" have been properly used in giving notice to the buyer. Since the Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code relating to Bank Deposits and Collections, and Letters of Credit, the obligations of banks relating to such documents which would be governed under such Articles will be governed by Navajo law pursuant to 7 N.N.C. § 204.

4. The rules of this section apply only "unless otherwise agreed". The surrounding circumstances, usage of trade, course of dealing and course of performance, as well as the express language of the parties, may constitute an "otherwise agreement".

Cross References

Point 1: Sections 2-504 and 2-505.

Point 2: Section 2-503.

Point 3: Section 2-512.

Definitional Cross References

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

Most commercial sales involve shipment of goods, in which payment is governed by §§ 2-503, 2-504 and 2-505. This section is employed only if the parties have not agreed in the contract on a place of delivery and the place of delivery is not established through previous transactions nor through the common practices in the industry.

§ 2-309. Absence of specific time provisions; notice of termination

A. The time shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

B. Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

C. Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-309 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) requires that all actions taken under a sales contract must be taken within a reasonable time where no time has been agreed upon. The reasonable time under this provision turns on the criteria as to "reasonable time" and on good faith and commercial standards set forth in §§ 1-203, 1-204 and 2-103. It thus depends upon what constitutes acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken. Agreement as to a definite time, however, may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Such cases fall outside of this Subsection since in them the time for action is "agreed" by usage.

2. The time for payment, where not agreed upon is related to the time for delivery; the particular problems which arise in connection with determining the appropriate time of payment and the time for any inspection before payment which is both allowed by law and demanded by the buyer are covered in § 2-513.

3. The facts in regard to shipment and delivery differ so widely as to make detailed provision for them in the text of this article impracticable. The applicable principles, however, make it clear that surprise is to be avoided, good faith judgment is to be protected, and notice or negotiation to reduce the uncertainty to certainty is to be favored.

4. When the time for delivery is left open, unreasonably early offers of or

demands for delivery are intended to be read under this article as expressions of desire or intention, requesting the assent or acquiescence of the other party, not as final positions which may amount without more to breach or to create breach by the other side. See §§ 2-207 and 2-609.

5. The obligation of good faith under this Code requires reasonable notification before a contract may be treated as breached because a reasonable time for delivery or demand has expired. This operates both in the case of a contract originally indefinite as to time and of one subsequently made indefinite by waiver.

When both parties let an originally reasonable time go by in silence, the course of conduct under the contract may be viewed as enlarging the reasonable time for tender or demand of performance. The contract may be terminated by abandonment.

6. Parties to a contract are not required in giving reasonable notification to fix, at peril of breach, a time which is in fact reasonable in the unforeseeable judgment of a later trier of fact. Effective communication of a proposed time limit calls for a response, so that figure to reply will make out acquiescence. Where objection is made, however, or if the demand is merely for information as to when goods win be delivered or will be ordered out, demand for assurances on the ground of insecurity maybe made under this article pending further negotiations. Only when a party insists on undue delay or on rejection of the other party's reasonable proposal is there a question of flat breach under the present section.

7. Subsection (B) applies a commercially reasonable view to resolve the conflict which has arisen in the cases as to contracts of indefinite duration. The "reasonable time" of duration appropriate to a given arrangement is limited by the circumstances. When the arrangement has been carried on by the parties over the years, the "reasonable time" can continue indefinitely and the contract will not terminate until notice.

8. Subsection (C) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this Subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs.

9. Justifiable cancellation for breach is a remedy for breach and is not the kind of termination covered by the present Subsection.

10. The requirement of notification is dispensed with where the contract provides for termination on the happening of an "agreed event". "Event" is a term chosen here to contrast with "option" or the like.

Cross References

Point 1: Sections 1-203, 1-204 and 2-103.

Point 2: Sections 2-320, 2-321, 2-504 and 2-511 through 2-514.

Point 5: Section 1–203.

Point 6: Section 2–609.

Point 7: Section 2–204.

Point 8: Sections 2–106, 2–318, 2–610 and 2–703.

Definitional Cross References

"Agreement". Section 1–201.

"Contract". Section 1–201.

"Notification". Section 1–201.

"Party". Section 1–201.

"Reasonable time". Section 1–204.

"Termination". Section 2–106.

§ 2–310. Open time for payment or running of credit; authority to ship under reservation

Unless otherwise agreed:

A. Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

B. If the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (§ 2–513); and

C. If delivery is authorized and made by way of documents of title otherwise than by Subsection (B) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

D. Where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–310 of the Uniform Commercial code adopted by the states. Since the Navajo

Nation has not adopted Article 4 of the Uniform Commercial Code, the obligations of banks relating to drafts which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. This section is drawn to reflect modern business methods of dealing at a distance rather than face to face. Subsection (A) provides that payment is due at the time and place "the buyer is to receive the goods" rather than at the point of delivery except in documentary shipment cases (Subsection (C)). This grants an opportunity for the exercise by the buyer of his preliminary right to inspection before paying, even though under the delivery term the risk of loss may have previously passed to him or the running of the credit period has already started.

2. Subsection (B), while providing for inspection by the buyer before he pays, protects the seller. He is not required to give up possession of the goods until he has received payment, where no credit has been contemplated by the parties. The seller may collect through a bank by a sight draft against an order bill of lading "hold until arrival; inspection allowed". Since the Navajo Nation has not adopted Article 4 of the Uniform Commercial Code relating to Banker's Deposits and Collections, the obligations of banks which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204. In the absence of a credit term, the seller is permitted to ship under reservation and if he does payment is then due where and when the buyer is to receive the documents.

3. Unless otherwise agreed, the place for the receipt of the documents and payment is the buyer's city but the time for payment is only after arrival of the goods, since under Subsection (B), and §§ 2-512 and 2-513 the buyer is under no duty to pay prior to inspection.

4. Where the mode of shipment is such that goods must be unloaded immediately upon arrival, too rapidly to permit adequate inspection before receipt, the seller must be guided by the provisions of this article on inspection which provide that if the seller wishes to demand payment before inspection, he must put an appropriate term into the contract. Even requiring payment against documents will not of itself have this desired result if the documents are to be held until the arrival of the goods. But under Subsections (B) and (C) if the terms are C.I.F., C.O.D., or cash against documents, payment may be due before inspection.

5. Subsection (D) states the common commercial understanding that an agreed credit period runs from the time of shipment or from the dating of the invoice which is commonly recognized as a representation of the time of shipment.The provision concerning any delay in sending forth the invoice is included because such conduct results in depriving the buyer of his fifth notice and warning as to when he must be prepared to pay.

Cross References

Point 1: Section 2-509.

Point 2: Section 2-505, 2-511, 2-512, and 2-513.

Point 3: Sections 2-308(B), 2-512, and 2-513.

Point 4: Section 2-513(C)(2).

Definitional Cross References

"Buyer". Section 2-103.

"Delivery". Section 1-201.

"Document of title". Section 1-20 1.

"Goods". Section 2-105.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

§ 2-311. Options and cooperation respecting performance

A. An agreement for sale which is otherwise sufficiently definite (§ 2-204(C)) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

B. Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in Subsections (A)(3) and (C) of § 2-319 specifications or arrangements relating to shipment are at the seller's option.

C. Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies:

1. Is excused for any resulting delay in his own performance; and

2. May also either proceed to perform in any reasonable manner or after the time for a material part if his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-311 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) permits the parties to leave certain detailed particulars of performance to be filled in by either of them without running the risk of having the contract invalidated for indefiniteness. The party to whom the agreement gives power to specify the missing details is required to exercise good faith and to act in accordance with commercial standards so that there is no surprise and the range of permissible variation is limited by what is commercially reasonable. The "agreement" which permits one party so to specify may be found as well in a course of dealing, usage of trade, or implication from circumstances as in explicit language used by the parties.

2. Options as to assortment of goods or shipping arrangements are specifically reserved to the buyer and seller respectively under Subsection (B) where no other arrangement has been made. This section rejects the test which mechanically and without regard to usage or the purpose of the option gave the option to the party "first under a duty to move" and applies instead a standard commercial interpretation to these circumstances. The "unless otherwise agreed" provision of this Subsection covers not only express terms but the background and circumstances which enter into the agreement.

3. Subsection (C) applies when the exercise of an option or cooperation by one party is necessary to or materially affects the other party's performance, but it is not seasonably forthcoming; the Subsection relieves the other party from the necessity for performance or excuses his delay in performance as the case may be. The contract-keeping party may at his option under this Subsection proceed to perform in any commercially reasonable manner rather than wait. In addition to the special remedies provided, this Subsection also reserves "all other remedies". The remedy of particular importance in this connection is that provided for insecurity. Request may also be made pursuant to the obligation of good faith for a reasonable indication of the time and manner of performance for which a party is to hold himself ready.

4. The remedy provided in Subsection (C) is one which does not operate in the situation which falls within the scope of § 2-614 on substituted performance. Where the failure to cooperate results from circumstances set forth in that section, the other party is under a duty to proffer or demand (as the case may be) substitute performance as a condition to claiming rights against the non-cooperating party.

Cross References

Point 1: Sections 1-201, 2-204 and 1-203.

Point 3: Sections 1-203 and 2-609.

Point 4: Section 2-614.

Definitional Cross References

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

§ 2-312. Warranty of title and against infringement; buyer's obligation against infringement

A. Subject to Subsection (B) there is in a contract for sale a warranty by the seller that:

1. The title conveyed shall be good, and its transfer rightful; and

2. The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

B. A warranty under Subsection (A) will be excluded or modified only by specific language or by circumstances which give the buyer reasons to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

C. Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-312 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

The warranty extends to a buyer whether or not the seller was in possession of goods at the time the sale or contract to sell was made.

The warranty of quiet possession is abolished. Disturbance of quiet possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established.

The "knowledge" referred to in Subsection (A)(2) is actual knowledge as distinct from notice.

2. The provisions of this article requiring notification to the seller within a reasonable time after the buyer's discovery of a breach apply to notice of a breach of the warranty of title, where the seller's breach was innocent. However, if the seller's breach was in bad faith he cannot be permitted to claim that the has been misled or prejudiced by the delay in giving notice. In such case the "reasonable" time for notice should receive a very liberal interpretation. Whether the breach by the seller is in good or bad faith § 2-725 provides that the cause of action accrues when the breach occurs. Under the provisions of that section the breach of the warranty of good title occurs when tender of delivery is made since the warranty is not one which extends to "future performance of the goods".

3. When the goods are part of the seller's normal stock and are sold in his normal course of business, it is his duty to see that no claim of infringement of a patent or trademark by a third party will mar the buyer's title. A sale by a person other than a dealer, however, raises no implication in its circumstances of such a warranty. Nor is there such an implication when the buyer orders goods to be assembled, prepared or manufactured on his own specifications. If, in such a case, the resulting product infringes a patent or trademark, the liability will run from buyer to seller. There is, under such circumstances, a tacit representation on the part of the buyer that the seller will be safe in manufacturing according to the specifications, and the buyer is under an obligation in good faith to indemnify him for any loss suffered.

4. This section rejects the cases which recognize the principle that infringements violate the warranty of title but deny the buyer a remedy unless he has been expressly prevented from using the goods. Under this article "eviction" is not a necessary condition to the buyer's remedy since the buyer's remedy arises immediately upon receipt of notice of infringement; it is merely one way of establishing the fact of breach.

5. Subsection (B) recognizes that sales by sheriffs, executors, foreclosing lienors and persons similarly situated are so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This Subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner.

6. The warranty of Subsection (A) is not designated as an "implied" warranty, and hence is not subject to § 2-316(C). Disclaimer of the warranty of title is governed instead by Subsection (B), which requires either specific language or the described circumstances.

Cross References

Point 1: Section 2-403.

Point 2: Sections 2-607 and 2-725.

Point 3: Section 1-203.

Point 4: Sections 2-609 and 2-725.

Point 6: Section 2-316.

Definitional Cross References

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Person". Section 1-201.

"Right". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

This section implements the policy that a buyer should normally obtain clear ownership rights, "title" to goods he buys. Such rights should allow him to hold the goods he receives without concern about substantial claims attacking those rights. The seller promises in each sale of goods that the buyer will receive "title", free of any substantial claims by third parties that they own the property. This promise also includes other types of claims which could limit a buyer's right to use the goods, such as security interests (see Article 9). The seller may avoid these obligations in only two ways: (1) specifically denying them in the contract or (2) in circumstances which give the buyer reason to know about the limited rights being transferred. Such circumstances would include a sheriffs sale or foreclosure sale where it is clear to the buyer that the seller may not have good title.

§ 2-313. Express warranties by affirmation, promise, description, sample

A. Express warranties by the seller are created as follows:

1. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

2. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

3. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

B. It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-313 of the Uniform Commercial Code adopted by the states.

Commentary. 1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer denying such warranty in a form agreement are repugnant to the basic dickered terms. "Implied" warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated. This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied".

The warranties under this section are also effected for consumer transactions by a federal statute, the Magnuson-Moss Warranty Act-Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 *et seq*. (1976).

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of § 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of the Code may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse, except in unusual circumstances, to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under § 2-316.

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Subsection (A)(2) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from the existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least.the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language

or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (§ 2-209).

8. Concerning affirmations of value or a seller's opinion or commendation under Subsection (B), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicted above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of Subsection (B) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

Cross References

Point 1: Section 2-316.

Point 2: Sections 1-102(C) and 2-318.

Point 3: Section 2-316(B)(2)

Point 4: Section 2-316.

Point 5: Sections 1-205(D) and 2-314.

Point 6: Section 2-316.

Point 7: Section 2-209.

Point 8: Section 1-103.

Definitional Cross References

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Goods". Section 2-105.

"Seller". Section 2-103.

Special Plain Language Comment

If the seller makes specific promises about the goods to the buyer and the buyer bought the goods on account of such promises, the seller must live up to those promises since they form an "express warranty". However, certain types of promises, such as those that are only opinions or general positive comments, do not give rise to an express warranty. Unlike the implied warranties in §§ 2-314 or 2-315, express warranties can not be excluded or modified in the agreement. However, a buyer might not be able to enforce oral promises which conflict with the written terms of the contract due to the limitation on proof regarding oral evidence. (See §§ 2-202 and 2-316). In commercial transactions the buyer must give notice of the breach of warranties to the seller to preserve his rights (see § 2-607).

§ 2-314. Implied warranty: merchantability, usage of trade

A. Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

B. Goods to be merchantable must be at least such as:

1. Pass without objection in the trade under the contract description; and

2. In the case of fungible goods, are of fair average quality within the description; and

3. Are fit for the ordinary purposes for which such goods are used; and

4. Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

5. Are adequately contained, packaged, and labeled as the agreement may require; and

6. Conform to the promises or affirmations of fact made on the container or label if any.

C. Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-314 of the Uniform Commercial Code adopted by the states. However, the limits on the definition of merchants in § 2-104 may limit the scope of this section.

Commentary. 1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (§ 2-316(B)). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under

an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller.

3. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section, and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a "merchant" as to the goods in question, if he states generally that they are "guaranteed" the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of second-hand sales, and has further significance in limiting the effect of the fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee".

5. The second sentence of Subsection (A) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in Subsections (A) and (B)(3) of this section.

6. Subsection (B) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as ... " and the intention is to leave open other possible attributes of merchantability.

7. Subsection (B)(1) and (2) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller's business. "Fair average" is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection". Of course a fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (3). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be "honestly" resalable in the

normal course of business because they are what they purport to be.

9. Paragraph (4) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units.

10. Paragraph (5) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (6) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labeling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. No problem of extra consideration arises in this connection since, under this article, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That Section must be read with particular reference to its Subsection (D) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Subsection (C) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under § 2-316. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

Cross References

Point 1: Section 2-316.

Point 3: Sections 1-203 and 2-104.

Point 5: Section 2-315.

Point 11: Section 2-316.

Point 12: Sections 1-201, 1-205 and 2-316.

Definitional Cross References

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Seller". Section 2-103.

Special Plain Language Comment

This section requires that goods sold by a "merchant" (someone who deals regularly in goods of that kind, for example a garage mechanic would probably be a merchant for the sale of automobile parts, but not for the sale of his furniture) must be of average quality. In other words the goods should be fit for normally expected uses. The warranty also extends to the packages in which goods are shipped, so for example this section would apply to soda bottles which explode. This warranty is limited to "sales" by merchants (although courts have used it to analogize to leasing and other transactions). Merchants may limit and deny the warranty in the agreement but the limitation must be in writing and conspicuous, (see § 2-316(A)).

§ 2-315. Implied warranty: fitness for particular purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-315 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, or course, must actually be relying on the seller.

2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.

The provisions of this article on the cumulation and conflict of express and implied warranties must be considered on the question of inconsistency between or among warranties. In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications.

3. In connection with the warranty of fitness for a particular purpose the provisions of this article on the allocation or division of risks are particularly applicable in any transaction in which the purpose for which the goods are to be used combines requirements both as to the quality of the goods themselves and compliance with certain laws or regulations. How the risks are divided is a question of fact to be determined, where not expressly contained in the agreement, from the circumstances of contracting, usage of trade, course of performance and the like, matters which may constitute the "otherwise agreement" of the parties by which they may divide the risk or burden.

4. Although normally the warranty will arise only where the seller is a merchant with the appropriate "skill or judgment", it can arise as to non-merchants where this is justified by the particular circumstances.

5. Under this section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate non-reliance if the article has been recommended by the seller as adequate for the buyer's purposes.

6. The specific reference forward in the present section to the following section on exclusion or modification of warranties is to call attention to the possibility of eliminating the warranty in any given case. However it must be noted that under the following section the warranty of fitness for a particular purpose must be excluded or modified by a conspicuous writing.

Cross References

Point 2: Sections 2-314 and 2-317.

Point 3: Section 2-303.

Point 6: Section 2-316.

Definitional Cross References

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

Special Plain Language Comment

This section provides that if the seller is aware of the special needs of buyer and the buyer's reliance upon the seller's judgment to meet those needs, the seller warrants or guarantees that the goods will meet these needs. This warranty may in some cases be broader than that of the warranty of merchantability in § 2-314, although it may overlap with that warranty. It is not limited to merchants and it may extend to uses of the goods which are not "ordinary". For example, if a buyer tells a seller that he needs a wrench which will not cause sparks because he is working in an explosive atmosphere, in selling the buyer a wrench the seller guarantees that the wrench he sells the buyer will not cause sparks. Since the requirement of "sparkless" operation goes beyond the ordinary use standard of "merchantability", the implied warranty of fitness for a particular use is broader than the warranty of merchantability. This warranty may also be limited or denied in accordance with § 2-316, but any such limitation must be in writing and conspicuous.

§ 2-316. Exclusion or modification of warranties

A. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (§ 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable. Any oral waiver or creation of an express warranty must be in language comprehensible to the purchaser.

B. Subject to Subsection (C), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof".

C. Notwithstanding Subsection (B):

1. Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults", or other language which in common understanding calls the buyer's

attention to the exclusion of warranties and makes plain that there is no implied warranty; and

2. When the buyer, before entering into the contract, has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

3. An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade;

4. With respect to the sale of cattle, goats, sheep, pigs, turkeys, horses, or poultry, there shall be no implied warranty that the animals are free from disease or sickness. This exemption shall not apply when the seller knowingly sells animals which are diseased or sick.

D. Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (§§ 2-718 and 2-719).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-316 of the Uniform Commercial Code adopted by the states, except that Subsection (A) has been modified to clarify that any oral creation or negation of an express warranty must be comprehensible to the purchaser and Subsection (C)(4) has been added to delete the implied warranty relating to the health of animals in a sale unless the seller knowingly sells diseased animals.

Commentary. 1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied". It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise. The effect of this section on warranties in consumer transactions has been modified by a federal statute, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. 15 U.S.C. § 2301 *et seq.* (1976).

2. The seller is protected under this article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under Subsection (D) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under Subsection (B), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (B) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in Subsection (C)(1)-(3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

7. Subsection (C)(1) deals with general terms such as "as is", "as they stand", "with all faults", and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (1) are in fact merely a particularization of paragraph (3) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under Subsection (C)(2) warranties may be excluded or modified by the circumstances where they buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather then proximately from a breach of warranty. See §§ 2-314 and 2-715 and comments thereto.

In order to bring the transaction within the scope of "refused to examine" in paragraph (2), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this article. Thus, if the offer of examination is accompanied bywords as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by Subsection (A) of the present section.

The particular buyer's skill and the normal method of examining goods in the circumstances determine that defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a non-professional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

9. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (3) of that section in case of such an inconsistency, the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

Cross References

Point 2: Sections 2-202, 2-718 and 2-719.

Point 7: Sections 1-205 and 2-208.

Definitional Cross References

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Course of dealing". Section 1-205.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

"Usage of trade". Section 1-205.

Special Plain Language Comment

Once the seller makes an "express" warranty (see § 2-312) he may not deny that warranty. However, if the express warranty was made orally and not included in the written contract, the buyer may not be able to prove that the oral warranty was made because of the rule against oral testimony where a "final" written document exists (see § 2-202). Before relying on any permits to purchase the buyer should have the promise put into writing as part of the agreement. This section also seeks to limit the denial ("disclaimer") of the "implied warranties" of merchantability and fitness for a particular purpose. Such denials must generally be in writing and conspicuous. However, other circumstances may prove effective to deny such warranties such as an opportunity by the buyer to examine the goods before sale or words which will make clear to the buyer the risks he or she is assuming. Even if a warranty exists the seller may limit the remedies of a buyer to recover under such warranty, (see §§ 2-718 and 2-719).

§ 2-317. Cumulation and conflict of warranties express or implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

A. Exact or technical specifications displace an inconsistent sample or model or general language of description.

B. A sample from an existing bulk displaces inconsistent general language of description.

C. Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-317 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The present section rests on the basic policy of this article that no warranty is created except by some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties

which later turn out to be inconsistent. To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in Subsections (A), (B) and (C) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.

Cross References

Point 1: Section 2-315

Definitional Cross References

"Party". Section 1-201.

§ 2-318. Third party beneficiaries of warranties express or implied

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-318 of the Uniform Commercial Code adopted by the states. The Navajo Nation has adopted Alternative C of those provided by the Official Text of the Uniform Commercial Code.

Commentary. 1. The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by § 2-316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in §§ 2-718 or 2-719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section.

2. The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity". It seeks to accomplish this purpose without any derogation of any right or remedy

resting on negligence. It rests primarily upon the merchant-seller's warranty under this article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action or breach of warranty against the seller whose warranty extends to him.

3. This alternative, the third of those presented in the Official Code text goes further, following the trend of modem decisions as indicated by the Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965), in extending the rule beyond injuries to the person. This rule eliminates horizontal and vertical privity and extends the right to sue on warranty claims to corporations as well as natural persons.

Cross References

Point 1: Sections 2–316, 2–718 and 2–719.

Point 2: Section 2–314.

Definitional Cross References

"Buyer". Section 2–103.

"Goods". Section 2–105.

"Seller". Section 2–103.

Special Plain Language Comment

This section eliminates certain technical requirements of "privity" — a specific type of direct contractual commitment between two parties-to allow a lawsuit based on warranty claims. Persons or corporations who are injured by goods may now sue not only the retailer, but the manufacturer as well, even though no direct contract was ever made between the manufacturer and the injured person or corporation.

§ 2–319. F.O.B. and F.A.S. terms

A. Unless otherwise agreed the term a F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which:

1. When the term is a F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article (§ 2–504) and bear the expense and risk of putting them into the possession of the carrier; or

2. When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this article (§ 2–503);

3. When under either (1) or (2) the term is also F.O.B. vessel, car

or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this article on the form of bill of lading (§ 2-323).

B. Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must:

1. At his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

2. Obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

C. Unless otherwise agreed in any case falling within Subsection (A)(1) or (3) or Subsection (B), the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B., the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this article (§ 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

D. Under the term F.O.B. vessel or F.A.S. unless otherwise agreed, the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-319 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The section is intended to negate the uncommercial line of decision which treats an "F.O.B." term as "merely a price term". The distinctions taken in Subsection (A) handle most of the issues which have on occasion led to the unfortunate judicial language just referred to. Other matters which have led to sound results being based on unhappy language in regard to F.O.B. clauses are dealt with in this Code by § 2-311(B) (seller's option regarding arrangements relating to shipment) and §§ 2-614 and 615 (substituted performance and seller's excuse).

2. Subsection (A)(3) not only specifies the duties of a seller who engages to deliver "F.O.B vessel", or the like, but ought to make dear that no agreement is soundly drawn when it looks to reshipment from San Francisco or New York, but speaks merely of "F.O.B." the place.

3. The buyer's obligations stated in Subsection (A)(3) and Subsection (C) are as shown in the text, obligations of cooperation. The last sentence of

Subsection (C) expressly, though perhaps unnecessarily, authorizes the seller, pending instructions, to go ahead with such preparatory moves as shipment from the interior to the named point of delivery. The sentence presupposes the usual case in which instructions "fail"; a prior repudiation by the buyer, giving notice that breach was intended, would remove the reason for the sentence, and would normally bring into play, instead, the second sentence of § 2-704, which duly calls for lessening damages.

4. The treatment of "F.O.B. vessel" in conjunction with F.A.S. fits, in regard to the need for payment against documents, with standard practice and case law; but "F.O.B. vessel" is a term which by its very language makes express the need for an "on board" document. In this respect, that term is stricter than the ordinary overseas "shipment" contract (C.I.F., etc., § 2-320).

Cross References

Sections 2-311(C), 2-323, 2-503 and 2-504.

Definitional Cross References

"Agreed". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Term". Section 1-201.

Special Plain Language Comment

Sections 2-319 to 2-322 concern standard methods of shipment. The sections determine when the risk of loss in the goods will pass from one party to the other and other rights of the parties. These other rights can be quite important: for example shipment under C.I.F. and C. & F. terms, the buyer must pay upon the delivery of the appropriate documents and may not inspect the goods prior to the payment.

§ 2-320. C.I.F. and C. & F. terms

A. The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named estimation. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

B. Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to:

1. Put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

2. Load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

3. Obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

4. Prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

5. Forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

C. Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligation and risks as a C.I.F. term except the obligation as to insurance.

D. Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-320 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and "title". Delivery of possession of the goods is accomplished by delivery of the bill of lading, and upon tender of the required documents the buyer must pay the agreed price without awaiting the arrival of the goods and if they have been lost or damaged after proper shipment he must seek his remedy against the carrier or insurer. The buyer has no right of inspection prior to payment or acceptance of the documents.

2. The seller's obligations remain the same even though the C.I.F. term is "used only in connection with the stated price and destination".

3. The insurance stipulated by the C.I.F. term is for the buyer's benefit, to protect him against the risk of loss or damage to the goods in transit. A clause in a C.I.F. contract "insurance-for the account of sellers" should be viewed in its ordinary mercantile meaning that the sellers must pay for the insurance and not that it is intended to run to the seller's benefit.

4. A bill of lading covering the entire transportation from the port of shipment is explicitly required but the provision on this point must be read in the light of its reason to assure the buyer of as full protection as the conditions of shipment reasonably permit, remembering always that this type of contract is designed to move the goods in the channels commercially available. To enable the buyer to deal with the goods while they are afloat the bill of lading must be one that covers only the quantity of goods called for by the contract. The buyer is not required to accept his part of the goods without a bill of lading because the latter covers a larger quantity, nor is he required to accept a bill of lading for the whole quantity under a stipulation to hold the excess for the owner. Although the buyer is not compelled to accept either goods or documents under such circumstances he may of course claim his rights in any goods which have been identified to his contract.

5. The seller is given the option of paying or providing for the payment of freight. He has no option to ship "freight collect" unless the agreement so provides. The rule of the common law that the buyer need not pay the freight if the goods do not arrive is preserved.

Unless the shipment has been sent "freight collect" the buyer is entitled to receive documentary evidence that he is not obligated to pay the freight; the seller is therefore required to obtain a receipt "showing that the freight has been paid or provided for". The usual notation in the appropriate space on the bill of lading that the freight has been prepaid is a sufficient receipt, as at common law. The phrase "provided for" is intended to cover the frequent situation in which the carrier extends credit to a shipper for the freight on successive shipments and receives periodical payments of the accrued freight charges from him.

6. The requirement that unless otherwise agreed the seller must procure insurance "of a kind and on terms then current at the port for shipment in the usual amount, in the currency of the contract, sufficiently shown to cover the same goods covered by the bill of lading" applies to both marine and war risk insurance. As applied to marine insurance, it means such insurance as is usual or customary at the port for shipment with reference to the particular kind of goods involved, the character and equipment of the vessel, the route of the voyage, the port of destination and any other considerations that affect the risk. It is the substantial equivalent of the ordinary insurance in the particular trade and on the particular voyage and is subject to agreed specifications of type or extent of coverage. The language does not mean that the insurance must be adequate to cover all risks to which the goods may be subject in transit. There are some types of loss or damage that are not covered by the usual marine insurance and are excepted in bills of lading or in applicable statutes from the causes of loss or damage for which the carrier or the vessel is liable. Such risks must be borne by the buyer under this article. Insurance secured in compliance with a C.I.F. term must cover the entire transportation of the goods to the named destination.

7. An additional obligation is imposed upon the seller in requiring him to procure customary war risk insurance at the buyer's expense. This changes the common law on the point. The seller is not required to assume the risk of including in the C.I.F. price the cost of such insurance, since it often fluctuates rapidly, but is required to treat it simply as a necessary for the buyer's account. What war risk insurance is "current" or usual turns on the standard forms of policy or rider in common use.

8. The C.I.F. contract calls for insurance covering the value of the goods at the time and place of shipment and does not include any increase in market value during transit or any anticipated profit to the buyer on a sale by him.

The contract contemplates that before the goods arrive at their destination they maybe sold again and again on C.I.F. terms and that the original policy of insurance and bill of lading will run with the interest in the goods by being transferred to each successive buyer. A buyer who becomes the seller in such an intermediate contract for sale does not thereby, if his sub-buyer knows the circumstances, undertake to insure the goods again at an increased price fixed in the new contract or to cover the increase in price by additional insurance, and his buyer may not reject the documents on the ground that the original policy does not cover such higher price. If such a sub-buyer desires additional insurance he must procure it for himself

Where the seller exercise an option to ship "freight collect" and to credit the buyer with the freight against the C.I.F. price, the insurance need not cover the freight since the freight is not at the buyer's risk. On the other hand, where the seller prepays the freight upon shipping under a bill of lading requiring prepayment and providing that the freight shall be deemed earned and shall be retained by the carrier "ship and/or cargo lost or not lost", or using words of similar import, he must procure insurance that will cover the freight, because notwithstanding that the goods are lost in transit the buyer is bound to pay the freight as part of the C.I.F. price and will be unable to recover it back from the carrier.

9. Insurance "for the account of whom it may concern" is usual and sufficient. However, for a valid tender the policy of insurance must be one which can be disposed of together with the bill of lading and so must be "sufficiently shown to cover the same goods covered by the bill of lading". It must cover separately the quantity of goods called for by the buyer's contract and not merely insure his goods as part of a larger quantity in which others are interested, a case provided for in American mercantile practice by the use of negotiable certificates of insurance which are expressly authorized by this section. By usage these certificates are treated as the equivalent of separate policies and are good tender under C.I.F. contracts. The term "certificate of insurance", however, does not of itself include certificates or "cover notes" issued by the insurance broker and stating that the goods are covered by a policy. Their sufficiency as substitutes for policies will depend upon proof of an established usage or course of dealing. The present section rejects the rule that not only brokers' certificates and "cover notes" but also certain forms of American insurance certificates are not the equivalent of policies and are not good tender under a C.I.F. contract.

The seller's failure to tender a proper insurance document is waived if the buyer refuses to make payment on other and untenable grounds at a time when proper insurance could have been obtained and tendered by the seller if timely objection had been made. Even a failure to insure on shipment may be cured by seasonable tender of a policy retroactive in effect; e.g., one insuring the goods "lost or not lost". The provisions of this article on cure of improper tender and on waiver of buyer's objections by silence are applicable to insurance tenders under a C.I.F. term. Where there is no waiver by the buyer as described above, however, the fact that the goods arrive safely does not cure the seller's breach of his obligations to insure them and tender to the buyer a proper insurance document.

10. The seller's invoice of the goods shipped under a C.I.F. contract is regarded as a usual and necessary document upon which reliance may properly be placed. It is the document which evidences points as of description, quality and the like which do not readily appear in other documents. This article rejects those statements to the effect that the invoice is a usual but not a necessary document under a C.I.F. term.

11. The buyer needs all of the documents required under a C.I.F. contract, in due form and with necessary endorsements, so that before the goods arrive he may deal with them by negotiating the documents or may obtain prompt possession of the goods after their arrival. If the goods are lost or damaged in transit the documents are necessary to enable him promptly to assert his remedy against the carrier or insurer. The seller is therefore obligated to do what is mercantilely reasonable in the circumstances and should make every reasonable exertion to send forward the documents as soon as possible after the shipment. The requirement that the documents be forwarded with "commercial promptness" expresses a more urgent need for action than that suggested by the phrase "reasonable time".

12. Under a C.I.F. contract the buyer, as under the common law, must pay the price upon tender of the required documents without first inspecting the goods, but his payment in these circumstances does not constitute an acceptance of the goods nor does it impair his right of subsequent inspection or his options and remedies in the case of improper delivery. All remedies and rights for the seller's breach are reserved to him. The buyer must pay before inspection and assert his remedy against the seller afterward unless the non-conformity of the goods amounts to a real failure of consideration, since the purpose of choosing this form of contract is to give the seller protection against the buyer's unjustifiable rejection of the goods at a distant port of destination which would necessitate taking possession of the goods and suing the buyer there.

13. A valid C.I.F. contract may be made which requires part of the transportation to be made on land and part on the sea, as where the goods are to be brought by rail from an inland point to a seaport and thence transported by vessel to the named destination under a "through" or combination bill of lading issued by the railroad company. In such a case shipment by rail from the inland point within the contract period is a timely shipment notwithstanding that the loading of the goods on the vessel is delayed by causes beyond the seller's control.

14. Although Subsection (B) stating the legal effects of the C.I.F. term is an "unless otherwise agreed" provision, the express language used in an agreement is frequently a precautionary, fuller statement of the normal C.I.F. terms and

hence not intended as a departure or variation from them. Moreover, the dominant outlines of the C.I.F. term are so well understood commercially that any variation should, whenever reasonably possible, be read as falling within those dominant outlines rather than as destroying the whole meaning of a term which essentially indicates a contract for proper shipment rather than one for delivery at destination. Particularly careful consideration is necessary before a printed form or clause is construed to mean agreement otherwise and where a C.I.F. contract is prepared on a printed form designed for some other type of contract, the C.I.F. terms must prevail over printed clauses repugnant to them.

15. Under Subsection (D) the fact that the seller knows at the time of the tender of the documents that the goods have been lost in transit does not affect his rights if he has performed his contractual obligations. Similarly, the seller cannot perform under a C.I.F. term by purchasing and tendering landed goods.

16. Under the C. & F. term, as under the C.I.F. term, title and risk of loss are intended to pass to the buyer on shipment. A stipulation in a C. & F. contract that the seller shall effect insurance on the goods and charge the buyer with the premium (in effect that he shall act as the buyer's agent for that purpose) is entirely in keeping with the pattern. On the other hand, it often happens that the buyer is in a more advantageous position than the seller to effect insurance on the goods or that he has in force an "open" or "floating" policy covering all shipments made by him or to him, in either of which events the C. & F. term is adequate without mention of insurance.

17. It is to be remembered that in a French contract the term "CA.F." does not mean "Cost and Freight" but has exactly the same meaning as the term "C.I.F." since it is merely the French equivalent of that term. The "A" does not stand for "and", but for "assurance" which means insurance.

Cross References

Point 4: Section 2–323.

Point 6: Section 2–509(A)(1).

Point 9: Sections 2–508 and 2–605(A)(1).

Point 12: Sections 2–321(C), 2–512 and 2–513(C).

Definitional Cross References

"Bill of lading". Section 1–201.

"Buyer". Section 2–103.

"Contract". Section 1–201.

"Goods". Section 2–105.

"Rights". Section 1–201.

"Seller". Section 2-103.

"Term". Section 1-201.

§ 2-321. C.I.F. or C. & F.: "net landed weights"; "payment on arrival"; warranty of condition on arrival

Under a contract containing a term C.I.F. or C. & F:

A. Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

B. An agreement described in Subsection (A) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

C. Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-321 of the Uniform Commercial Code adopted by the states.

Commentary. This section deals with two variations of the C.I.F. contract which have evolved in mercantile practice but are entirely consistent with the basic C.I.F. pattern. Subsections (A) and (B), which provide for a shift to the seller of the risk of quality and weight deterioration during shipment, are designed to conform the law to the best mercantile practice and usage without changing the legal consequences of the C.I.F. or C. & F. term as to the passing of marine risks to the buyer at the point of shipment. Subsection (C) provides that where under the contract documents are to be presented for payment after arrival of the goods, this amounts merely to a postponement of the payment under the C.I.F. contract and is not to be confused with the "no arrival, no sale" contract. If the goods are lost, delivery of the documents and payment against them are due when the goods should have arrived. The clause for payment on or after arrival is not to be construed as such a condition precedent to payment that if the goods are lost in transit the buyer need never pay and the seller must bear the loss.

Cross References

Section 2–324.

Definitional Cross References

"Agreement". Section 1–201.

"Contract". Section 1–201.

"Delivery". Section 1–201.

"Goods". Section 2–105.

"Seller". Section 2–103.

"Term". Section 1–201.

§ 2–322. Delivery "ex-ship"

A. Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

B. Under such a term unless otherwise agreed:

1. The seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

2. The risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–322 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The delivery term, "ex-ship", as between seller and buyer, is the reverse of the F.A.S. term covered.

2. Delivery need not be made from any particular vessel under a clause calling for delivery "ex-ship", even though a vessel on which shipment is to be made originally is named in the contract, unless the agreement by appropriate language restricts the clause to delivery from a named vessel.

3. The appropriate place and manner of unloading at the port of destination depend upon the nature of the goods and the facilities and usages of the port.

4. A contract fixing a price "ex-ship" with payment "cash against documents"

calls only for such documents as are appropriate to the contract. Tender of a delivery order and of a receipt for the freight after the arrival of the carrying vessel is adequate. The seller is not required to tender a bill of lading as a document of title nor is he required to insure the goods for the buyer's benefit, as the goods are not at the buyer's risk during the voyage.

Cross References

Point 1: Section 2-319(B).

Definitional Cross References

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

"Term". Section 1-201.

§ 2-323. Form of bill of lading required in overseas shipment: "overseas"

A. Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

B. Where in a case within Subsection (A) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:

1. Due tender of a single part is acceptable within the provisions of this article on cure of improper delivery (§ 2-508(A)); and

2. Even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

C. A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-323 of the Uniform Commercial Code adopted by the states. Article 5 of the

Uniform Commercial Code relating to "Letters of Credit" has not been adopted by the Navajo Nation. The rights of parties which would be governed under Article 5 are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. Subsection (A) follows the "American" rule that a regular bill of lading indicating delivery of the goods at the dock for shipment is sufficient, except under a term "F.O.B. vessel". See § 2-319 and comment thereto.

2. Subsection (B) deals with the problems of bills of lading covering deep water shipments, issued not as a single bill of lading but in a set of parts, each part referring to the other parts and the entire set constituting in commercial practice and at law a single bill of lading. Commercial practice in international commerce is to accept and pay against presentation of the first part of a set if the part is sent from overseas even though the contract of the buyer requires presentation of a full set of bills of lading provided adequate indemnity for the missing parts is forthcoming.

This Subsection codifies that practice as between buyer and seller. Article 5 of the Uniform Commercial Code which has not been adopted by the Navajo Nation and the rules concerning banks' presentations of drafts under letters of credit which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204. This Subsection means that the buyer must accept and act on drafts by banks issued under letters of credit to give indemnities against missing parts if he in good faith deems them adequate. But neither this Subsection nor Article 5 decides whether a bank which has issued a letter of credit is similarly bound. The issuing bank's obligation under a letter of credit is independent and depends on its own terms.

Cross References

Section 2-508(B).

Definitional Cross References

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Financing agency". Section 2-104.

"Person". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". § 1-201.

§ 2-324. "No arrival, no sale" term

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed:

A. The seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

B. Where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (§ 2-613).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-324 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The "no arrival, no sale" term in a "destination" overseas contract leaves risk of loss on the seller but gives him an exemption from liability for non-delivery. Both the nature of the case and the duty of good faith require that the seller must not interfere with the arrival of the goods in any way. If the circumstances impose upon him the responsibility for making or arranging the shipment, he must have a shipment made despite the exemption clause. Further, the shipment made must be a conforming one, for the exemption under a "no arrival, no sale" term applies only to the hazards of transportation and the goods must be proper in all other respects.

The reason of this section is that where the seller is reselling goods bought by him as shipped by another and this fact is known to the buyer, so that the seller is not under any obligation to make the shipment himself, the seller is entitled under the "no arrival, no sale" clause to exemption from payment of damages for non-delivery if the goods do not arrive or if the goods which actually arrive are non-conforming. This does not extend to sellers who arrange shipment by their own agents, in which case the clause is limited to casualty due to marine hazards. But sellers who make known that they are contracting only with respect to what will be delivered to them by parties over whom they assume no control are entitled to the full quantum of the exemption.

2. The provisions of this article on identification must be read together with the present section in order to bring the exemption into application. Until there is some designation of the goods in a particular shipment or on a particular ship as being those to which the contract refers there can be no application of an exemption for their non-arrival.

3. The seller's duty to tender the agreed or declared goods if they do arrive is not impaired because of their delay in arrival or by their arrival after transshipment.

4. The phrase "to arrive" is often employed in the same sense as "no arrival,

no sale" and may then be given the same effect. But a "to arrive" term, added to a C.I.F. or C. & F. contract, does not have the full meaning given by this section to "no arrival, no sale". Such a "to arrive" term is usually intended to operate only to the extent that the risks are not covered by the agreed insurance and the loss or casualty is due to such uncovered hazards. In some instances the "to arrive" term maybe regarded as a time of payment term, or, in the case of the reselling seller discussed in Point I above, as negating responsibility for conformity of the goods, if they arrive, to any description which was based on his good faith belief of the quality. Whether this is the intention of the parties is a question of fact based on all the circumstances surrounding the resale and in case of ambiguity the rules of §§ 2-316 and 2-317 apply to preclude dishonor.

5. Subsection (B) applies where goods arrive impaired by damage or partial loss during transportation and makes the policy of this article on casualty to identified goods applicable to such a situation. For the term cannot be regarded as intending to give the seller an unforeseen profit through casualty, it is intended only to protect him from loss due to causes beyond his control.

Cross References

Point 1: Section 1-203.

Point 2: Section 2-501(1) and (3)

Point 5: Section 2-613.

Definitional Cross References

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Sale". Section 2-106.

"Seller". Section 2-103.

"Term". Section 1-201.

§ 2-325. "Letter of credit" term; "confirmed credit"

A. Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

B. The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

C. Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-325 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (B) follows the general policy of this article and Article 3 (§ 3-802) on conditional payment, under which payment by check or other short-term instrument is not ordinarily final as between the parties if the recipient duly presents the instrument and honor is refused. Thus the furnishing of a letter of credit does not substitute the financing agency's obligation for the buyer's, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.

2. Subsection (C) requires that the credit be irrevocable and be a prime credit as determined by the standing of the issuer. It is not necessary, unless otherwise agreed, that the credit be a negotiation credit; the seller can finance himself by an assignment of the proceeds.

3. The definition of "confirmed credit" is drawn on the supposition that the credit is issued by a bank which is not doing direct business in the seller's financial market; there is no intention to require the obligation of two banks both local to the seller.

Cross References

Sections 2-403, 2-511(C) and 3-802.

Definitional Cross References

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Draft". Section 3-104.

"Financing agency". Section 2-104.

"Notifies". Section 1-201.

"Overseas". Section 2-323.

"Purchaser". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Term". Section 1-201.

§ 2-326. Sale on approval and sale or return: consignment sales and rights of creditors

A. Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

1. A "sale on approval" if the goods are delivered primarily for use; and

2. A "sale or return" if the goods are delivered primarily for resale.

B. Except as provided in Subsection (C), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

C. Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this Subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this Subsection is not applicable if the person making delivery:

1. Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or

2. Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or

3. Complies with the filing provisions of the Article on Secured Transactions (Article 9).

4. Is delivering a work of art pursuant to Subsection (D).

D. Where goods are works of art delivered to an art dealer by an artist for the purpose of exhibition or sale, and the artist's share of the proceeds from the sale of the work by the dealer, whether to the dealer on his own account or to a third person, shall create a priority in favor of the artist over the claims, liens or security interests of the creditors of the art dealer, notwithstanding any provision of the Code. For the purposes of this Subsection:

1. "Art" includes, but is not limited to paintings, sculptures, drawings, works of graphic art, pottery, weaving, batik, sand paintings,

kachina dolls, bead work, baskets, jewelry, macramés or quilts containing the artist's original handwritten signature or the artist's distinctive mark on the work of art;

2. "Artist" means the creator of a work of art, or, if he or she is deceased, the artist's heirs or personal representative;

3. "Art dealer" means a person primarily engaged in the business of selling works of art;

4. "Creditor" means a "creditor" as defined in § 1–201 of the Code; and

5. "Person" means an individual, partnership, corporation or association.

E. Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the Statute of Frauds section of this article (§ 2–201) and as contradicting the sale aspect of the contract within the provisions of this article on parol or extrinsic evidence (§ 2–202).

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–326 of the Uniform Commercial Code adopted by the states. Subsections (C)(4) and (D) were added to protect the rights of artists against the claims of creditors of art dealers or their consignees.

Commentary. 1. A "sale on approval" or "sale or return" is distinct from other types of transactions with which they have frequently been confused. The type of "sale on approval", "on trial" or "on satisfaction" dealt with involves a contract under which the seller undertakes a particular business risk to satisfy his prospective buyer with the appearance or performance of the goods in question. The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them. The price has already been agreed. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell. The type of "sale or return" involved herein is a sale to a merchant whose unwillingness to buy is overcome by the seller's engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold. These two transactions are so strongly delineated in practice and in general understanding that every presumption runs against a delivery to a consumer being a "sale or return" and against a delivery to a merchant for resale being a "sale on approval".

The right to return the goods for failure to conform to the contract does not make the transaction a "sale on approval" or "sale or return" and has nothing to do with this and the following section. The present section is not concerned with remedies for breach of contract. It deals instead with a power given by the contract to turn back the goods even though they are wholly as warranted.

The section nevertheless presupposes that a contract for sale is contemplated by the parties although that contract may be of the peculiar character here described.

Where the buyer's obligation as a buyer is conditioned not on his personal approval but on the article's passing a described objective test, the risk of loss by casualty pending the test is properly the seller's and proper return is at his expense. On the point of "satisfaction" as meaning "reasonable satisfaction" where an industrial machine is involved, this article takes no position.

2. Pursuant to the general policies of this Code which require good faith not only between the parties to the sales contract, but as against interested third parties, Subsection (C) resolves all reasonable doubts as to the nature of the transaction in favor of the general creditors of buyer. As against such creditors words such as "on consignment" or "on memorandum", with or without words of reservation of title in the seller, are disregarded when the buyer has a place of business at which he deals in goods of the kind involved. A necessary exception is made where the buyer is known to be engaged primarily in selling the goods of others or is selling under a relevant sign law, or the seller complies with the filing provisions of Article 9 as if his interest were a security interest. However, there is no intent in this section to narrow the protection afforded to third parties in any jurisdiction which has a selling Factors Act. The purpose of the exception is merely to limit the effect of the present Subsection itself, in the absence of any such Factors Act, to cases in which creditors of the buyer may reasonably be deemed to have been misled by the secret reservation.

3. Subsections (C)(4) and (D) protect the rights of artists against the interests of the creditors of the art dealers.

4. Subsection (E) resolves a conflict in the preexisting case law by recognition that an "or return" provision is so definitely at odds with any ordinary contract for sale of goods that where written agreements are involved it must be contained in a written memorandum. The "or return" aspect of a sales contract must be treated as a separate contract under the Statute of Frauds section and as contradicting the sale insofar as questions of parol or extrinsic evidence are concerned.

Cross References

Point 2: Article 9.

Point 4: Sections 2-201 and 2-202.

Definitional Cross References

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Creditor". Section 1-201.

"Goods". Section 2-105.

"Sale". Section 2-106.

"Seller". Section 2-103.

§ 2-327. Special incidents of sale on approval and sale or return

A. Under a sale on approval unless otherwise agreed:

1. Although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

2. Use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

3. After due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

B. Under a sale or return unless otherwise agreed:

1. The option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

2. The return is at the buyer's risk and expense.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-327 of the Uniform Commercial Code adopted by the states.

Commentary. 1. If all of the goods involved in a sale on approval conform to the contract, the buyer's acceptance of part of the goods constitutes acceptance of the whole. Acceptance of part falls outside the normal intent of the parties in the "on approval" situation and the policy of this article allowing partial acceptance of a defective delivery has no application here. A case where a buyer takes home two dresses to select one commonly involves two distinct contracts; if not, it is covered by the words "unless otherwise agreed".

2. In the case of a sale or return, the return of any unsold unit merely

because it is unsold is the normal intent of the "sale or return" provision, and therefore the right to return for this reason alone is independent of any other action under the contract which would turn on wholly different considerations. On the other hand, where the return of goods is for breach, including return of items resold by the buyer and returned by the ultimate purchasers because of defects, the return procedure is governed not by the present section but by the provisions on the effects and revocation of acceptance.

3. In the case of a sale on approval the risk rests on the seller until acceptance of the goods by the buyer, while in a sale or return the risk remains throughout on the buyer.

4. Notice of election to return given by the buyer in a sale on approval is sufficient to relieve him of any further liability. Actual return by the buyer to the seller is required in the case of a sale or return contract. What constitutes due "giving" of notice, as required in "on approval" sales, is governed by the provisions on good faith and notice. "Seasonable" is used here as defined in § 1-204. Nevertheless, the provisions of both this article and of the contract on this point must be read with commercial reason and with full attention to good faith.

Cross References

Point 1: Sections 2-501, 2-601 and 2-603.

Point 2: Sections 2-607 and 2-608.

Point 4: Sections 1-201 and 1-204.

Definitional Cross References

"Agreed". Section 1-201.

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Notification". Section 1-201.

"Sale on approval". Section 2-326.

"Sale or return". Section 2-326.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

§ 2-328. Sale by auction

A. In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

B. A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

C. Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

D. If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This Subsection shall not apply to any bid at a forced sale.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-328 of the Uniform Commercial code adopted by the states.

Commentary. 1. The auctioneer may in his discretion either reopen the bidding or close the sale on the bid on which the hammer was falling when a bid is made at that moment. The recognition of a bid of this kind by the auctioneer in his discretion does not mean a closing in favor of such a bidder, but only that the bid has been accepted as a continuation of the bidding. If recognized, such a bid discharges the bid on which the hammer was falling when it was made.

2. An auction "with reserve" is the normal procedure. The crucial point, however, for determining the nature of an auction is the "putting up" of the goods. This article accepts the view that the goods may be withdrawn before they are actually "put up", regardless of whether the auction is advertised as one without reserve, without liability on the part of the auction announcer to persons who are present. This is subject to any peculiar facts which might bring the case within the "firm offer" principle of this article, but an offer

to persons generally would require unmistakable language in order to fall within that section. The prior announcement of the nature of the auction either as with reserve or without reserve will, however, enter as an "explicit term" in the "putting up" of the goods and conduct thereafter must be governed accordingly. The present section continues the prior rule permitting withdrawal of bids in auctions both with and without reserve; and the rule is made explicit that the retraction of a bid does not revive a prior bid.

Cross References

Point 2: Section 2-205.

Definitional Cross References

"Buyer". Section 2-103.

"Good Faith". Section 1-201.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Notice". Section 1-201.

"Sale". Section 2-106.

"Seller". Section 2-103.

Part 4. Title, Creditors and Good Faith Purchasers

§ 2-401. Passing of title; reservation for security; limited application of this section

Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this article and matters concerning title become material, the following rules apply:

A. Title to goods cannot pass under a contract for sale prior to their identification to the contract (§ 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Code. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

B. Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:

1. If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

2. If the contract requires delivery at destination, title passes on tender there.

C. Unless otherwise explicitly agreed where delivery is to be made without moving goods:

1. If the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

2. If the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

D. A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-401 of the Uniform Commercial code adopted by the states.

Commentary. 1. This article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed. That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the Article is made clear by the preamble of this section. This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition. The basic policy of this article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this article in case the courts deem any public regulation to incorporate the defined term of the "private" law. Examples of this type of "public" law include tax law which employs transfer of "title" to determine when taxes are due and criminal law which employs the transfer of title to determine potential liability for theft.

2. "Future" goods cannot be the subject of a present sale. Before title can pass the goods must be identified in the manner set forth in § 2-501. The

parties, however, have full liberty to arrange by specific terms for the passing of title to goods which are existing.

3. The "special property" of the buyer in goods identified to the contract is excluded from the definition of "security interest"; its incidents are defined in provisions of this article such as those on the rights of the seller's creditors, on good faith purchase, on the buyer's right to goods on the seller's insolvency, and on the buyer's right to specific performance or replevin.

4. The factual situations in Subsections (B) and (C) upon which passage of title turn actually base the test upon the time when the seller has finally committed himself in regard to specific goods. Thus in a "shipment" contract he commits himself by the act of making the shipment. If shipment is not contemplated Subsection (C) turns on the seller's final commitment, i.e., the delivery of documents or the making of the contract.

Cross References

Point 2: Sections 2-102, 2-501 and 2-502.

Point 3: Sections 1-201, 2-402, 2-403, 2-502 and 2-716.

Definitional Cross References

"Agreement". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Receipt of goods". Section 2-103.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

Special Plain Language Comment

In most cases the transfer of title (or ownership) under the Code does not determine changes in the rights of the parties. Such rights are determined by concepts in the Code such as acceptance. However, in some "residual" cases not covered by the Code, the time of transfer of title will be important to determine log the rights of the parties. For these "residual" cases and other statutes such as tax and criminal statutes this section gives guidance on the issue of when title passes. Title may only pass after "identification" (a term defined in § 2-501) of the goods, when the goods covered by the agreement have been designated in some way so that they can be separated from other goods. Unless otherwise agreed by the parties, title passes upon the seller's completion of any actions necessary to "deliver" the goods. For example, if the agreement provides for shipment, but not delivery of the goods, then title passes upon such shipment, i.e., in such a contract the title passes to the buyer when the seller places the cattle on a truck for delivery, not at the time the shipper delivers the cattle to their destination. Ownership in the goods returns to the seller if the goods are rejected by buyer, but such a transfer is not defined as a "sale" since the goods are being returned and many Code provisions relating to sales would be inappropriate.

§ 2-402. Rights of seller's creditors against sold goods

A. Except as provided in Subsections (B) and (C), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this article (§§ 2-502 and 2-716).

B. A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

C. Nothing in this article shall be deemed to impair the rights of creditors of the seller:

1. Under the provisions of the Article on Secured Transactions (Article 9); or

2. Where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from the doctrine of fraudulent retention in this section 2-402(A) and 2-402(B) constitute the transaction a

fraudulent transfer or voidable preference.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-402 of the Uniform Commercial Code adopted by the states. The reference to this "Article" in § 2-402(C)(2) is clarified by referring specifically to the Doctrine of Fraudulent Retention.

Commentary. 1. Local law on questions of hindrance of creditors by the seller's retention of possession of the goods are outside the scope of this article, but retention of possession in the current course of trade is legitimate. Transactions which fall within the law's policy against improper preferences are reserved from the protection of this article.

2. The retention of possession of the goods by a merchant seller for a commercially reasonable time after a sale or identification in current course is exempted from attack as fraudulent. Similarly, the provisions of Subsection (C) have no application to identification or delivery made in the current course of trade, as measured against general commercial understanding of what a "current" transaction is.

Definitional Cross References

"Contract for sale". Section 2-106.

"Creditor". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Money". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Seller". Section 2-103.

Special Plain Language Comment

This section deals with the problem of the conflict of rights between the seller's creditors and the buyer for goods which have been sold to the buyer but are still held by the seller. The retention of goods by the seller which have already been sold can mislead the creditors of the seller concerning his financial position—the seller will appear to have more "assets" than he actually owns. The creditors of the seller may void the "sale" of the goods to the buyer, unless the seller is a "merchant" and only retains the goods for a "reasonable time". Moreover, even if the goods are delivered to the buyer a seller may still claim rights to them through a security interest (see Article 9) or the doctrine of fraudulent conveyance under Navajo law.

§ 2-403. Power to transfer; good faith purchase of goods; "entrusting"

A. A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of this interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:

1. The transferor was deceived as to the identity of the purchaser; or

2. The delivery was in exchange for a check which is later dishonored; or

3. It was agreed that the transaction was to be a "cash sale"; or

4. The delivery was procured through fraud punishable as larcenous under the criminal law.

B. Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to, transfer all rights of the entruster to a buyer in ordinary course of business.

C. "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

D. The rights of other purchasers of goods and of lien creditors are governed by the Article on Secured Transactions (Article 9), and the Articles on Bulk Transfers and Documents of Title as established Navajo law pursuant to 7 N.N.C. § 204.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-403 of the Uniform commercial Code adopted by the states. References to Articles 6 and 7 of the Uniform Commercial Code have been omitted because the Navajo Nation has not adopted these Articles.

Commentary. 1. This section states a unified and simplified policy on good faith purchase of goods. The basic policy of our law allowing transfer of such title as the transferor has is generally continued and expended under Subsection (A). In this respect the provisions of the section are applicable to a person taking by any form of "purchase" as defined by the Code. Moreover the policy of the Code expressly providing for the application of supplementary general principles of law to sales transactions wherever appropriate joins with the present section to continue unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles.

On the other hand, the contract of purchase is of course limited by its own terms as in a case of pledge for a limited amount or of sale of a fractional interest in goods. The Code in § 2-403(A)(1) rejects the distinction between deception carried on face-to-face and deception carried on by mail or wire. This rejection is based upon the policy of shifting the focus of the inquiry from the intention of the initial transferor to the good faith of the ultimate purchaser.

2. The many particular situations in which a buyer in ordinary course of business from a dealer has been protected against reservation of property or other hidden interest are gathered by subsections (B)-(D) into a single principle protecting persons who buy in ordinary course out of inventory. Consignors have no reason to complain, nor have lenders who hold a security interest in the inventory, since the very purpose of goods in inventory is to be turned into cash by sale.

The principle is extended in Subsection (C) to fit with the abolition of the old law of "cash sale" by Subsection (A)(3). It is also freed from any technicalities depending on the extended law of larceny; such extension of the concept of theft to include trick, particular types of fraud, and the like is for the purpose of helping conviction of the offender; it has no proper application to the long-standing policy of civil protection of buyers from persons guilty of such trick or fraud. Finally, the policy is extended, in the interest of simplicity and sense, to any entrusting by a bailor; this is in consonance with the explicit provisions of § 7-205 on the powers of a warehouseman who is also in the business of buying and selling fungible goods of the kind he warehouses. Article 7 has not been adopted by the Navajo Nation and the powers of the warehouseman which would be governed under § 7-205 are governed by Navajo law pursuant to 7 N.N.C. § 204. As to entrusting by a secured party, Subsection (B) is limited by the more specific provisions of § 9-307(A), which deny protection to a person buying farm products from a person engaged in farming operations.

3. The definition of "buyer in ordinary course of business" (§ 1-201) is effective here and preserves the essence of the healthy limitations developed by the case law on the older statutes. The older loose concept of good faith and wide definition of value combined to create apparent good faith purchasers in many situations in which the result outraged common sense; the court's solution was to protect the original title especially by use of "cash sale" or of over-technical construction of the enabling clauses of pre-Uniform Commercial Code statutes. But such rulings then turned into limitations on the proper protection of buyers in the ordinary market. Section 1-201(1) cuts down the category of buyer in ordinary course in such fashion as to take care of the results of the cases, but with no price either in confusion or in injustice to

proper dealings in the normal market.

4. Except as provided in Subsection (A), the rights of purchasers other than buyers in ordinary course are left to the Articles on Secured Transactions, Documents of Title, and Bulk Sales. The Navajo Nation has not adopted Articles 6 and 7 (Bulk Sales and Documents of Title) of the Uniform Commercial Code; thus the rights of purchasers which would be governed under these Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

Cross References

Point 1: Sections 1-103 and 1-201.

Point 2: Sections 1-201, 2-402 and 9-307(A).

Points 3 and 4: Sections 1-102, 1-201, 2-104, 2-707 and Article 9.

Definitional Cross References

"Buyer in ordinary course of business" § 1-20 1.

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

"Goods". Section 2-105.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Signed". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

Special Plain Language Comment

This section is based on the presumption that for markets to operate efficiently a buyer must be confident that he is receiving "good title" (ownership) of the goods. This section deals with situations in which two sales of the goods have taken place, the owner has sold to a first buyer who has in turn sold to a second or "ultimate" buyer. In such circumstances, what are the rights of the owner against the ultimate buyer if the first buyer is a wrongdoer? For example, if the check of "first buyer" bounces or the first buyer fails to pay the cash he promised. Thus a business which purchases a truck and pays for it by a check which bounces, does not have "good title" to the truck. The original owner may demand the return of the truck. However, if the company buying the truck in turn sells it to a new purchaser who buys it "in good faith" (i.e., honestly, without an intent to defraud the original owner) and for "value", the original owner has no rights to demand the truck from the "new purchaser". The rights of the original owner have been "cut off" by the sale of the truck to a "good faith purchaser for value". The same result comes about if the first buyer obtained the truck by fraud or by misidentifying himself. However, the original owner could obtain the truck back from the "new purchaser" if the first buyer stole the truck.

The second part of this section deals with situations in which the owner voluntarily gives possession of goods to a "merchant" who normally deals in such goods and agrees to let such a merchant retain the goods. A common example is bringing a watch to a jeweler for repair. If the "merchant" sells the goods to an innocent buyer the owner cannot recover the goods from such an innocent buyer. Once again the section follows the policy of assuring buyers that they are getting "good title" to the goods they buy in the marketplace.

Part 5. Performance

§ 2-501. Insurable interest in goods; manner of identification of goods

A. The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs:

1. When the contract is made if it is for the sale of goods already existing and identified;

2. If the contract is for the sale of future goods other than those described in paragraph (3), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

3. When the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within 12 months after contracting or for the sale of crops to be harvested within 12 months or the next normal harvest season after contracting whichever is longer.

B. The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone, he may, until default or insolvency or notification to the buyer that the identification is final, substitute other goods for those identified.

C. Nothing in this section impairs any insurable interest recognized under any statute or rule of law.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-501 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The present section deals with the manner of identifying goods to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue. Generally speaking, identification may be made in any manner "explicitly agreed to" by the parties. The rules of paragraphs (1), (2) and (3) apply only in the absence of such "explicit agreement".

2. In the ordinary case identification of particular existing goods as goods to which the contract refers is unambiguous and may occur in one of many ways. It is possible, however, for the identification to be tentative or contingent. In view of the limited effect given to identification by this article, the general policy is to resolve all doubts in favor of identification.

3. The uncertainty concerning the effect of presumptions in paragraphs (1), (2) and (3) is reduced to a minimum under this section by requiring "explicit agreement" of the parties before the rules of these paragraphs are displaced—as they would be by a term giving the buyer power to select the goods. An "explicit" agreement, however, need not necessarily be found in the terms used in the particular transaction. Thus, where usage of the trade had previously been made explicit by reduction to a standard set of "rules and regulations" currently incorporated by reference into the contracts of the parties, a relevant provision of those "rules and regulations" is "explicit" within the meaning of this section.

4. In view of the limited function of identification there is no requirement in this section that the goods be in deliverable state or that all of the seller's duties with respect to the processing of the goods be completed in order that identification occur. For example, despite identification the risk of loss remains on the seller under the risk of loss provisions until completion of his duties as to the goods and all of his remedies remain dependent upon his not defaulting under the contract.

5. Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough under paragraph (1) to effect an identification if there is no explicit agreement otherwise. The seller's duty, however, to segregate and deliver according to the contract is not affected by such an identification but is controlled by other provisions of this article.

6. Identification of crops under paragraph (3) is made upon planting only if they are to be harvested within the year or within the next normal harvest season. The phrase "next normal harvest season" fairly includes nursery stock raised for normally quick "harvest", but plainly excludes a "timber" crop to which the concept of a harvest "season" is inapplicable.

Paragraph (3) is also applicable to a crop of wool or the young of animals to be born within twelve (12) months after contracting. The product of a lumbering, mining or fishing operation, though seasonal, is not within the concept of "growing". Identification under a contract for all or part of the output of such an operation can be effected early in the operation.

Cross References

Point 1: Section 2–502.

Point 4: Sections 2-509, 2-510 and 2-703.

Point 5: Sections 2-105, 2-308, 2-503 and 2-509.

Point 6: Sections 2-105(A), 2-107(A) and 2-402.

Definitional Cross References

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Future goods". Section 2-105.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Party". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 2-502. Buyer's right to goods on seller's insolvency

A. Subject to Subsection (B) and even though the goods have not been shipped a buyer, who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section, may on making and keeping good a tender of any unpaid portion of their price recover them from the Seller if the seller's insolvency occurs 10 days prior to or 10 days after the receipt of any installment on their price. This remedy is not available if the buyer had actual knowledge of seller's insolvency prior to payment of the installment.

B. If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section has been amended to increase the circumstances under which a buyer may recover such goods. Under the Official Text of the Uniform Commercial Code the buyer may only exercise this right if the seller becomes insolvent within 10 days after the payment of buyer's installment. To avoid the difficult factual issue of when a seller became insolvent, the Code provides that this remedy is available if the seller becomes insolvent either 10 days before or after the payment of any, not just the first, installment. However, the buyer will not be able to employ this extraordinary remedy if his payment was made with actual knowledge of the seller's insolvency since he was aware of the risks he undertook.

Commentary. 1. This section gives an additional right to the buyer as a result of identification of the goods to the contract in the manner provided in § 2-501. The buyer is given a right to the goods on the seller's insolvency occurring 10 days before or after he receives the installment on their price.

2. The question of whether the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency takes place after the 10-day period provided in this section depends upon compliance with the provisions of the Article on Secured Transactions (Article 9).

3. Subsection (B) is included to preclude the possibility of unjust enrichment which exists if the buyer were permitted to recover goods even though they were greatly superior in quality or quantity to that called for by the contract for sale.

Cross References

Point 1: Section 1-201.

Point 2: Article 9.

Definitional Cross References

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Right". Section 1-201.

"Seller". Section 2-103.

§ 2-503. Manner of seller's tender of delivery

A. Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this article, and in particular:

1. Tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

2. Unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

B. Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

C. Where the seller is required to deliver at a particular destination, tender requires that he comply with Subsection (A) and also in any appropriate case tender documents as described in Subsections (D) and (E) of this section.

D. Where goods are in the possession of a bailee and are to be delivered without being moved:

1. Tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

2. Tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

E. Where the contract requires the seller to deliver documents

1. He must tender all such documents in correct form, except as provided in this article with respect to bills of lading in a set (§ 2-323(B)); and

2. Tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-503 of the Uniform Commercial Code adopted by the states. Article 7 of the Uniform Commercial Code has not been adopted by the Navajo Nation and the rights of a buyer in transactions involving documents of title which would be governed by such Article are governed by Navajo laws pursuant to 7 N.N.C. § 204.

Commentary. 1. The major general rules governing the manner of proper or due tender of delivery are gathered in this section. The term "tender" is used in this article in two different senses. In one sense it refers to "due tender" which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed. Unless the context unmistakably indicates otherwise this is the meaning of "tender" in this article and the occasional addition of the word "due" is only for clarity and emphasis. At other times it is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation. Used in either sense, however, "tender" connotes such performance by the tendering party as puts the other party in default if he fails to proceed in some manner.

2. The seller's general duty to tender and deliver is laid down in § 2-301 and more particularly in § 2-507. The seller's right to a receipt if he demands one and receipts are customary is governed by § 1-205. Subsection (A) of the present section proceeds to set forth two primary requirements of tender: first, that the seller "put and hold conforming goods at the buyer's disposition", and second, that he "give the buyer any notice reasonably necessary to enable him to take delivery."

In cases in which payment is due and demanded upon delivery the "buyer's disposition" is qualified by the seller's right to retain control of the goods until payment by the provision of this article on delivery on condition. However, where the seller is demanding payment on delivery he must first allow the buyer to inspect the goods in order to avoid impairing his tender unless the contract for sale is on C.I.F., C.O.D., cash against documents or similar terms negating the privilege of inspection before payment.

In the case of contracts involving documents the seller can "put and hold conforming goods at the buyer's disposition" under Subsection (A) by tendering documents which give the buyer complete control of the goods under the provisions of Article 7 of the Uniform Commercial Code on due negotiation. Article 7 of the Uniform Commercial Code has not been adopted by the Navajo Nation, but the rights of buyers which would be governed under such Article 7 will be governed by Navajo law pursuant to 7 N.N.C. § 204.

3. Under Subsection (A)(1) usage of the trade and the circumstances of the particular case determine what is a reasonable hour for tender and what constitutes a reasonable period of holding the goods available.

4. The buyer must furnish reasonable facilities for the receipt of the goods tendered by the seller under Subsection (A)(2). This obligation of the buyer is no part of the seller's tender.

5. For the purposes of Subsections (B) and (C), there is omitted from this article the rule that a term requiring the seller to pay the freight or cost of transportation to the buyer is equivalent to an agreement by the seller to deliver to the buyer or at an agreed destination. This omission is with the specific intention of negating the rule, for under this article the "shipment" contract is regarded as the normal one and the "destination" contract as the variant type. The seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed so to deliver or the commercial understanding of the terms used by the parties contemplates such delivery.

6. Subsection (D)(2) adopts the rule that between the buyer and the seller the risk of loss remains on the seller during a period reasonable for securing acknowledgment of the transfer from the bailee, while as against an other parties the buyer's rights are fixed as of the time the bailee receives notice of the transfer.

7. Under Subsection (E) documents are never "required" except where there is an express contract term or it is plainly implicit in the peculiar circumstances of the case or in a usage of trade. Documents may, of course, be "authorized" although not required, but such cases are not within the scope of this Subsection. When documents are required, there are three main requirements of this Subsection: (1) "All": each required document is essential to a proper tender; (2) "Such": the documents must be the ones actually required by the contract in terms of source and substance; (3) "Correct form": all documents must be in correct form.

When a prescribed document cannot be procured, a question of fact arises under the provision of this article on substituted performance as to whether the agreed manner of delivery is actually commercially impracticable and whether the substitute is commercially reasonable.

Cross References

Point 2: Sections 1-205, 2-301, 2-310, 2-507 and 2-513.

Point 5: Sections 2-308, 2-3 10 and 2-509.

Point 7: Section 2-614(A).

Specific matters involving tender are covered in many additional sections of this article. See §§ 1-205, 2-301, 2-306 to 2-319, 2-321(C), 2-504, 2-507(B), 2-511(A), 2-513, 2-612 and 2-614.

Definitional Cross References

"Agreement". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 1-106.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Dishonor". Section 3-508.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Goods". Section 2-105.

"Notification". Section 1–201.

"Reasonable time". Section 1–204.

"Receipt of goods". Section 2–103.

"Rights". Section 1–201.

"Seasonably". Section 1–204.

"Seller". Section 2–103.

"Written". Section 1–201.

Special Plain Language Comment

This section describes the seller's basic obligation under the Code to "tender" delivery of conforming goods (§ 2–301). "Tender" is defined specifically in Comment 1, but generally means the offer of goods to the buyer with the ability to deliver them upon the buyer's request. The seller must have the goods ready to deliver to the buyer and must give the buyer proper notice of such readiness. The tender must be done at a reasonable time and the buyer must furnish facilities appropriate to receive the goods. Finally, where the transaction is based on documents (such as bills of lading which stand in for the actual goods themselves) the seller must deliver the proper document in "correct" form. Because such documents are considered to be the "goods" for legal purposes, they must be completed in precisely the correct manner.

§ 2–504. Shipment by seller

A. Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must:

1. Put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

2. Obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

3. Promptly notify the buyer of the shipment.

B. Failure to notify the buyer under paragraph (3) or to make a proper contract under paragraph (1) is a ground for rejection only if material delay or loss ensues.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-504 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The section is limited to "shipment" contracts as contrasted with "destination" contracts or contracts for delivery at the place where the goods are located. The general principles embodied in this section cover the special cases of F.O.B. point of shipment contracts and C.I.F. and C. & F. contracts. Under the preceding section on manner of tender of delivery, due tender by the seller requires that he comply with the requirements of this section in appropriate cases.

2. The contract to be made with the carrier under paragraph (1) must conform to all express terms of the agreement, subject to any substitution necessary because of failure of agreed facilities as provided in the later provision on substituted performance. However, under the policies of this article on good faith and commercial standards and on buyer's rights on improper delivery, the requirements of explicit provisions must be read in terms of their commercial and not their literal meaning. This policy is made express with respect to bills of lading in a set in the provision of this article on form of bills of lading required in overseas shipment.

3. In the absence of agreement, the provision of this article on options and cooperation respecting performance gives the seller the choice of any reasonable carrier, routing and other arrangements. Whether or not the shipment is at the buyer's expense the seller must see to any arrangements, reasonable in the circumstances, such as refrigeration, watering of livestock, protection against cold, the sending along of any necessary help, selection of specialized cars and the like for paragraph (1) is intended to cover all necessary arrangements whether made by contract with the carrier or otherwise. There is, however, a proper relaxation of such requirements if the buyer is himself in a position to make the appropriate arrangements and the seller gives him reasonable notice of the need to do so. It is an improper contract under paragraph (1) for the seller to agree with the carrier to a limited valuation below the true value and thus cut off the buyer's opportunity to recover from the carrier in the event of loss, when the risk of shipment is placed on the buyer by his contract with the seller.

4. Both the language of paragraph (2) and the nature of the situation it concerns indicate that the requirement that the seller must obtain and deliver promptly to the buyer in due form any document necessary to enable him to obtain possession of the goods is intended to cumulate with the other duties of the seller such as those covered in paragraph (1). In this connection, in the case of pool car shipments, a delivery order furnished by the seller on the pool car consignee, or on the carrier for delivery out of a larger quantity, satisfies the requirements of paragraph (2) unless the contract requires some other form of document.

5. This article makes it the seller's duty to notify the buyer of shipment in all cases. The consequences of his failure to do so, however, are limited in that the buyer may reject on this ground only where material delay or loss ensues.

A standard and acceptable manner of notification in open credit shipments is the sending of an invoice and in the case of documentary contracts is the prompt forwarding of the documents as under paragraph (2) of this section. It is also usual to send on a straight bill of lading but this is not necessary to the required notification. However, should such a document prove necessary or convenient to the buyer, as in the case of loss and claim against the carrier, good faith would require the seller to send it on request.

Frequently the agreement expressly requires prompt notification as by wire or cable. Such a term may be of the essence and the final clause of paragraph (3) does not prevent the parties from making this a particular ground for rejection. To have this vital and irreparable effect upon the seller's duties, such a term should be part of the "dickered" terms written in any "form", or should otherwise be called seasonably and sharply to the seller's attention.

6. Generally, under the final sentence of the section, rejection by the buyer is justified only when the seller's dereliction as to any of the requirements of this section in fact is followed by material delay or damage. It rests on the seller, so far as concerns matters not within the peculiar knowledge of the buyer, to establish that his error has not been followed by events which justify rejection.

Cross References

Point 1: Sections 2-319, 2-320 and 2-503(B).

Point 2: Sections 1-203, 2-323(B), 2-601 and 2-614(A).

Point 3: Section 2-311(B).

Point 5: Section 1-203.

Definitional Cross References

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Usage of trade". Section 1-205.

§ 2-505. Sellers shipment under reservation

A. Where the seller has identified goods to the contract by or before shipment:

1. His procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the sellers expectation of transferring that interest to the person named.

2. A non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (§ 2-507(B)) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

B. When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-505 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Article 7 of the Uniform Commercial Code and the rights of parties which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. The security interest reserved to the seller under Subsection (A) is restricted to securing payment or performance by the buyer and the seller is strictly limited in his disposition and control of the goods as against the buyer and third parties. Under this article, the provision as to the passing of interest expressly applies "despite any reservation of security title" and also provides that the "rights, obligations and remedies" of the parties are not altered by the incidence of title generally. The security interest, therefore, must be regarded as a means given to the seller to enforce his rights against the buyer which is unaffected by and in turn does not effect the location of tide generally. The rules set forth in Subsection (A) are not to be altered by any apparent "contrary intent" of the parties as to passing of title, since the rights and remedies of the parties to the contract of sale, as defined in this article, rest on the contract and its performance or breach and not on stereotyped presumptions as to the location of title.

This article does not attempt to regulate local procedure in regard to the effective maintenance of the seller's security interest when the action is in replevin by the buyer against the carrier.

2. Every shipment of identified goods under a negotiable bill of lading reserves a security interest in the seller under Subsection (A)(1). It is frequently convenient for the seller to make the bill of lading to the order of

a nominee such as his agency at destination, the financing agency to which he expects to negotiate the document, or the bank issuing a credit to him. In many instances, also, the buyer is made the order party. This article does not deal directly with the question as to whether a bill of lading made out by the seller to the order of a nominee gives the carrier notice of any rights which the nominee may have so as to limit its freedom or obligation to honor the bill of lading in the hands of the seller as the original shipper if the expected negotiation fails. This circumstance is dealt with in the Article on Documents of Title (Article 7). The Navajo Nation has not adopted Article 7 of the Uniform Commercial Code and rights which would be governed under Article 7 are governed by Navajo law pursuant to 7 N.N.C. § 204.

3. A non-negotiable bill of lading taken to a party other than the buyer under Subsection (A)(2) reserves possession of the goods as security in the seller but if he seeks to withhold the goods improperly the buyer can tender payment and recover them.

4. In the case of a shipment by non-negotiable bill of lading taken to a buyer, the seller, under Subsection (A) retains no security interest or possession as against the buyer and by the shipment he de facto loses control as against the carrier except where he rightfully and effectively stops delivery in transit. In cases in which the contract gives the seller the right to payment against delivery, the seller, by making an immediate demand for payment, can show that his delivery is conditional, but this does not prevent the buyer's power to transfer full title to a sub-buyer in ordinary course or other purchaser under § 2-403.

5. Under Subsection (B) an improper reservation by the seller which would constitute a breach in no way impairs such of the buyer's rights as result from identification of the goods. The security title reserved by the seller under Subsection (A) does not protect his holding of the document or the goods for the purpose of exacting more than is due him under the contract.

Cross References

Point 1: Section 1-201.

Point 3: Sections 2-501(B) and 2-504.

Point 4: Sections 2-403, 2-507(B) and 2-705.

Point 5: Sections 2-310, 2-319(D), 2-320(D), 2-501 and 2-502.

Definitional Cross References

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Consignee". Section 7-102.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Financing agency". Section 2-104.

"Goods". Section 2-105.

"Holder". Section 1-201.

"Person". Section 1-201.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 2-506. Rights of financing agency

A. A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of tide securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

B. The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

History

CJA-1-86 January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-506 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Articles 4, 5 and 7 of the Uniform Commercial Code. The rights of parties which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. "Financing agency" is broadly defined in this article to cover every normal instance in which a party aids or intervenes in the financing of a sales transaction. The term as used in Subsection (A) is not in any sense intended as a limitation and covers any other appropriate situation which may arise outside the scope of the definition.

2. "Paying" as used in Subsection (A) is typified by the letter of credit, or "authority to pay" situation in which a banker, by arrangement with the buyer or other consignee, pays on his behalf a draft for the price of the goods. It is immaterial whether the draft is formally drawn on the party paying or his principal, whether it is a sight draft paid in cash or a time draft "paid" in the first instance by acceptance or whether the payment is viewed as absolute or conditional. All of these cases constitute "payment" under this Subsection. Similarly, "purchasing for value" is used to indicate the whole area of

financing by the seller's banker and the principle of Subsection (A) is applicable without any niceties of distinction between "purchase", "discount", "advance against collection" or the like. But it is important to notice that the only right to have the draft honored that is acquired is that against the buyer, if any right against any one else is claimed it will have to be under some separate obligation of that other person. A letter of credit does not necessarily protect purchasers of drafts. The Navajo Nation has not adopted Articles 4 and 5 and the rights of the parties which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

3. Subsection (A) is made applicable to payments or advances against a draft which "relates to" a shipment of goods and this has been chosen as a term of maximum breadth. In particular the term is intended to cover the case of a draft against an invoice or against a delivery order. Further, it is unnecessary that there be an explicit assignment of the invoice attached to the draft to bring the transaction within the reason of this Subsection.

4. After shipment, "the rights of the shipper in the goods" are merely security rights and are subject to the buyer's right to force delivery upon tender of the price. The rights acquired by the financing agency are similarly limited and, moreover, if the agency fails to procure any outstanding negotiable document of title, it may find its exercise of these rights hampered or even defeated by the seller's disposition of the document to a third party. This section does not attempt to create any new rights in the financing agency against the carrier which would force the latter to honor a stop order from the agency, a stranger to the shipment, or any new rights against a holder to whom a document of tide has been duly negotiated under Article 7. Article 7 of the Uniform Commercial Code has not been adopted by the Navajo Nation and the rights of parties which would be governed under Article 7 are governed by the Navajo law pursuant to 7 N.N.C. § 204.

Cross References

Point 1: Section 2-104(B).

Point 4: Sections 2-501 and 2-502(A).

Definitional Cross References

"Buyer". Section 2-103.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Financing agency". Section 2-104.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Honor". Section 1-201.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Value". Section 1-201.

§ 2-507. Effect of seller's tender: delivery on condition

A. Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

B. Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-507 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code and the rights of parties which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. Under this article the same rules in these matters are applied to present sales and to contracts for sale. But the provisions of this Subsection must be read within the framework of the other sections of this article which bear upon the question of delivery and payment.

2. The "unless otherwise agreed" provision of Subsection (A) is directed primarily to cases in which payment in advance has been promised or a letter of credit term has been included. Payment "according to the contract" contemplates immediate payment, payment at the end of an agreed credit term, payment by a time acceptance or the like. Under the Code, "contract" means the total obligation in law which results from the parties' agreement including the effect of this article. In this context, therefore, there must be considered the effect in law of such provisions as those on means and manner of payment and on failure of agreed means and manner of payment.

3. Subsection (B) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's "right as against the seller" conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this article for a 10-day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.

Cross References

Point 1: Sections 2-310, 2-503, 2-511, 2-601 and 2-711 to 2-713.

Point 2: Sections 1-201, 2-511 and 2-614.

Point 3: Sections 2-401, 2-403, and 2-702(A)(2).

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Document of tide". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

§ 2-508. Cure by seller of improper tender of delivery; replacement

A. Where any tender of delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

B. Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-508 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) permits a seller who has made a non-conforming tender in any case to make a conforming delivery within the contract time upon seasonable notification to the buyer. It applies even where the seller his taken back the non-conforming goods and refunded the purchase price. He may still make a good tender within the contract period. The closer, however, it is to the contract date, the greater is the necessity for extreme promptness on the seller's part in notifying of his intention to cure, if such notification is to be "seasonable" under this Subsection.

The rule of this Subsection, moreover, is qualified by its underlying reasons. Thus if, after contracting for June delivery, a buyer later makes known to the seller his need for shipment early in the month and the seller ships accordingly, the "contract time" has been cut down by the supervening modification and the time for cure offender must be referred to this modified time term.

2. Subsection (B) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer. However, the seller is not protected unless he had "reasonable grounds to believe" that the tender would be acceptable. Such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict; conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a "no replacement" clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a "form" contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to the seller's attention maybe sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable.

3. The words "a further reasonable time to substitute a conforming tender" are intended as words of limitation to protect the buyer. What is a "reasonable time" depends upon the attending circumstances. Compare § 2-511 on the comparable case of a seller's surprise demand for legal tender.

4. Existing trade usages permitting variations without rejection but with price allowance enter into the agreement itself as contractual limitations of remedy and are not covered by this section.

Cross References

Point 2: Section 2-302.

Point 3: Section 2-511.

Point 4: Sections 1-205 an 2-721.

Definitional Cross References

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Money". Section 1-201.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

§ 2-509. Risk of loss in the absence of breach

A. Where the contract requires or authorizes the seller to ship the goods by carrier:

1. If it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (§ 2-505); but

2. If it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

B. Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

1. On his receipt of a negotiable document of title covering the goods; or

2. On acknowledgment by the bailee of the buyer's right to possession of the goods; or

3. After his receipt of a non-negotiable document of title or other written direction to deliver, as provided in § 2-503(D)(2).

C. In any case not within Subsection (A) or (B), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

D. The provisions of this section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (§ 2-327) and on effect of breach on risk of loss (§ 2-510).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-509 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The underlying theory of these sections on risk of loss is the adoption of the contractual approach rather than an arbitrary shifting of the risk with the "property" in the goods. The scope of the present section, therefore, is limited strictly to those cases where there has been no breach by the seller. Where for any reason his delivery or tender fails to conform to the contract, the present section does not apply and the situation is governed by the provisions on effect of breach on risk of loss.

2. The provisions of Subsection (A) apply where the contract "requires or authorizes" shipment of the goods. This language is intended to be construed parallel to comparable language in the section on shipment by seller. In order that the goods be "duly delivered to the carrier" under paragraph (1), a contract must be entered into with the carrier which will satisfy the requirements of the section on shipment by the seller and the delivery must be made under circumstances which will enable the seller to take any further steps necessary to a due tender. The underlying reason of this Subsection does not require that the shipment be made after contracting, but where, for example, the seller buys the goods afloat and later diverts the shipment to the buyer, he must identify the goods to the contract before the risk of loss can pass. To transfer the risk is enough that a proper shipment and a proper identification come to apply to the same goods although, aside from special agreement, the risk will not pass retroactively to the time of shipment in such a case.

3. Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. Protection is afforded him, in the event of breach by the buyer, under the next section.

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

4. Where the agreement provides for delivery of the goods as between the buyer and seller without removal from the physical possession of a bailee, the provisions on manner of tender of delivery apply on the point of transfer of risk. Due delivery of a negotiable document of title covering the goods or acknowledgment by the bailee that he holds for the buyer completes the "delivery" and passes the risk.

5. The provisions of this section are made subject by Subsection (D) to the "contrary agreement" of the parties. This language is intended as the equivalent of the phrase "unless otherwise agreed" used more frequently throughout this Code. "Contrary" is in no way used as a word of limitation and the buyer and seller are left free to readjust their rights and risks as declared by this section in any manner agreeable to them. Contrary agreement can also be found in the circumstances of the case, a trade usage or practice, or a course of dealing or performance.

Cross References

Point 1: Section 2-510(A),

Point 2: Sections 2-503 and 2-504.

Point 3: Sections 2-104, 2-503 and 2-510.

Point 4: Section 2-503(D).

Point 5: Section 1-201.

Definitional Cross References

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Party". Section 1-201.

"Receipt of goods". Section 2-103.

"Sale on approval". Section 2-326.

"Seller". Section 2-103.

Special Plain Language Comment

This section governs when the risk of loss or damage to the goods shifts from the seller to the buyer. This section is a "gap filler" which applies only when parties themselves do not determine in their agreement when the risk of loss will pass. The section sets up four categories: contracts where goods are shipped; contracts where the goods are delivered without being moved; consignment contracts and all other types of contracts.

A. Where the contract either authorizes or requires shipment by a third party (i.e., not in the seller's own trucks) the time when the risk of loss will shift from the seller to the buyer depends on whether the transportation obligations require only delivery to a carrier ("shipment contract") or delivery to a particular location ("delivery contract"). The parties may also choose to use the rules set out in the standard mercantile terms defined in §§ 2-319 to 2-324. In a shipment contract the risk of loss shifts to the buyer upon the delivery of the goods to the carrier. In a delivery contract the risk of loss shifts to the buyer upon the proper "tender" to the buyer at the required destination (see § 2-503 regarding proper "tender").

B. If the goods are delivered without movement the risk of loss shifts to the buyer upon receipt by the buyer of the proper documents.

C. If the goods are on consignment, the risk of loss is governed by § 2-327.

D. And in all other cases the shift of the risk of loss will depend on the status of the buyer. If the buyer is a nonmerchant the risk of loss shifts when he takes possession of the goods. If the buyer is a merchant the risk of loss shifts when the seller tenders delivery (see § 2-503).

History

CJA-1-86, January 29, 1986.

§ 2-510. Effect of breach on risk of loss

A. Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

B. Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

C. Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-510 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under Subsection (A) the seller by his individual action cannot shift the risk of loss to the buyer unless his action conforms with all the conditions resting on him under the contract.

2. The "cure" of defective tenders contemplated by Subsection (A) applies only to those situations in which the seller makes changes in goods already tendered, such as repair, partial substitution, sorting out from an improper mixture and the like since "cure" by repossession and new tender has on effect on the risk of loss of the goods originally tendered. The seller's privilege of cure does not shift the risk, however, until the cure is completed.

Where defective documents are involved a cure of the defect by the seller or a waiver of the defects by the buyer will operate to shift the risk under this section. However, if the goods have been destroyed prior to the cure or the buyer is unaware of their destruction at the time he waives the defect in the documents, the risk of the loss must still be borne by the seller, for the risk shifts only at the time of cure, waiver of documentary defects or acceptance of the goods.

3. In cases where there has been a breach of the contract, if the one in

control of the goods is the aggrieved party, whatever loss or damage may prove to be uncovered by his insurance falls upon the contract breaker under Subsections (B) and (C) rather than upon him. The word "effective" as applied to insurance coverage in those Subsections is used to meet the case of supervening insolvency of the insurer. The "deficiency" referred to in the text means such deficiency in the insurance coverage as exists without subrogation. This section merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer.

Cross References

Section 2-509.

Definitional Cross References

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Seller". Section 2-103.

§ 2-511. Tender of payment by buyer; payment by check

A. Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

B. Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

C. Subject to the provisions of the Code on the effect of an instrument on an obligation (§ 3-802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-511 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The requirement of payment against delivery in Subsection (A) is applicable to non-commercial sales generally and to ordinary sales at retail although it has no application to the great body of commercial contracts which carry credit terms. Subsection (A) applies also to documentary contracts in general and to contracts which look to shipment by the seller but contain no term on time and manner of payment, in which situations the payment may, in proper case, be demanded against delivery of appropriate documents.

In the case of specific transactions such as C.O.D. sales or agreement providing for payment against documents, the provisions of this Subsection must be considered in conjunction with the special sections of the article dealing with such terms. The provision that tender of payment is a condition to the seller's duty to tender and complete "any delivery" integrates this section with the language and policy of the section on delivery in several lots which call for separate payment. Finally, attention should be directed to the provision on right to adequate assurance of performance which recognizes, even before the time for tender, an obligation on the buyer not to impair the seller's expectation of receiving payment in due course.

2. Unless there is agreement otherwise the concurrence of the conditions as to tender of payment and tender of delivery requires their performance at a single place or time. This article determines that place and time by determining in various other sections the place and time for tender of delivery under various circumstances and in particular types of transactions. The sections dealing with time and place of delivery together with the section on right to inspection of goods answer the subsidiary question as to when payment may be demanded before inspection by the buyer.

3. The essence of the principle involved in Subsection (B) is avoidance of commercial surprise at the time of performance. The section on substituted performance covers the peculiar case in which legal tender is not available to the commercial community.

4. Subsection (C) is concerned with the rights and obligations as between the parties to a sales transaction when payment is made by check. This article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way. The conditional character of the payment under this section refers only to the effect of the transaction "as between the parties" thereto and does not purport to cut into the law of "absolute" and "conditional" payment as applied to such other problems as the discharge of sureties or the responsibilities of a drawee bank which is at the same time an agent for collection.

The phrase "by check" includes not only the buyer's own but any check which does not effect a discharge under Article 3 (§ 3-802). Similarly the reason of this Subsection should apply and the same result should be reached where the buyer "pays" by sight draft on a commercial firm which is financing him.

5. Under Subsection (C) payment by check is defeated if it is not honored upon due presentment. This corresponds to the provisions of Article on Commercial Paper (§ 3-802). But if the seller procures certification of the check instead of cashing it, the buyer is discharged (§ 3-411).

6. Where the instrument offered by the buyer is not a payment but a credit instrument such as a note or a check post-dated by even one (1) day, the seller's acceptance of the instrument insofar as third parties are concerned, amounts to a delivery on credit and his remedies are set forth in the section on buyer's insolvency. As between the buyer and the seller, however, the matter turns on the present Subsection and the section on conditional delivery

and subsequent dishonor of the instrument gives the seller rights on it as well as for breach of the contract for sale.

Cross References

Point 1: Sections 2-307, 2-310, 2-320, 2-325, 2-503, 2-513 and 2-609.

Point 2: Sections 2-307, 2-310, 2-319, 2-322, 2-503, 2-504 and 2-513.

Point 3: Section 2-614.

Point 5: Article 3, esp. §§ 3-802 and 3-411.

Point 6: Sections 2-507, 2-702, and Article 3.

Definitional Cross References

"Buyer". Section 2-103.

"Check". Section 3-104,

"Dishonor". Section 3-508.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

§ 2-512. Payment by buyer before inspection

A. Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless:

1. The non-conformity appears without inspection; or

2. Despite tender of the required documents the circumstances would justify injunction against honor under the provisions of the Code.

B. Payment pursuant to Subsection (A) does not constitute an acceptance of goods or impair the buyers right to inspect or any of his remedies.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-512 of the Uniform Commercial Code adopted by the states. The reference in Subsection (B) has been revised to reflect that the Navajo Nation has not adopted Article 5 of the Uniform Commercial Code and that the rights of parties which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. Subsection (A) of the present section recognizes that the essence of a contract providing for payment before inspection is the intention of the parties to shift to the buyer the risks which would usually rest upon the seller. The basic nature of the transaction is thus preserved and the buyer is in most cases required to pay first and litigate as to any defects later.

2. "Inspection" under this section is an inspection in a manner reasonable for detecting defects in goods whose surface appearance is satisfactory.

3. Paragraph (1) of this Subsection states an exception to the general rule based on common sense and normal commercial practice. The apparent non-conformity referred to is one which is evident in the mere process of taking delivery.

4. Paragraph (2) is concerned with contracts for payment against documents and incorporates the general clarification and modification of the case law contained in the section on excuse of a financing agency. The Navajo Nation has not adopted Article 5 of the Uniform Commercial Code and the rights of parties which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

5. Subsection (B) makes explicit the general policy that the payment required before the inspection in no way impairs the buyer's remedies or rights in the event of a default by the seller. The remedies preserved to the buyer are all of his remedies, which include as a matter of reason the remedy for total non-delivery after payment in advance.

The provision of performance or acceptance under reservation of rights does not apply to the situations contemplated here in which payment is made in due course under the contract and the buyer need not pay "under protest" or the like in order to preserve his rights as to defects discovered upon inspection.

6. This section applies to cases in which the contract requires payment before inspection either by the express agreement of the parties or by reason of the effect in law of that contract. The present section must therefore be considered in conjunction with the provision on right to inspection of goods which sets forth the instances in which the buyer is not entitled to inspection before payment.

Cross References

Point 5: Section 1–207.

Point 6: Section 2–513(C).

Definitional Cross References

"Buyer". Section 2–103.

"Conform". Section 2–106.

"Contract". Section 1–201.

"Financing agency". Section 2-104.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

§ 2-513. Buyer's right to inspection of goods

A. Unless otherwise agreed and subject to Subsection (C), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable time and place and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

B. Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

C. Unless otherwise agreed and subject to the provisions of this article on C.I.F. contracts (§ 2-321(C)), the buyer is not entitled to inspect the goods before payment of the price when the contract provides:

1. For delivery "C.O.D." or on other like terms; or

2. For payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

D. A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-513 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The buyer is entitled to inspect goods as provided in Subsection (A) unless it has been otherwise agreed by the parties. The phrase "unless otherwise agreed" is intended principally to cover such situations as those outlined in Subsections (C) and (D) and those in which the agreement of the parties negates inspection before tender of delivery. However, no agreement by the parties can displace the entire right of inspection except where the contract is simply for the sale of "this thing". Even in a sale of boxed goods "as is" inspection is a right of the buyer, since if the boxes prove to contain some other merchandise altogether the price can be recovered back; nor do the limitations of the provision on effect of acceptance apply in such a case.

2. The buyer's right of inspection is available to him upon tender, delivery or appropriation of the goods with notice to him. Since inspection is available to him on tender, where payment is due against delivery he may, unless otherwise agreed, make his inspection before payment of the price. It is also available to him after receipt of the goods and so may be postponed after receipt for a reasonable time. Failure to inspect before payment does not impair the right to inspect after receipt of the goods unless the case falls within Subsection (D) on agreed and exclusive inspection provisions. The right to inspect goods which have been appropriated with notice to the buyer hold whether or not the sale was by sample.

3. The buyer may exercise his right of inspection at any reasonable time or place and in any reasonable manner. It is not necessary that he select the most appropriate time, place or manner to inspect or that his selection be the customary one in the trade or locality. Any reasonable time, place or manner is available to him and the reasonableness will be determined by trade usages, past practices between the parties and the other circumstances of the case.

The last sentence of Subsection (A) makes it clear that the place of arrival of shipped goods is a reasonable place for their inspection.

4. Expenses of an inspection made to satisfy the buyer of the seller's performance must be assumed by the buyer in the first instance. Since the rule provides merely for an allocation of expense there is no policy to prevent the parties from providing otherwise in the agreement. Where the buyer would normally bear the expenses of the inspection but the goods are rightly rejected because of what the inspection reveals, demonstrable and reasonable costs of the inspection are part of his incidental damage caused by the seller's breach.

5. In the case of payment against documents, Subsection (C) requires payment before inspection, since shipping documents against which payment is to be made will commonly arrive and be tendered while the goods are still in transit. This article recognizes no exception in any peculiar case in which the goods happen to arrive before the documents. However, whereby the agreement payment is to await the arrival of the goods, inspection before payment becomes proper since the goods are then "available for inspection".

Whereby the agreement the documents are to be held until arrival the buyer is entitled to inspect before payment since the goods are then "available for inspection". Proof of usage is not necessary to establish this right, but if inspection before payment is disputed the contrary must be established by usage or by an explicit contract term to that effect.

For the same reason, that the goods are available for inspection, a term calling for payment against storage documents or a delivery order does not normally bar the buyer's right to inspection before payment under Subsection (C)(2). This result is reinforced by the buyer's right under Subsection (A) to inspect goods which have been appropriated with notice to him.

6. Under Subsection (D) an agreed place or method of inspection is generally

held to be intended as exclusive. However, where compliance with such an agreed inspection term becomes impossible, the question is basically one of intention. If the parties clearly intend that the method of inspection named is to be a necessary condition without which the entire deal is to fail, the contract is at an end if that method becomes impossible. On the other hand, if the parties merely seek to indicate a convenient and reliable method but do not intend to give up the deal in the event of its failure, any reasonable method of inspection may be substituted under this article.

Since the purpose of an agreed place of inspection is only to make sure at that point whether or not the goods will be thrown back, the "exclusive" feature of the named place is satisfied under this article if the buyer's failure to inspect there is held to be an acceptance with the knowledge of such defects as inspection would have revealed within the section on waiver of buyer's objections by failure to particularize. Revocation of the acceptance is limited to the situations stated in the section pertaining to that subject. The reasonable time within which to give notice of defects within the section on notice of breach begins to run from the point of the "acceptance".

7. Clauses on time of inspection are commonly clauses which limit the time in which the buyer must inspect and give notice of defects. Such clauses are therefore governed by the section of this article which requires that such a time limitation must be reasonable.

8. Inspection under this article is not to be regarded as a "condition precedent to the passing of title" so that risk until inspection remains on the seller. Under Subsection (D) such an approach cannot be sustained. Issues between the buyer and seller are settled in this article almost wholly by special provisions and not by the technical determination of the focus of the title. Thus "inspection as a condition to the passing of title" becomes a concept almost without meaning. However, in peculiar circumstances inspection may still have some of the consequences hitherto sought and obtained under that concept.

9. "Inspection" under this section has to do with the buyer's check-up on whether the seller's performance is in accordance with a contract previously made and is not to be confused with the "examination" of the goods or of a sample or model of them at the time of contracting which may affect the warranties involved in the contract.

Cross References

Generally: Sections 2-310(2), 2-321(C) and 2-606(A)(2).

Point 1: Section 2-607.

Point 2: Sections 2-501 and 2-502.

Point 4: Section 2-715.

Point 5: Section 2-321(C).

Point 6: Sections 2-606 to 2-608.

Point 7: Section 1-204.

Point 8: Comment to § 2-401.

Point 9: Section 2-316(C)(2).

Definitional Cross References

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Presumed". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

§ 2-514. When documents deliverable on acceptance; when on payment

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-514 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code and the rights of parties which would be governed under such Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. This section covers any document against which a draft may be drawn, whatever maybe the form of the document, and applies to interpret the action of a seller or consignor insofar as it may affect the rights and duties of any buyer, consignee or financing agency concerned with the paper. Supplementary or corresponding provisions are found in Articles 4 and 5 of the Uniform Commercial Code. The Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code and the rights of parties which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

2. An "arrival" draft is a sight draft within the purpose of this section.

Cross References

Point 1: See §§ 2-502, 2-505(B), 2-507(B), 2-512, 2-513 and 2-607.

Definitional Cross References

"Delivery". Section 1-201.

"Draft". Section 3-104.

§ 2-515. Preserving evidence of goods in dispute

In furtherance of the adjustment of any claim or dispute

A. Either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as maybe in the possession or control of the other; and

B. The parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-515 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section meets certain serious problems which arise when there is a dispute as to the quality of the goods and thereby aids the parties in reaching a settlement, and furthers the use of devices which will promote certainty as to the condition of the goods, or at least aid in preserving evidence of their conditions.

2. Subsection (A) affords either party an opportunity for preserving evidence, whether or not agreement has been reached, and thereby reduces uncertainty in any litigation and, in turn perhaps, promotes agreement. Subsection (B) does not conflict with the provisions on the seller's right to resell rejected goods or the buyer's similar right. Apparent conflict between these provisions which will be suggested in certain circumstances is to be resolved by requiring prompt action by the parties. Nor does Subsection (A) impair the effect of a

term for payment before inspection. Short of such defects as amount to fraud or substantial failure of consideration, non-conformity is neither an excuse nor a defense to an action for non-acceptance of documents. Normally, therefore until the buyer has made payment, inspected and rejected the goods, there is no occasion or use for the rights under Subsection (A).

3. Subsection (B) provides for third party inspection upon the agreement of the parties, thereby opening the door to amicable adjustments based upon the findings of such third parties. The use of the phrase "conformity or condition" makes it clear that the parties' agreement may range from a complete settlement of all aspects of the dispute by a third party to the use of a third party merely to determine and record the condition of the goods so that they can be resold or used to reduce the stake in controversy. "Conformity", at one end of the scale of possible issues, includes the whole question of interpretation of the agreement and its legal effect, the state of the goods in regard to quality and condition, whether any defects are due to factors which operate at the risk of the buyer, and the degree of non-conformity where that may be material. "Condition", at the other end of the scale, includes nothing but the degree of damage or deterioration which the goods show. Subsection (B) is intended to reach any point in the gamut which the parties may agree upon.

The principle of the section on reservation of rights reinforces this paragraph in simplifying such adjustments as the parties wish to make in partial settlement while reserving their rights as to any further points. Subsection (B) also suggests the use of arbitration, where desired, of any points left open, but nothing in this section is intended to repeal or amend any statute governing arbitration. Where any question arises as to the extent of the parties' agreement under the paragraph, the presumption should be that it was meant to extend only to the relation between the contract description and the goods as delivered, since that is what a craftsman in the trade would normally be expected to report upon. Finally, a written and authenticated report of inspection or tests by a third party, whether or not sampling has been practicable, is entitled to be admitted as evidence under the Code, for it is a third party document.

Cross References

Point 2: Sections 2–513(C), 2–706 and 2–711(B).

Point 3: Sections 1–202 and 1–207.

Definitional Cross References

"Conform". Section 2–106.

"Goods". Section 2–105.

"Notification". Section 1–201.

"Party". Section 1–201.

Part 6. Breach, Repudiation and Excuse

§ 2-601. Buyers rights on improper delivery

Subject to the provisions of this article on breach in installment contracts (§ 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (§§ 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

A. Reject the whole; or

B. Accept the whole; or

C. Accept any commercial unit or units and reject the rest.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-601 of the Uniform Commercial Code adopted by the states.

Commentary. 1. A buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover and regulate the acceptance of a part of any lot improperly tendered in any case where the price can reasonably be apportioned. Partial acceptance is permitted whether the part. of the goods accepted conforms or not. The only limitation on partial acceptance is that good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods. This is the reason for the insistence on the "commercial unit" in Subsection (C). In this respect, the test is not only what unit has been the basis of contract, but whether the partial acceptance produces so materially adverse an effect on the remainder as to constitute bad faith.

2. Acceptance made with the knowledge of the other party is final. An original refusal to accept may be withdrawn by a later acceptance if the seller has indicated that he is holding the tender open. However, if the buyer attempts to accept, either in whole, or in part, after his original rejection has caused the seller to arrange for other disposition of the goods, the buyer must answer for any ensuing damage since the next section provides that any exercise of ownership after rejection is wrongful as against the seller. Further, he is liable even though the seller may choose to treat his action as acceptance rather than conversion, since the damage flows from the misleading notice. Such arrangements for resale or other disposition of the goods by the seller must be viewed as within the normal contemplation of a buyer who has given notice of rejection. However, the buyer's attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance.

Cross References

Sections 2-602(B)(1), 2-612, 2-718 and 2-719.

Definitional Cross References

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Installment contract". Section 2-612.

"Rights". Section 1-201.

Special Plain Language Comment

This section provides that the buyer may accept or reject the entire delivery or "commercial units" of the delivery of goods if the goods or the "tender" (manner of delivery) does not conform to the contract. It is critical to recognize that in this context, contract includes not only the written agreement of the parties, but also the "usages" or customs of the industry, the prior behavior of the parties in other transactions and the prior behavior of the parties in this transaction.

§ 2-602. Manner and effect of rightful rejection

A. Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

B. Subject to the provisions of the two following sections on rejected goods (§§ 2-603 and 2-604):

1. After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

2. If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article (§ 2-711(C)), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

3. The buyer has no further obligations with regard to goods rightfully rejected.

C. The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this article on Seller's remedies in general (§ 2-703).

History

CJA-1-86 January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-602 of the Uniform Commercial Code adopted by the states.

Commentary. 1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under Subsection (A), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this article dealing with inspection of goods must be read in connection with the buyers reasonable time for action under this Subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in § 1-201.

2. Subsection (B) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the seller's disposition, this section generally relieves the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (C) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

Cross References

Point 1: Sections 1-201, 1-204(A) and (C), 2-512(B), 2-513(A) and 2-606(A)(2).

Point 2: Section 2-603(A).

Point 3: Section 2-703.

Definitional Cross References

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 2-603. Merchant buyer's duties as to rightfully rejected goods

A. Subject to any security interest in the buyer (§ 2-711(C)), when the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

B. When the buyer sells goods under Subsection (A), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent (10%) on the gross proceeds.

C. In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

History

CJA-1-86 January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-603 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code. The rights of parties which would be governed under these Articles concerning the discharge of a buyer's obligation to resell the goods under Subsection (B) are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. This section recognizes the duty imposed upon the merchant buyer by good faith and commercial practice to follow any reasonable instructions of the seller as to reshipping, storing, delivery to a third party, reselling or the like. Subsection (A) goes further and extends the duty to include the making of reasonable efforts to effect a salvage sale where the value of the goods is threatened and the seller's instructions do not arrive in time to prevent serious loss.

2. The limitations on the buyer's duty to resell under Subsection (A) are to be liberally construed. The buyer's duty to resell under this section arises from commercial necessity and thus is present only when the seller has "no agent or place of business at the market of rejection". A financing agency which is acting on behalf of the seller in handling the documents rejected by the buyer is sufficiently the seller's agent to lift the burden of salvage resale from the buyer. (See provisions of Articles 4 and 5 of the Uniform Commercial Code; the Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code. The rights of parties which would be governed under those Articles is governed by Navajo law pursuant to 7 N.N.C. § 204). The buyer's duty to resell is extended only to goods in his "possession or control", but these are intended as words of wide, rather than narrow, import. In effect, the measure of the buyer's "control" is whether he can practicably effect control without undue commercial burden.

3. The explicit provisions for reimbursement and compensation to the buyer in Subsection (B) are applicable and necessary only where he is not acting under instructions from the seller. As provided in Subsection (A) the seller's instructions to be "reasonable" must on demand of the buyer include indemnity for expenses. If, however, the buyer is actually under the instructions of the seller and he fails to request reimbursement, the buyer is still entitled to reimbursement under Subsection (B).

4. Since this section makes the resale of perishable goods an affirmative duty in contrast to a mere right to sell as under the case law, Subsection (C) makes it clear that the buyer is liable only for the exercise of good faith in determining whether the value of the goods is sufficiently threatened to justify a quick resale or whether he has waited a sufficient length of time for instructions, or what a reasonable means and place of resale is.

5. A buyer who fails to make a salvage sale when his duty to do so under this section has arisen is subject to damages pursuant to the section on liberal administration of remedies.

Cross References

Point 5: Section 1-106. Compare generally § 2-706.

Definitional Cross References

"Buyer". Section 2-103.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 2-604. Buyer's options as to salvage of rightfully rejected goods

Subject to the provisions of the immediately preceding section on perishables, if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-604 of the Uniform Commercial Code adopted by the states.

Commentary. The basic purpose of this section is twofold: on the one hand it aims at reducing the stake in dispute and on the other at avoiding the pinning of a technical "acceptance" on a buyer who has taken steps towards realization on or preservation of the goods in good faith. This section is essentially a salvage Section and the buyer's right to act under it is conditioned upon: (1) non-conformity of the goods; (2) due notification of rejection to the seller under the section on manner of rejection; and (3) the absence of any instructions from the seller which the merchant-buyer has a duty to follow under the preceding section.

This section is designed to accord all reasonable leeway to a rightfully rejecting buyer acting in good faith. The listing of what the buyer may do in the absence of instructions from the seller is intended to be not exhaustive but merely illustrative. This is not a "merchant's" Section and the options are pure options given to merchant and non-merchant buyers alike. The merchant-buyer, however, may in some instances be under a duty rather than an option to resell under the provisions of the preceding section.

Cross References

Sections 2-602(A), and 2-603(A) and 2-706.

Definitional Cross References

"Buyer". Section 2-103.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

§ 2-605. Waiver of buyer's objections by failure to particularize

A. The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach:

1. Where the seller could have cured it if stated seasonably; or

2. Between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

B. Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-605 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The present section rests upon a policy of permitting the buyer to give a quick and informal notice of defects in a tender without penalizing him for omissions in his statement, while at the same time protecting a seller who is reasonably misled by the buyer's failure to state curable defects.

2. Where the defect in a tender is one which could have been cured by the seller, a buyer who merely rejects the delivery without stating his objections to it is probably acting in commercial bad faith and seeking to get out of a deal which has become unprofitable. Subsection (A)(1), following the general policy of this article which looks to preserving the deal wherever possible, therefore insists that the seller's right to correct his tender in such circumstances be protected.

3. When the time for cure is past, Subsection (A)(2) makes it plain that a seller is entitled upon request to a final statement of objections upon which he can rely. What is needed is that he make clear to the buyer exactly what is being sought. A formal demand under paragraph (2) will be sufficient in the case of a merchant-buyer.

4. Subsection (B) applies to the particular case of documents the same principle which the section on effects of acceptance applies to the case of goods. The matter is dealt with in this section in terms of "waiver" of objections rather than of right to revoke acceptance, partly to avoid any confusion with the problems of acceptance of goods and partly because defects in documents which are not taken as grounds for rejection are generally minor ones. The only defects concerned in the present subjection are defects in the documents which are apparent on their face. Where payment is required against the documents they must be inspected before payment, and the payment then constitutes acceptance of the documents. Under the section dealing with this problem, such acceptance of the documents does not constitute an acceptance of the goods or impair any options or remedies of the buyer for their improper delivery. Where the documents are delivered without requiring such contemporary action as payment from the buyer, the reason of the next section on what constitutes acceptance of goods, applies. Their acceptance by

non-objection is therefore postponed until after a reasonable time for their inspection. In either situation, however, the buyer "waives" only what is apparent on the face of the documents.

Cross References

Point 2: Section 2–508.

Point 4: Sections 2–512(B), 2–606(A)(2), and 2–607(B).

Definitional Cross References

"Between merchants". Section 2–104.

"Buyer". Section 2–103.

"Seasonably". Section 1–204.

"Seller". Section 2–103.

"Writing" and "written". Section 1–201.

§ 2–606. What constitutes acceptance of goods

A. Acceptance of goods occurs when the buyer:

1. After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

2. Fails to make an effective rejection (§ 2–602(A)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

3. Does any act inconsistent with the sellers ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

B. Acceptance of a part of any commercial unit is acceptance of that entire unit.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–606 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under this article "acceptance" as applied to goods means that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own, whether or not he is obligated to do so, and whether he does so by words, action, or silence when it is time to speak. If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligation.

2. Under this article acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for "acceptance of title" apart from acceptance in general, since acceptance of title is not material under this article to the detailed rights and duties of the parties. (See § 2-401). The refinements of the older law between acceptance of goods and of tide become unnecessary in view of the provisions of the sections on effect and revocation of acceptance, on effects of identification and on risk of loss, and those sections which free the seller's and buyer's remedies from the complications and confusions caused by the question of whether tide has or has not passed to the buyer before breach.

3. Under paragraph (1), payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive. Also, a conditional communication of acceptance always remains subject to its expressed conditions.

4. Under paragraph (3), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance. However, the provisions of paragraph (3) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the goods pursuant to his options and duties imposed by those sections, without effecting an acceptance of the goods. The second clause of paragraph (3) modifies some of the prior case law and makes it clear that "acceptance" in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged.

In the same manner in which a buyer can bind himself, despite his insistence that he is rejecting or has rejected the goods, by an act inconsistent with the seller's ownership under paragraph (3), he can obligate himself by a communication of acceptance despite a prior rejection under paragraph (1). However, the sections on buyer's rights on improper delivery and on the effect of rightful rejection, make it clear that after he once rejects a tender, paragraph (1) does not operate in favor of the buyer unless the seller has retendered the goods or has taken affirmative action indicating that he is holding the tender open. See also Comment 2 to § 2-601.

5. Subsection (B) supplements the policy of the section on buyer's rights on improper delivery, recognizing the validity of a partial acceptance but insisting that the buyer exercise this right only as to whole commercial units.

Cross References

Point 2: Sections 2-401, 2-509, 2-510, 2-607, 2-608 and Part 7.

Point 4: Sections 2-601 through 2-604.

Point 5: Section 2-601.

Definitional Cross References

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Goods". Section 2-105.

"Seller". Section 2-103.

Special Plain Language Comment

This section defines "acceptance" by the buyer. This concept is very important since many of the rights and obligations of buyers and sellers differ after the buyer's acceptance; for example, the buyer's right to reject defective goods are much more limited after his "acceptance" of the goods.

§ 2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over

A. The buyer must pay the contract rate for any goods accepted.

B. Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this article for non-conformity.

C. Where a tender has been accepted:

1. The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

2. If the claim is one for infringement or the like (§ 2-312(C)) and the buyer is sued as a result of such a breach, he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy for liability established by the litigation.

D. The burden is on the buyer to establish any breach with respect to the goods accepted.

E. Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over;

1. He may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

2. If the claim is one for infringement or the like (§ 2-312(C)) the original seller may demand in writing that his buyer turn over to him

control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

F. The provision of Subsections (C), (D) and (E) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (§ 2-312(C)).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-607 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under Subsection (A), once the buyer accepts a tender the seller acquires a right to its price on the contract terms. In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, using the type of apportionment familiar to the courts in *quantum valebant* cases, to be determined in terms of "the contract rate", which is the rate determined from the bargain in fact (the agreement) after the rules and policies of this article have been brought to bear.

2. Under Subsection (B) acceptance of goods precludes their subsequent rejection. Any return of the goods thereafter must be byway of revocation of acceptance under the next section. Revocation is unavailable for a non-conformity known to the buyer at the time of acceptance, except where the buyer has accepted on the reasonable assumption that the non-conformity would be seasonably cured.

3. All other remedies of the buyer remain unimpaired under Subsection (B). This is intended to include the buyer's full rights with respect to future installments despite his acceptance of any earlier non-conforming installment.

4. The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objects that will be relied on by the buyer, as under the section covering statements of defects upon rejection (§ 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

5. Under this article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

6. Subsection (D) unambiguously places the burden of proof to establish breach on the buyer after acceptance. However, this rule becomes one purely of procedure when the tender accepted was non-conforming and the buyer has given the seller notice of breach under Subsection (C). For Subsection (B) makes it clear that acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the price.

7. Subsections (C)(2) and (E)(2) give a warrantor against infringement an opportunity to defend or compromise third party claims or be relieved of his liability. Subsection (E)(1) codifies for all warranties the practice of voucher to defend. Compare § 3-803. Subsection (F) makes these provisions applicable to the buyer's liability for infringement under § 2-312.

8. All of the provisions of the present section are subject to any explicit reservation of rights.

Cross References

Point 1: Section 1-201.

Point 2: Section 2-608.

Point 4: Sections 1-204 and 2-605.

Point 5: Section 2-318.

Point 6: Section 2-717.

Point 7: Sections 2-312 and 3-803.

Point 8: Section 1-207.

Definitional Cross References

"Burden of establishing". Section 1-201.

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1–201.

"Goods". Section 2–105.

"Notifies". Section 1–201.

"Reasonable time". Section 1–204.

"Remedy". Section 1–201.

"Seasonably". Section 1–204.

§ 2–608. Revocation of acceptance in whole or in part

A. The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:

1. On the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

2. Without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

B. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

C. A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–608 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The buyer is not required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in this section. The section no longer speaks of "rescission", a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election" of any sort.

2. Revocation of acceptance is possible only where the non-conformity

substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

3. "Assurances" by the seller under paragraph (2) of Subsection (A) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in paragraph (2). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this article is available to the buyer under the section on remedies for fraud.

4. Subsection (B) requires notification of revocation of acceptance within a reasonable time after discovery of the grounds for such revocation. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender. The parties may by their agreement limit the time for notification under this section, but the same sanctions and considerations apply to such agreements as are discussed in the comment on manner and effect of rightful rejection.

5. The content of the notice under Subsection (B) is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment. More will generally be necessary than the mere notification of breach required under the preceding section. On the other hand the requirements of the section on waiver of buyer's objections do not apply here. The fact that quick notification of trouble is desirable affords good ground for being slow to bind a buyer by his first statement. Following the general policy of this article, the requirements of the content of notification are less stringent in the case of a non-merchant buyer.

6. Under Subsection (B) the policy is one of seeking substantial justice in regard to the condition of goods restored to the seller. Thus the buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects. Worthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded.

7. The policy of the section allowing partial acceptance is carried over into the present section and the buyer may revoke his acceptance, in appropriate cases, as to the entire lot or any commercial unit thereof.

Cross References

Point 3: Section 2-721.

Point 4: Sections 1-204, 2-602 and 2-607.

Point 5: Sections 2-605 and 2-607.

Point 7: Section 2-601.

Definitional Cross References

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

Special Plain Language Comment

This section provides that a buyer can reject the goods even after formal acceptance if defects in the goods: (1) substantially impair the value of the goods; *and* (2) he accepted the goods based on the assumption that the defects would be cured or the defects were too difficult to detect initially. However to exercise this right the buyer must "revoke" his acceptance within a "reasonable" time of discovering the defects and must formally notify the seller of his intention to revoke his acceptance.

§ 2-609. Right to adequate assurance of performance

A. A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may, if commercially reasonable, suspend any performance for which he has not already received the agreed return.

B. Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

C. Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

D. After receipt of a justified demand, failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

History

CJA-1-86 January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-609 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller's deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.

2. Three measures have been adopted to meet the needs of commercial men in such situations. First, the aggrieved party is permitted to suspend his own performance and any preparation therefor, with excuse for any resulting necessary delay, until the situation has been clarified. "Suspend performance" under this section means to hold up performance pending the outcome of the demand, and includes also the holding up of any preparatory action. This is the same principle which governs the ancient law of stoppage and seller's lien, and also of excuse of a buyer from prepayment if the seller's actions manifest that he cannot or will not perform.

Secondly, the aggrieved party is given the right to require adequate assurance that the other party's performance will be duly forthcoming. This principle is reflected in the familiar clauses permitting the seller to curtail deliveries if the buyer's credit becomes impaired, which when held within the limits of reasonableness and good faith actually express no more than the fair business meaning of any commercial contract.

Third, and finally, this section provides the means by which the aggrieved party may treat the contract as broken if his reasonable grounds for insecurity are not cleared upon within a reasonable time. This is the principle underlying the law of anticipatory breach, whether by way of defective part performance or by repudiation. This section merges these three principles of law and commercial practice into a single theory of general application to all sales agreements looking to future performance.

3. Subsection (B) of the present section requires that "reasonable" grounds and "adequate" assurance as used in Subsection (A) be defined by commercial rather

than legal standards. The express reference to commercial standards carries no connotation that the obligation of good faith is not equally applicable here.

Under commercial standards and in accord with commercial practice, a ground for insecurity need not arise from or be directly related to the contract in question. The law as to "dependence" or "independence" of promises within a single contract does not control the application of the present section.

Thus a buyer who falls behind in "his account" with the seller, even though the items involved have to do with separate and legally distinct contracts, impairs the seller's expectation of due performance. Again, under the same test, a buyer who requires precision parts which he intends to use immediately upon delivery, may have reasonable grounds for insecurity if he discovers that his seller is making defective deliveries of such parts to other buyers with similar needs. Thus, too, in a situation such as arose in *Jay Dreher Corporation v. Delco Appliance Corporation,* 93 F.2d 275 (C.C.A. 2, 1937), where a manufacturer gave a dealer an *exclusive* franchise for the sale of his product but on two or three occasions breached the exclusive dealing clause. Although there was no default in orders, deliveries or payments under the separate sales contract between the parties, the aggrieved dealer would be entitled to suspend his performance of the contract for sale under the present section and demand assurance that the exclusive dealing contract be lived up to. There is no need for an explicit clause tying the exclusive franchise into the contract for the sale of goods since the situation itself ties the agreements together.

The nature of the sales contract enters also into the question of reasonableness. For example, a report from an apparently trustworthy source that the seller had shipped defective goods or was planning to ship them would normally give the buyer reasonable grounds for insecurity. But when the buyer has assumed the risk of payment before inspection of the goods, as in a sales contract on C.I.F. or similar cash against documents terms, that risk is not to be evaded by a demand for assurance. Therefore no ground for in security would exist under this section unless the report went to a ground which would excuse payment by the buyer.

4. What constitutes "adequate" assurance of due performance is subject to the same test of factual conditions. For example, where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved. By the same token where a delivery has defects, even though easily curable, which interfere with easy use by the buyer, no verbal assurance can be deemed adequate which is not accompanied by replacement, repair, money-allowance, or other commercially reasonable cure. A fact situation such as arose in *Corn Products Refining Co. v. Fasola*, 94 N.J.L. 181, 109 A. 505 (1920) offers illustration both of reasonable grounds for insecurity and "adequate" assurance. In that case a contract for the sale of oils on 30 days credit, two percent (2%) off for payment within 10 days, provided that credit was to be extended to the buyer only if his financial responsibility was satisfactory to the seller. The buyer had been in the habit of taking advantage of the discount but at the same time that he failed to make his customary 10-day payment, the seller heard rumors, in fact false, that the

buyer's financial condition was shaky. Thereupon, the seller demanded cash before shipment or security satisfactory to him. The buyer sent a good credit report from his banker, expressed willingness to make payments when due on the 30-day terms and insisted on further deliveries under the contract. Under this article the rumors, although false, were enough to make the buyer's financial condition "unsatisfactory" to the seller under the contract clause. Moreover, the buyer's practice of taking the cash discounts is enough, apart from the contract clause, to lay a commercial foundation for suspicion when the practice is suddenly stopped. These matters, however, go only to the justification of the seller's demand for security, or his "reasonable grounds for insecurity".

The adequacy of the assurance given is not measured as in the type of "satisfaction" situation affected with intangibles, such as in personal service cases, cases involving a third party's judgment as final, or cases in which the whole contract is dependent on one party's satisfaction, as in a sale on approval. Here, the seller must exercise good faith and observe commercial standards. This article thus approves the statement of the court in *James B. Berry's Sons Co. Illinois v. Monark Gasoline & Oil Co., Inc., 32* F.2d 74 (C.C.A. 8, 1929), that the seller's satisfaction under such a clause must be based upon reason and must not be arbitrary or capricious; and rejects the purely personal "good faith" test of the *Corn Products Refining Co.* case, which held that in the seller's sole judgment, if for *any* reason he was dissatisfied, he was entitled to revoke the credit. In the absence of the buyer's failure to take the two percent (2%) discount as was his custom, the banker's report given in that case would have been "adequate" assurance under this Code, regardless of the language of the "satisfaction" clause. However, the seller is reasonably entitled to feel insecure at a sudden expansion of the buyer's use of a credit term, and should be entitled either to security or to a satisfactory explanation.

The entire foregoing discussion as to adequacy of assurance by way of explanation is subject to qualification when repeated occasions for the application of this section arise. This Code recognizes that repeated delinquencies must be viewed as cumulative. On the other hand, commercial sense also requires that if repeated claims for assurance are made under this section, the basis for these claims must be increasingly obvious.

5. A failure to provide adequate assurance of performance and thereby to re-establish the security of expectation, results in a breach only "by repudiation" under Subsection (D). Therefore, the possibility is continued of retraction of the repudiation under the section dealing with that problem, unless the aggrieved party has acted on the breach in some manner. The 30-day limit on the time to provide assurance is laid down to free the question of reasonable time from uncertainty in later litigation.

6. Clauses seeking to give the protected party exceedingly wide powers to cancel or readjust the contract when ground for insecurity arises must be read against the fact that good faith is a part of the obligation of the contract and not subject to modification by agreement and includes, in the case of a merchant, the reasonable observance of commercial standards of fair dealing in the trade. Such clauses can thus be effective to enlarge the protection given by the present section to a certain extent, to fix the reasonable time within which requested assurance must be given, or to define adequacy of the assurance in any commercially reasonable fashion. But any clause seeking to set up

arbitrary standards for action is ineffective under this article. Acceleration clauses are treated similarly in the Articles on Commercial Paper and Secured Transactions.

Cross References

Point *3:* Section 1-203.

Point 5: Section 2-611.

Point 6: Sections 1-203 and 1-208 and Articles 3 and 9.

Definitional Cross References

"Aggrieved party". Section 1-201.

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Rights", Section 1-201.

"Writing". Section 1-201.

Special Plain Language Comment

This section embodies the philosophy of the Code to encourage performance of the contract. It permits a method of reassurance to a party to the contract who becomes concerned about the ability of the second party to complete the second party's obligations. The first party can demand in writing some assurance that the second party will complete its performance and while waiting for the answer, suspend certain part of the first party's performance. If the second party fails to reply to this request for assurance within 30 days of receiving it, the contract can be considered repudiated.

§ 2-610. Anticipatory repudiation

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

A. For a commercially reasonable time, await performance by the repudiating party; or

B. Resort to any remedy for breach (§ 2-703 or § 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

C. In either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (§ 2-704).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-610 of the Uniform Commercial Code adopted by the states.

Commentary. 1. With the problem of insecurity taken care of by the preceding section and with provision being made in this article as to the effect of a defective delivery under an installment contract, anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.

Under the present section when such a repudiation substantially impairs the value of the contract, the aggrieved party may at any time resort to his remedies for breach, or he may suspend his own performance while he negotiates with, or awaits performance by, the other party. But if he awaits performance beyond a commercially reasonably time he cannot recover resulting damages which he should have avoided.

2. It is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation. And, a repudiation automatically results under the preceding section on insecurity when a party fails to provide adequate assurance of due future performance within 30 days after a justifiable demand therefor has been made. Under the language of this section, a demand by one or both parties for more than the contract calls for in the way of counter-performance is not in itself a repudiation nor does it invalidate a plain expression of desire for future performance. However, when under a fair reading it amounts to a statement of intention not to perform except on conditions which go beyond the contract, it becomes a repudiation.

3. The test chosen to justify an aggrieved party's action under this section is the same as that in the section on breach in installment contracts—namely the substantial value of the contract. The most useful test of substantial value is to determine whether materials inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated.

4. After repudiation, the aggrieved party may immediately resort to any remedy he chooses provided he moves in good faith (see § 1-203). Inaction and silence by the aggrieved party may leave the matter open but it cannot be regarded as misleading the repudiating party. Therefore the aggrieved party is left free to proceed at any time with his options under this section, unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued.

Cross References

Point 1: Sections 2-609 and 2-612.

Point 2: Section 2-609.

Point 3: Section 2-612.

Point 4: Section 1-203.

Definitional Cross References

"Aggrieved party". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

§ 2-611. Retraction of anticipatory repudiation

A. Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

B. Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this article (§ 2-609).

C. Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-611 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The repudiating party's right to reinstate the contract is entirely dependent upon the action taken by the aggrieved party. If the latter has cancelled the contract or materially changed his position at any time after the repudiation, there can be no retraction under this section.

2. Under Subsection (B) an effective retraction must be accompanied by any assurances demanded under the section dealing with right to adequate assurance. A repudiation is of course sufficient to give reasonable ground for insecurity and to warrant a request for assurance as an essential condition of the

retraction. However, after a timely and unambiguous expression of retraction, a reasonable time for the assurance to be worked out should be allowed by the aggrieved party before cancellation.

Cross References

Point 2: Section 2–609.

Definitional Cross References

"Aggrieved party". Section 1–20 1.

"Cancellation". Section 2–106.

"Contract". Section 1–201.

"Party". Section 1–201.

"Rights". Section 1–201.

§ 2–612. "Installment contract"; breach

A. An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

B. The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within Subsection (C) and the seller gives adequate assurance of its cure the buyer must accept that installment.

C. Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–612 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The definition of an installment contract is phrased more broadly in this article so as to cover installment deliveries tacitly authorized by the circumstances or by the option of either party.

2. In regard to the apportionment of the price for separate payment this

article applies the more liberal test of what can be apportioned rather than the test of what is clearly apportioned by the agreement. This article also recognizes approximate calculation or apportionment of price subject to subsequent adjustment. A provision for separate payment for each lot delivered ordinarily means that the price is at least roughly calculable by units of quantity, but such a provision is not essential to an "installment contract". If separate acceptance of separate deliveries is contemplated, no generalized contrast between wholly "entire" and wholly "divisible" contracts has any standing under this article.

3. This article rejects any approach which gives clauses such as "each delivery is a separate contract" their legalistically literal effect. Such contracts nonetheless call for installment deliveries. Even where a clause speaks of "a separate contract for all purposes", a commercial reading of the language under the section on good faith and commercial standards requires that the singleness of the document and the negotiation, together with the sense of the situation, prevail over any uncommercial and legalistic interpretation.

4. One of the requirements for rejection under Subsection (B) is non-conformity substantially impairing the value of the installment in question. However, an installment agreement may require accurate conformity in quality as a condition to the right to acceptance if the need for such conformity is made clear either by express provision or by the circumstances. In such a case the effect of the agreement is to define explicitly what amounts to substantial impairment of value impossible to cure. A clause requiring accurate compliance as condition to the right to acceptance must, however, have some basis in reason, must avoid imposing hardship by surprise and is subject to waiver or to displacement by practical construction.

Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract. The defect in required documents refers to such matters as the absence of insurance documents under a C.I.F. contract, falsity of a bill of lading, or one failing to show shipment within the contract period or to the contract destination. Even in such cases, however, the provisions on cure of tender apply if appropriate documents are readily procurable.

5. Under Subsection (B) an installment delivery must be accepted if the nonconformity is curable and the seller gives adequate assurance of cure. Cure of non-conformity of an installment in the first instance can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by a further delivery or a partial rejection. This article requires reasonable action by a buyer in regard to discrepant delivery and good faith requires that the buyer make any reasonable minor outlay of time or money necessary to cure an overshipment by severing out an acceptable percentage thereof. The seller must take over a cure which involves any material burden; the buyer's obligation reaches only to cooperation. Adequate assurance for purposes of Subsection (B) is measured by the same standards as under the section on right to adequate assurance of performance.

6. Subsection (C) is designed to further the continuance of the contract in the absence of an overt cancellation. The question arising when an action is brought as to a single installment only is resolved by making such action waive

the right of cancellation. This involves merely a defect in one or more installments, as contrasted with the situation where there is a true repudiation within the section on anticipatory repudiation. Whether the nonconformity in any given installment justifies cancellation as to the future depends, not on whether such nonconformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the nonconformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. It is clear under this article, however, that defects in prior installments are cumulative in effect so that acceptance does not wash out the defect "waived". The rule as to buyer's default is put on the same footing as that in regard to seller's default.

7. Under the requirement of seasonable notification of cancellation under Subsection (C), a buyer who accepts a non-conforming installment which substantially impairs the value of the entire contract should properly be permitted to withhold his decision as to whether or not to cancel pending a response from the seller as to his claim for cure or adjustment. Similarly, a seller may withhold a delivery pending payment for prior ones, at the same time delaying his decision as to cancellation. A reasonable time for notifying of cancellation, judged by commercial standards under the section on good faith extends of course to include the time covered by any reasonable negotiation in good faith. However, during this period the defaulting party is entitled, on request, to know whether the contract is still in effect, before he can be required to perform further.

Cross References

Point 2: Sections 2–307 and 2–607.

Point 3: Section 1–203.

Point 5: Sections 2–208 and 2–609.

Point 6: Section 2–610.

Definitional Cross References

"Action". Section 1–201.

"Aggrieved party". Section 1–201.

"Buyer". Section 2–103.

"Cancellation". Section 2–106.

"Conform". Section 2–106.

"Contract". Section 1–201.

"Lot". Section 2–105.

"Notifies". Section 1–201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

§ 2-613. Casualty to identified goods

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (§ 2-324) then:

A. If the loss is total the contract is avoided; and

B. If the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-613 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Where goods whose continued existence is presupposed by the agreement are destroyed without fault of either party, the buyer is relieved from his obligation but may at his option take the surviving goods at a fair adjustment. "Fault" is intended to include negligence and not merely wilful wrong. The buyer is expressly given the right to inspect the goods in order to determine whether he wishes to avoid the contract entirely or to take the goods with a price adjustment.

2. The section applies whether the goods were already destroyed at the time of contracting without the knowledge of either party or whether they are destroyed subsequently but before the risk of loss passes to the buyer. Where under the agreement, including of course usage of trade, the risk has passed to the buyer before the casualty, the section has no application. Beyond this, the essential question in determining whether the rules of this section are to be applied is whether the seller has or has not undertaken the responsibility for the continued existence of the goods in proper condition through the time of agreed or expected delivery.

3. The section on the term "no arrival, no sale" makes clear that delay in arrival, quite as much as physical change in the goods gives the buyer the options set forth in this section.

Cross References

Point 3: Section 2-324.

Definitional Cross References

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

§ 2-614. Substituted performance

A. Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

B. If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-614 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Article 5 of the Uniform Commercial Code and rights of the parties governed under the Article is governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. Subsection (A) requires the tender of a commercially reasonable substituted performance where agreed to facilities have failed or become commercially impracticable. Under this article, in the absence of specific agreement, the normal or usual facilities enter into the agreement either through the circumstances, usage of trade or prior course of dealing.

This section appears between § 2-613 on casualty to identified goods and the next section on excuse by failure of presupposed conditions, both of which deal with excuse and complete avoidance of the contract where the occurrence or non-occurrence of a contingency which was a basic assumption of the contract makes the expected performance impossible. The distinction between the present section and those sections lies in whether the failure or impossibility of performance arises in connection with an incidental matter or goes to the very heart of the agreement. The differing fines of solution are contrasted in a comparison of *International Paper Co. v. Rockefeller,* 161 App. Div. 180, 146 N.Y.S. 371 (1914) and *Meyer v. Sullivan,* 40 Cal. App. 723, 181 P. 847 (1919). In the former case a contract for the sale of spruce to be cut from a particular tract of land was involved. When a fire destroyed the trees growing on that tract the seller was held excused since performance was impossible. In the latter case the contract called for delivery of wheat "F.O.B. Kosmos Steamer at Seattle". The war led to cancellation of that line's sailing schedule after space had been duly engaged and the buyer was held entitled to demand substituted delivery at the warehouse on the line's loading dock. Under this article, of course, the seller would also be entitled, had the market gone the other way to make a substituted tender in that manner.

There must, however, be a true commercial impracticability to excuse the agreed to performance and justify a substituted performance. When this is the case a reasonable substituted performance tendered by either party should excuse him from strict compliance with contract terms which do not go to the essence of the agreement.

2. The substitution provided in this section as between buyer and seller does not carry over into the obligation of a financing agency under a letter of credit, since such an agency is entitled to performance which is plainly adequate on its face and without need to look into commercial evidence outside of the documents. See Article 5. The Navajo Nation has not adopted Article 5 of the Uniform Commercial Code and the rights of parties which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

3. Under Subsection (B) where the contract is still executory on both sides, the seller is permitted to withdraw unless the buyer can provide him with a commercially equivalent return despite the governmental regulation. Where, however, only the debt for the office remains, a larger leeway is permitted. The buyer may pay in the manner provided by the regulation even though this may not be commercially equivalent provided that the regulation is not "discriminatory, oppressive or predatory".

Definitional Cross References

"Buyer". Section 2–103.

"Fault". Section 1–201.

"Party". Section 1–201.

"Seller". Section 2–103.

§ 2–615. Excuse by failure of presupposed conditions

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

A. Delay in delivery or non-delivery in whole or in part by a seller who complies with Subsections (B) and (C) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

B. Where the causes mentioned in Subsection (A) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

C. The seller must notify the buyer seasonably that there will be delay or non-delivery and when allocation is required under Subsection (B), of the estimated quota thus made available for the buyer.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–615 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section excuses a seller from timely delivery of goods contracted for where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. The destruction of specific goods and the problem of the use of substituted performance on points other than delay or quantity, treated elsewhere in this article, must be distinguished from the matter covered by this section.

2. The present section deliberately refrains from any effort at an exhaustive expression of contingencies and is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose.

3. The first test for excuse under this article in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with "impossibility", "frustration of performance" or "frustration of the venture") has been adopted in order to call attention to the commercial character of the criterion chosen by this article.

4. Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Other factors such as the express terms of the contract, the contract's purpose, and custom, usage of the trade or prior dealings are considered. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of

raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.

5. Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting.

There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that this source will not fail.

In the case of failure of production by an agreed source for causes beyond the seller's control, the seller should, if possible, be excused since production by an agreed source is without more a basic assumption of the contract. Such excuse should not result in relieving the defaulting supplier from liability nor in dropping into the seller's lap an unearned bonus of damages over. The flexible adjustment machinery of this article provides the solution under the provision on the obligation of good faith. A condition to his making good the claim of excuse is the turning over to the buyer of his rights against the defaulting source of supply to the extent of the buyer's contract in relation to which excuse is being claimed.

6. In situations in which neither sense nor justice are served by either answer when the issue is posed in flat terms of "excuse" or "no excuse", adjustment under the various provisions of this article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Code to use equitable principles in furtherance of commercial standards and good faith.

7. The failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance does not amount to a complete excuse. However, good faith and the reason of the present section and of the preceding one may properly be held to justify and even to require any needed delay involved in a good faith inquiry seeking a readjustment of the contract terms to meet the new conditions.

8. The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. The exemption otherwise present through usage of trade under the present section may also be expressly negated by the language of the agreement. Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and

reasonable interpretation and provides a minimum beyond which agreement may not go.

Agreement can also be made in regard to the consequences of exemption as laid down in Subsections (B) and (C) and the next section on procedure on notice claiming excuse.

9. The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract. Exemption of the buyer in the case of a "requirements" contract presents a special situation which is covered by the "Output and Requirements" section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

10. Following its basic policy of using commercial practicability as a test for excuse, this section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between "law", "regulation", "order" and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this article and the best evidence of his good faith is the general commercial acceptance of the regulation. However, governmental interference cannot excuse unless it truly "supervenes" in such a manner as to be beyond the seller's or buyer's assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.

11. An excused seller must fulfill his obligations under the contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. Subsections (A) and (B), therefore, explicitly permit in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies. Customers at different stages of the manufacturing process may be fairly treated by including the seller's manufacturing requirement. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since

any allocation which exceeds normal past requirements will not be reasonable. However, good faith requires, when prices have advanced, that the seller exercise real care in making his allocations, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price. Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller.

Cross References

Point 1: Sections 2-613 and 2-614.

Point 2: Section 1-102.

Point 5: Sections 1-203 and 2-613.

Point 6: Sections 1-102, 1-203 and 2-609.

Point 7: Section 2-614.

Point 8: Sections 1-201, 2-302 and 2-616.

Point 9: Sections 1-102, 2-306 and 2-613.

Definitional Cross References

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Good faith". Section 1-201.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

Special Plain Language Comment

In certain rare instances a party may be excused of its performance under a contract without "breaching" the contract because a change in the underlying circumstances has made his performance "commercially impracticable".

§ 2-616. Procedure on notice claiming excuse

A. Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this article relating to breach of installment contracts (§ 2-612), then also as to the whole:

1. Terminate and thereby discharge any unexecuted portion of the contract; or

2. Modify the contract by agreeing to take his available quota in substitution.

B. If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected.

C. The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-616 of the Uniform Commercial Code adopted by the states.

Commentary. This section seeks to establish simple and workable machinery for providing certainty as to when a supervening and excusing contingency "excuses" the delay, "discharges" the contract, or may result in a waiver of the delay by the buyer. When the seller notifies, in accordance with the preceding section, claiming excuse, the buyer may acquiesce, in which case the contract is so modified. No consideration is necessary in a case of this kind to support such a modification. If the buyer does not elect so to modify the contract, he may terminate it and under Subsection (B) his silence after receiving the seller's claim of excuse operates as such a termination. Subsection (C) denies effect to any contract clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances.

Cross References

Point 1: Sections 2-209 and 2-615.

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Installment contract". Section 2-612.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

"Termination". Section 2-106.

"Written". Section 1-201.

Special Plain Language Comment

This section deals with a buyer's options if a seller has acted properly under § 2-615 and notified the buyer of the seller's inability to perform. The buyer may treat the contract as an installment contract if the original contract involved more than a single item and where only part of the original contract's performance was excused pursuant to § 2-615. If the seller's action substantially impairs the value of the original contract the buyer can cause the rest of the original contract to be terminated by remaining silent for 30 days after the receipt of notice from the seller. If the buyer wishes to accept the contract modified by the seller's actions pursuant to § 2-615 he must indicate his willingness within that 30-day period of receiving notice from the seller.

Part 7. Remedies

§ 2-701. Remedies for breach of collateral contracts not impaired

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-701 of the Uniform Commercial Code adopted by the states.

Commentary. Whether a claim for breach of an obligation collateral to the contract for sale requires separate trial to avoid confusion of issues is beyond the scope of this article; but contractual arrangements which as a business matter enter vitally into the contract should be considered a part thereof in so far as cross-claims or defenses are concerned.

Definitional Cross References

"Contract for sale". Section 2-106.

"Remedy". Section 1-201.

§ 2-702. Seller's remedies on discovery of buyer's insolvency

A. Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery, under this article (§ 2-705).

B. Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within 10 days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the 10-day limitation does not apply. Except as provided in this Subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

C. The seller's right to reclaim under Subsection (B) is subject to the rights of a buyer in ordinary course of business or other good faith purchaser under this article (§ 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-702 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The seller's right to withhold the goods or to stop delivery except for cash when he discovers the buyer's insolvency is made explicit in Subsection (A) regardless of the passage of title, and the concept of stoppage has been extended to include goods in the possession of any bailee who has not yet attorned to the buyer.

2. Subsection (B) takes as its base-line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller. This article makes discovery of the buyer's insolvency and demand within a 30-day period a condition of the right to reclaim goods on the ground. The 30-day limitation period operates from the time of receipt of the goods.

An exception to this time limitation is made when a written misrepresentation of solvency has been made to the particular seller within three months prior to the delivery. To fall within the exception the statement of solvency must be in writing, addressed to the particular seller and dated within three months of the delivery.

3. Because the right of the seller to reclaim goods under this section constitutes preferential treatment as against the buyer's other creditors, Subsection (C) provides that such reclamation bars all his other remedies as to the goods involved.

Cross References

Point 1: Sections 2-401 and 2-705.

Compare § 2-502.

Definitional Cross References

"Buyer". Section 2-103.

"Buyer in ordinary course of business". Section 1-201.

"Contract". Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Receipt of goods". Section 2-103.

"Remedy ". Section 1-201.

"Rights". Section 2-103.

"Seller". Section 2-103.

"Writing". Section 1-201.

Special Plain Language Comment

The seller on credit is given a special preference over other creditors on discovery of the insolvency of the buyer. Insolvency is defined in § 1-201 (W). The seller may demand payment in cash for future deliveries of goods. If the goods have already been delivered to the buyer the seller may reclaim the goods but he must make his claim to the goods within 10 days of their receipt by the buyer. However, this 10-day limit does not apply to situations where the buyer has recently (within three months) given the seller a written representation that the buyer is solvent. However, this right to reclaim may be lost if the buyer sells the goods to certain types of third parties.

§ 2-703. Seller's remedies in general

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (§ 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may:

A. Withhold delivery of such goods;

B. Stop delivery by any bailee as hereafter provided (§ 2-705);

C. Proceed under the next section respecting goods still unidentified to the contract;

D. Resell and recover damages as hereafter provided (§ 2-706);

E. Recover damages for non-acceptance (§ 2—708) or in a proper case the price (§ 2-709);

F. Cancel.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-703 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section is an index Section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer. This article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.

2. The buyer's breach which occasions the use of the remedies under this section may involve only one lot or delivery of goods, or may involve all of the goods which are the subject matter of the particular contract. The right of the seller to pursue a remedy as to all the goods when the breach is as to only one or more lots is covered by the section on breach in installment contracts. The present section deals only with the remedies available after the goods involved in the breach have been determined by that section.

3. In addition to the typical case of refusal to pay or default in payment, the language in the preamble, "fails to make a payment due", is intended to cover the dishonor of a check on due presentment, or the non-acceptance of a draft, and the failure to furnish an agreed letter of credit.

4. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is unenforceable by action unless a different effect is specifically prescribed (§ 1-106).

Cross References

Point 2: Section 2-612.

Point 3: Section 2-325.

Point 4: Section 1-106.

Definitional Cross References

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

§ 2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods

A. An aggrieved seller under the preceding section may:

1. Identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

2. Treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

B. Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-704 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section gives an aggrieved seller the right at the time of breach to identify to the contract any conforming finished goods, regardless of the resalability, and to use reasonable judgment as to completing unfinished goods. It thus makes the goods available for resale under the resale Section, the seller's primary remedy, and in the special case in which resale is not practicable, allows the action for the price which would then be necessary to give the seller the value of his contract.

2. Under this article the seller is given express power to complete manufacture or procurement of goods for the contract unless the exercise of reasonable commercial judgment as to the facts as they appear at the time he learns of the breach makes it clear that such action will result in a material increase in

damages. The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture.

Cross References

Sections 2-703 and 2-706.

Definitional Cross References

"Aggrieved party". Section 1-201.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

§ 2-705. Seller's stoppage of delivery in transit or otherwise

A. The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (§ 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

B. As against such buyer the seller may stop delivery until:

1. Receipt of the goods by the buyer; or

2. Acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

3. Such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

4. Negotiation to the buyer of any negotiable document of title covering the goods.

C. 1. To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

2. After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

3. If a negotiable document of title has been issued for goods the bailee is not obligated to obey a notification to stop until surrender of the document.

4. A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-705 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) applies the stoppage principle to other bailees as well as carriers.

It also expands the remedy to cover the situations, in addition to buyer's insolvency, specified in the Subsection. But since stoppage is a burden in any case to carriers, and might be a very heavy burden to them if it covered all small shipments in all these situations, the right to stop for reasons other than insolvency is limited to carload, truckload, planeload or larger shipments. The seller shipping to a buyer of doubtful credit can protect himself by shipping C.O.D.

Where stoppage occurs for insecurity it is merely a suspension of performance, and if assurances are duly forthcoming from the buyer the seller is not entitled to resell or divert.

Improper stoppage is a breach by the seller if it effectively interferes with the buyer's right to due tender under the section on manner of tender of delivery. However, if the bailee obeys an unjustified order to stop he may also be liable to the buyer. The measure of his obligation is dependent on the provisions of the Documents of Title article of Article 7 of the Uniform Commercial Code. This article has not been adopted by the Navajo Nation and the rights of the parties which would be governed under that Article are governed by Navajo law. 7 N.N.C. § 204. Subsection (C)(2) therefore gives him a right of indemnity as against the seller in such a case.

2. "Receipt by the buyer" includes receipt by the buyer's designated representative, the sub-purchaser, when shipment is made direct to him and the buyer himself never receives the goods. It is entirely proper under this article that the seller, by making such direct shipment to the sub-purchaser, be regarded as acquiescing in the latter's purchase and as thus barred from stoppage of the goods as against him.

As between the buyer and the seller, the latter's right to stop the goods at any time until they reach the place of final delivery is recognized by this section.

Under Subsections (C)(3) and (4), the carrier is under no duty to recognize the stop order of a person who is a stranger to the carrier's contract. But the seller's right as against the buyer to stop delivery remains, whether or not the carrier is obligated to recognize the stop order. If the carrier does obey it, the buyer cannot complain merely because of that circumstance; and the seller becomes obligated under Subsection (C)(2) to pay the carrier any ensuing damages or charges.

3. A diversion of a shipment is not a "reshipment" under Subsection (B)(3) when it is merely an incident to the original contract of transportation. Nor is the procurement of "exchange bills" of lading which change only the name of the consignee to that of the buyer's local agent but do not alter the destination of a reshipment.

Acknowledgment by the carrier as a "warehouseman" within the meaning of this article requires a contract of a truly different character from the original shipment, a contract not in extension of transit but as a warehouseman.

4. Subsection (C)(3) makes the bailee's obedience of a notification to stop conditional upon the surrender of any outstanding negotiable document.

5. Any charges or losses incurred by the carrier in following the seller's orders, whether or not he was obligated to do so, fall to the seller's charge.

6. After an effective stoppage under this section the seller's rights in the goods are the same as if he had never made a delivery.

Cross References

Sections 2-702 and 2-703.

Point 1: Sections 2-503 and 2-609.

Point 2: Section 2-103.

Definitional Cross References

"Buyer". Section 2-103

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Notification". Section 1-201.

"Receipt of goods". Section 2-103.

"Rights". Section 1-201.

"Seller". Section 2-103.

§ 2-706. Seller's resale including contract for resale

A. Under the conditions stated in § 2-703 on Seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof.

Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (§ 2-710), but less expenses saved in consequence of the buyer's breach.

B. Except as otherwise provided in Subsection (C) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

C. Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

D. Where the resale is at public sale:

1. Only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

2. It must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

3. If the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

4. The seller may buy.

E. A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

F. The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (§ 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (§ 2-711(C)).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-706 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The only condition precedent to the seller's right of resale under Subsection (A) is a breach by the buyer within the section on the seller's remedies in general or insolvency. Under this section the seller may resell the goods after any breach by the buyer. Thus, an anticipatory repudiation by the buyer gives rise to any of the seller's remedies for breach, and to the right of resale. This principle is supplemented by Subsection (B) which authorizes a resale of goods which are not in existence or were not identified to the contract before the breach.

2. In order to recover the damages prescribed in Subsection (A) the seller must act "in good faith and in a commercially reasonable manner" in making the resale. Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in § 2-708.

Under this article the seller resells by authority of law, in his own behalf, for his own benefit and for the purpose of fixing his damages. The theory of a seller's agency is thus rejected.

3. If the seller complies with the prescribed standard of duty in making the resale, he may recover from the buyer the damages provided for in Subsection (A). Evidence of market of current prices at any particular time or place is relevant only on the question of whether the seller acted in a commercially reasonable manner in making the resale.

The distinction drawn by some courts between cases where the title had not passed to the buyer and the seller had resold as owner, and cases where the title had passed and the seller had resold by virtue of his lien on the goods, is rejected.

4. Subsection (B) frees the remedy of resale from legalistic restrictions and enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances. By "public" sale is meant a sale by auction. A "private" sale may be effected by solicitation and negotiations conducted either directly or through a broker. In choosing between a public and private sale the character of the goods must be considered and relevant trade practices and usages must be observed.

5. Subsection (B) merely clarifies the common law rule that the time for resale is a reasonable time after the buyer's breach, by using the language "commercially reasonable". What is such a reasonable time depends upon the nature of the goods, the condition of the market and the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees. Where a seller contemplating resale receives a demand from the buyer for inspection under the section of preserving evidence of goods in dispute, the time for resale may be appropriately lengthened.

On the question of the place for resale, Subsection (B) goes to the ultimate test, the commercial reasonableness of the seller's choice as to the place for an advantageous resale. This article rejects the theory that the seller is required to resell at the agreed place for delivery and that a resale elsewhere can be permitted only in exceptional cases.

6. The purpose of Subsection (B) being to enable the seller to dispose of the

goods to the best advantage, he is permitted in making the resale to depart from the terms and conditions of the original contract for sale to any extent "commercially reasonable" in the circumstances.

7. The provision of Subsection (B) that the goods need not be in existence to be resold applies when the buyer is guilty of anticipatory repudiation of a contract for future goods, before the goods or some of them have come into existence. In such a case the seller may exercise the right of resale and fix his damages by "one or more contracts to sell" the quantity of conforming future goods affected by the repudiation. The companion provision of Subsection (B) that resale maybe made although the goods were not identified to the contract prior to the buyer's breach, likewise contemplates an anticipatory repudiation by the buyer but occurring after the goods are in existence. If the goods so identified conform to the contract, their resale will fix the seller's damages quite as satisfactorily as if they had been identified before the breach.

8. Where the resale is to be by private sale, Subsection (C) requires that reasonable notification of the seller's intention to resell must be given to the buyer. The length of notification of a private sale depends upon the urgency of the matter. Notification of the time and place of this type of sale is not required.

Subsection (D)(2) requires that the seller give the buyer reasonable notice of the time and place of a public resale so that he may have an opportunity to bid or to secure the attendance of other bidders. An exception is made in the case of goods "which are perishable or threaten to decline speedily in value".

9. Since there would be no reasonable prospect of competitive bidding elsewhere, Subsection (D) requires that a public resale "must be made at a usual place or market for public sale if one is reasonably available;" i.e., a place or market which prospective bidders may reasonably be expected to attend. Such a market may still be "reasonably available" under this Subsection, though at a considerable distance from the place where the goods are located. In such a case the expense of transporting the goods for resale is recoverable from the buyer as part of the seller's incidental damages under Subsection (A). However, the question of availability is one of commercial reasonableness in the circumstances and if such "usual" place or market is not reasonably available, a duly advertised public resale may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for goods of the kind.

Subsection (D)(1) qualifies the last sentence of Subsection (B) with respect to resales of unidentified and future goods at public sale. If conforming goods are in existence the seller may identify them to the contract after the buyer's breach and then resell them at public sale. If the goods have not been identified, however, he may resell them at public sale only as "future" goods and only where there is a recognized market for public sale of futures in goods of the kind.

The provisions of of Subsection (D)(3) are intended to permit intelligent bidding.

The provisions of Subsection (D)(4) permitting the seller to bid and, of course, to become the purchaser, benefits the original buyer by tending to increase the resale price and thus decreasing the damages he will have to pay.

10. This article in Subsection (E) permits a good faith purchaser at resale to take a good title as against the buyer even though the seller fails to comply with the requirements of this section.

11. Under Subsection (F), the seller retains profit, if any, without distinction based on whether or not he had a lien since this article divorces the question of passage of title to the buyer from the seller's right of resale or the consequences of its exercise. On the other hand, where "a person in the position of a seller" or a buyer acting under the section on buyer's remedies exercises his right of resale under the present section he does so only for the limited purpose of obtaining cash, for his "security interest" in the goods. Once that purpose has been accomplished any excess in the resale price belongs to the seller to whom an accounting must be made as provided in the last sentence of Subsection (F).

Cross References

Point 1: Sections 2-610, 2-702 and 2-703.

Point 2: Section 1-201.

Point 3: Sections 2-708 and 2-710.

Point 4: Section 2-328.

Point 8: Section 2-104.

Point 9: Section 2-710.

Point 11: Sections 2-401, 2-707 and 2-711(C).

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notification". Section 1-201.

"Person in position of seller". Section 2-707.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

This right of resale is the most common remedy for sellers in the case of repudiation or breach of the contract by the buyer. Generally a seller does not wish to retain the rejected or withheld goods and he will resell them. The seller is permitted to recover the difference between the resale price and the contract price plus incidental damages (as defined in § 2-710) less any expenses saved because of the breach by buyer (for example further packaging or transportation costs). The measure of damages in §§ 2-706 and 2-708 are essentially the same, but the remedy of § 2-706 is generally more advantageous for the seller than the remedy in § 2-708 because of the burden of proof: in § 2-706 the resale price is conclusive proof of the value of the goods whereas in § 2-708 the seller has the burden of establishing the market price in order to obtain the advantages of § 2-708. The resale must be: (1) in good faith; and (2) commercially reasonable. The satisfaction of these two tests will vary depending on the situation, but generally the resale must be performed in a fashion which takes into account the type of goods and the custom of the trade in such goods. The section also sets out specific requirements depending on whether the resale is public or private.

§ 2-707. "Person in the position of a seller"

A. A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

B. A person in the position of a seller may as provided in this article withhold or stop delivery (§ 2-705) and resell (§ 2-706) and recover incidental damages (§ 2-710).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-707 of the Uniform Commercial Code adopted by the states.

Commentary. In addition to following in general the prior law the case of a financing agency which has acquired documents by honoring a letter of credit for the buyer or by discounting a draft for the seller has been included in the term "a person in the position of a seller".

Cross References

Section 2-506.

Definitional Cross References

"Consignee". Section 2-103.

"Consignor". Section 2-103.

"Goods". Section 2-105.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 2-708. Seller's damages for non-acceptance or repudiation

A. Subject to Subsection (B) and to the provisions of this article with respect to proof of market price (§ 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contact price together with any incidental damages provided in this article (§ 2-710), but less expenses saved in consequences of the buyer's breach.

B. If the measure of damages provided in Subsection (A) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this article (§ 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-708 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The current market price at the time and place for tender is set as the standard by which damages for non-acceptance are to be determined. The time and place of tender is determined by reference to the section on manner of tender of delivery, and to the sections on the effect of such terms as F.O.B., F.A.S., C.I.F., C & F, Ex Ship and No Arrival, No Sale.

In the event that there is no evidence available of the current market price at the time and place of tender, proof of a substitute market may be made under the section on determination and proof of market price. Furthermore, the section on the admissibility of market quotations is intended to ease materially the problem of providing competent evidence.

2. The provision of this section permitting recovery of expected profit

including reasonable overhead where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical, are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of "profit" to show a history of earnings, especially if a new venture is involved.

3. In all cases the seller may recover incidental damages.

Cross References

Point 1: Sections 2-319 through 2-324, 2-503, 2-723 and 2-724.

Point 2: Section 2-709.

Point 3: Section 2-710.

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Seller". Section 2-103.

§ 2-709. Action for the price

A. When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price:

1. Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

2. Of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

B. Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entities him to any goods not resold.

C. After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (§ 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-709 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Neither the passing of title to the goods nor the appointment of a day certain for payment is now material to a price action.

2. The action for the price is now generally limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer.

3. This section uses an objective test concerning the "resalability" of the goods. An action for the price under Subsection (A)(2) can be sustained only after a "reasonable effort to resell" the goods "at reasonable price" has actually been made or where the circumstances "reasonably indicate" that such an effort win be unavailing.

4. If a buyer is in default not with respect to the price, but on an obligation to make an advance, the seller should recover not under this section for the price as such, but for the default in the collateral (though coincident) obligation to finance the seller. If the agreement between the parties contemplates that the buyer will acquire, on making the advance, a security interest in the goods, the buyer on making the advance has such an interest as soon as the seller has rights in the agreed collateral. See § 9-204.

5. "Goods accepted" by the buyer under Subsection (A)(1) include only goods as to which there has been no justified revocation of acceptance, for such a revocation means that there has been a default by the seller which bars his rights under this section. "Goods lost or damaged" are covered by the section on risk of loss. "Goods identified to the contract" under Subsection (A)(2) are covered by the section on identification and the section on identification notwithstanding breach.

6. This section is intended to be exhaustive in its enumeration of cases where an action for the price lies.

7. If the action for the price fails, the seller may nonetheless have proved a case entitling him to damages for non-acceptance. In such a situation, Subsection (C) permits recovery of those damages in the same action.

Cross References

Point 4: Section 1-106.

Point 5: Sections 2-501, 2-509, 2-510 and 2-704.

Point 7: Section 2-708

Definitional Cross References

"Action". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201

"Goods". Section 2-105.

"Seller". Section 2-103.

§ 2-710. Seller's incidental damages

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-710 of the Uniform Commercial Code adopted by the states.

Commentary. This section authorizes reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer's breach. The section sets forth the principal normal and necessary additional elements of damage flowing from the breach but intends to allow all commercially reasonable expenditure made by the seller.

Definitional Cross References

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

§ 2-711. Buyer's remedies in general; buyer's security interest in rejected goods

A. Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§ 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:

1. "Cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

2. Recover damages for non-delivery as provided in this article (§ 2-713).

B. Where the seller fails to deliver or repudiates the buyer may also:

1. If the goods have been identified recover them as provided in this article (§ 2-502); or

2. In a proper case obtain specific performance or replevy the goods as provided in this article (§ 2-716).

C. On a rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (§ 2-706).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-711 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section is an index to the buyer's remedies, Subsection (A) covering those remedies permitting the recovery of money damages, and Subsection (B) covering those which permit reaching the goods themselves. The remedies listed here are those available to a buyer who has not accepted the goods or who has justifiably revoked his acceptance. The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. The buyer's right to proceed as to all goods when the breach is as to only some of the goods is determined by the section on breach in installment contracts and by the section on partial acceptance.

Despite the seller's breach, proper retender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer's remedies under this section, except for any delay involved.

2. Subsection (C) makes clear that the buyer may hold and resell rejected goods if he has paid a part of the price or incurred expenses of the type specified. "Paid" as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. His freedom of resale is coextensive with that of a seller under this article except that the buyer may not keep any profit resulting from the resale and is limited to retaining only

the amount of the price paid and the costs involved in the inspection and handling of the goods. The buyer's security interest in the goods is intended to be limited to the items listed in Subsection (C), and the buyer is not permitted to retain such funds as he might believe adequate for his damages. The buyer's right to cover, or to have damages for non-delivery, is not impaired by his exercise of his right of resale.

3. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (§ 1-106).

Cross References

Point 1: Sections 2-508, 2-601(C), 2-608, 2-612 and 2-714.

Point 2: Section 2-706.

Point 3: Section 1-106.

Definitional Cross References

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Cover". Section 2-712.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Receipt'.' of goods". Section 2-103.

"Remedy". Section 1-201.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 2-712. "Cover"; buyer's procurement of substitute goods

A. After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

B. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§ 2-715), but less expenses saved in consequence of the seller's breach.

C. Failure of the buyer to effect cover within this section does not bar him from any other remedy.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-712 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section provides the buyer with a remedy aimed at enabling him to obtain the goods he needs thus meeting his essential need. This remedy is the buyer's equivalent of the seller's right to resell.

2. The definition of "cover" under Subsection (A) envisages a series of contracts or sales, as well as a single contract or sale; goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case; and contracts on credit or delivery terms differing from the contract in breach, but again reasonable under the circumstances. The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

The requirement that the buyer must cover "without unreasonable delay" is not intended to limit the time necessary for him to look around and decide as to how he may best effect cover. The test here is similar to that generally used in this article as to reasonable time and seasonable action.

3. Subsection (C) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non-delivery under the next section.

However, this Subsection must be read in conjunction with the section which limits the recovery of consequential damages to such as could not have been obviated by cover. Moreover, the operation of the section on specific performance of contracts for "unique" goods must be considered in this connection for availability of the goods to the particular buyer, for his particular needs is the test for that remedy and inability to cover is made an express condition to the right of the buyer to replevy the goods.

4. This section does not limit cover to merchants, in the first instance. It is the vital and important remedy for the consumer buyer as well. Both are free to use cover: the domestic or non-merchant consumer is required only to act in normal good faith while the merchant buyer must also observe all reasonable commercial standards of fair dealing in the trade, since this falls within the definition of good faith on his part.

Cross References

Point 1: Section 2-706.

Point 2: Section 1-204.

Point 3: Sections 2-713, 2-715 and 2-716.

Point 4: Section 1-203.

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Purchase". Section 1-201.

"Remedy". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

The most common remedy for buyers, similar to resale for sellers, is "cover" (the purchase of substitute goods) because the buyer generally needs to acquire the goods he sought to purchase. If the buyer "covers" within a "reasonable time" he may then obtain as damages the difference between the price he paid to cover and the contract price plus any incidental or consequential damages; but less expenses saved due to seller's breach. Just as in the seller's remedies under §§ 2-706 and 2-708 the two remedies, §§ 2-712 and 2-713, have the same measure of damages, but the burden of proof differs: in § 2-712 the cover price is conclusive evidence of the cost of the goods and in § 2-713 the market price must be proved by the buyer. The buyer, unlike the seller, may receive consequential damages (§ 2-715). Consequential damages are difficult to define but are generally those which arise outside the scope of the immediate buyer-seller transactions and are losses by the buyer due to the breach by the seller and which were reasonably foreseeable to the seller at the time of contracting. For example, if a dealer knows that a farmer is purchasing a tractor in order to harvest his crop and yet he fails to deliver the tractor on time, knowing that no other tractors are available for rental, the dealer would be liable for the loss of the farmer's crop as consequential damages of his failure to deliver the tractor.

However, if the goods are "unique" or not otherwise available the buyer may demand that the seller perform the contract"specific performance" (§ 2-716).

§ 2-713. Buyer's damages for non-delivery or repudiation

A. Subject to the provisions of this article with respect to proof of market price (§ 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages-provided in this article (§ 2-715), but less expenses saved in consequence of the seller's breach.

B. Market price is to be determined as of the place for tender or, in cases of rejection after arrival of acceptance, as of the place of arrival.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-713 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief. So the place for measuring damages is the place of tender (or the place of arrival if the goods are rejected or their acceptance is revoked after reaching their destination) and the crucial time is the time at which the buyer learns of the breach.

2. The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade.

3. When the current market price under this section is difficult to prove the section on determination and proof of market price is available to permit a showing of a comparable market price or, where no market price is available, evidence of spot sale prices is proper. Where the unavailability of a market price is caused by a scarcity of goods of the type involved, a good case is normally made for specific performance under this article. Such scarcity conditions, moreover, indicate that the price has risen and under the section providing for liberal administration of remedies, opinion evidence as to the value of the goods would be admissible in the absence of a market price and a liberal construction of allowable consequential damages should also result.

4. This section carries forward the standard rule that the buyer must deduct from his damages any expenses saved as a result of the breach.

5. The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.

Cross References

Point 3: Sections 1-106, 2-716 and 2-723.

Point 5: Section 2-712.

Definitional Cross References

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Seller". Section 2-103.

§ 2-714. Buyer's damages for breach in regard to accepted goods

A. Where the buyer has accepted goods and given notification (§ 2-607(C)) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

B. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

C. In a proper case any incidental and consequential damages under the next section may also be recovered.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-714 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by. This section lays down an explicit provision as to the time and place for determining the loss.

The section on deduction of damages from price provides an additional remedy for a buyer who still owes part of the purchase price, and frequently the two remedies will be available concurrently. The buyer's failure to notify of his claim under the section on effects of acceptance, however, operates to bar his remedies under either that section or the present section.

2. The "non-conformity" referred to in Subsection (A) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable".

3. Subsection (B) describes the usual, standard and reasonable methods of ascertaining damages in the case of breach of warranty, but it is not intended as an exclusive measure. It departs from the measure of damages for non-delivery in utilizing the place of acceptance rather than the place of tender. In some cases the two may coincide, as where the buyer signifies his acceptance upon the tender. If, however, the nonconformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer's decision not to revoke.

4. The incidental and consequential damages referred to in Subsection (C),

which will usually accompany an action, brought under this section, are discussed in detail in the comment on the next section.

Cross References

Point 1: Compare Sections 2-711, 2-607 and 2-717.

Point 2: Section 2-106.

Point 3: Sections 2-608 and 2-713.

Point 4: Section 2-715.

Definitional Cross References

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Goods". Section 1-201.

"Notification". Section 1-201.

"Seller". Section 2-103.

§ 2-715. Buyer's incidental and consequential damages

A. Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

B. Consequential damages resulting from the seller's breach include:

1. Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

2. Injury to person or property proximately resulting from any breach of warranty.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-715 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) is intended to provide reimbursement of the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract has in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damages.

2. Subsection (B) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller's breach. The "tacit agreement" test for the recovery of consequential damages is rejected. Although the older rule at common law which made the seller liable for all consequential damages of which he had "reason to know" in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise. Paragraph (2) modifies the former rule concerning consequential damages resulting from breach of warranty by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise.

3. In the absence of excuse under the section on merchant's excuse by failure of presupposed conditions, the seller is liable for consequential damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting. It is not necessary that there be a conscious acceptance of an insurer's liability on the seller's part, nor is his obligation for consequential damages limited to cases in which he fails to use due effort in good faith.

Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.

Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy.

4. The burden of proving the extent of loss incurred by way of consequential damages is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

5. Subsection (B)(2) states the usual rule as to breach of warranty, allowing recovery for injuries "proximately" resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

6. In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of Subsection (13)(1).

Cross References

Point 1: Section 2-608.

Point 3: Sections 1-203, 2-615 and 2-719.

Point 4: Section 1-106.

Definitional Cross References

"Cover". Section 2-712.

"Goods". Section 1-201.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

§ 2-716. Buyer's right to specific performance or replevin

A. Specific performance may be decreed where the goods are unique or in other proper circumstances.

B. The decree for specific performance may include such terms and conditions and to payment of the price, damages, or other relief as the court may deem just.

C. The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-716 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the

older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances".

3. The legal remedy of replevin is given the buyer in cases in which cover is reasonably unavailable and goods have been identified to the contract. This is in addition to the buyer's right to recover identified goods on the seller's insolvency (§ 2-502).

4. This section is intended to give the buyer rights to the goods comparable to the seller's rights to the price.

5. If a negotiable document of title is outstanding, the buyer's right of replevin relates of course to the document not directly to the goods.

Cross References

Point 3: Section 2-502.

Point 4: Section 2-709.

Definitional Cross References

"Buyer". Section 2-103.

"Goods". Section 1-201.

"Rights". Section 1-201.

§ 2-717. Deduction of damages from the price

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-717 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section permits the buyer to deduct from the price damages resulting from any breach by the seller and does not limit the relief to cases of breach of warranty as did the prior law. To bring this provision into application the breach involved must be of the same contract under which the price in question is claimed to have been earned.

2. The buyer, however, must give notice of his intention to withhold all or part of the price if he wishes to avoid a default within the meaning of the section on insecurity and right to assurances. In conformity with the general policies of this article, no formality of notice is required and any language

which reasonably indicates the buyer's reason for holding up his payment is sufficient.

Cross References

Point 2: Section 2-609.

Definitional Cross References

"Buyer". Section 2-103.

"Notifies". Section 1-201.

§ 2-718. Liquidation or limitation of damages: deposits

A. Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

B. Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds:

1. The amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with Subsection (A); or

2. In the absence of such terms, twenty percent (20%) of the value of the total performance for which the buyer is obligated under the contract or five hundred dollars ($500.00), whichever is smaller.

C. The buyer's right to restitution under Subsection (B) is subject to offset to the extent that the seller establishes:

1. A right to recover damages under the provisions of this article other than Subsection (A); and

2. The amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

D. Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of Subsection (B); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this article on resale by an aggrieved seller (§ 2-706).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-718 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under Subsection (A) liquidated damages clauses are allowed where the amount involved is reasonable in the light of the circumstances of the case. The Subsection sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damages clause. A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

2. Subsection (B) refuses to recognize a forfeiture unless the amount of the payment so forfeited represents a reasonable liquidation of damages as determined under Subsection (A). A special exception is made in the case of small amounts (twenty percent (20%) of the price or five hundred dollars ($500.00), whichever is smaller) deposited as security. No distinction is made between cases in which the payment is to be applied on the price and those in which it is intended as security for performance. Subsection (B) is applicable to any deposit or down or part payment. In the case of a deposit or turn in of goods resold before the breach, the amount actually received on the resale is to be viewed as the deposit rather than the amount allowed the buyer for the trade in. However, if the seller knows of the breach prior to the resale of the goods turned in, he must make reasonable efforts to realize their true value, and this is assured by requiring him to comply with the conditions laid down in the section on resale by an aggrieved seller.

Cross References

Point 1: Section 2-302.

Point 2: Section 2-706.

Definitional Cross References

"Aggrieved party". Section 1-201.

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Notice". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

Special Plain Language Comment

Where damages due to breach of contract are difficult to prove and other remedies are not feasible the parties may agree to an estimated amount of damages, "liquidated damages". Such liquidated damages must be reasonable as compared to actual damages—liquidated damages which are too high will be declared void and unenforceable. Liquidated damages must meet three tests to be permitted: (1) reasonable amount as compared to actual damages; (2) actual damages difficult to prove; and (3) other remedies are not feasible.

§ 2–719. Contractual modification or limitation of remedy

A. Subject to the provisions of Subsections (B) and (C) of this section and of the preceding section on liquidation and limitation of damages:

1. The agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or the repair and replacement of non-conforming goods or parts; and

2. Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

B. Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

C. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2–719 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus, any clause purporting to modify or limit the remedial provisions of this article in an unconscionable manner is subject to deletion and in that event the remedies made available by this article are applicable as if the stricken cause had never existed. Similarly, under Subsection (B), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this article.

2. Subsection (A)(2) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

3. Subsection (C) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or indeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in § 2-316.

Cross References

Point 1: Section 2-302.

Point 3: Section 2-316.

Definitional Cross References

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

Special Plain Language Comment

This section permits the parties to limit the remedies available. For example, they could agree that monetary damages are limited to a certain maximum or that monetary damages are not available at all, the only remedy available is the right to have the goods repaired or replaced. The Code imposes two restrictions on such limitations of remedies: the remedy must not be so limited as to "fail of its essential purpose" nor may the exclusion of consequential damages be "unconscionable". Failure of essential purpose is a difficult concept, but it embodies the traditional principle of contract interpretation that the interpretation of a provision must take into account the purpose of that provision. For example, a contract for the sale of a television set might limit remedies to the repair or replacement of defective components. If a defective picture tube caused the television set to catch on fire and be destroyed, such a limitation on remedies would "fail in its essential purpose" because no television set would be available to be repaired. The buyer could then turn to other remedies under the Code. The second restriction on the limitation of remedies deals with the limitation or exclusion of consequential damages. Because of the potential importance of such a limitation, the Code has specifically restricted the ability of parties to agree to such limitations, particularly for personal injuries involving consumer goods. For example, if defective wiring in a space heater results in third degree burns, the seller's attempt to limit the amount of consequential damages to the price of the space heater will not be successful.

§ 2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-720 of the Uniform Commercial Code adopted by the states.

Commentary. This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill-advised use of such terms as "cancellation", "rescission", or the like. Once a party's rights have accrued they are not to be lightly impaired by concessions made in business decency and without intention to forego them. Therefore, unless the cancellation of a contract expressly declares that it is "without reservation of rights", or the like, it cannot be considered to be a renunciation under this section.

Cross References

Section 1-107.

Definitional Cross References

"Cancellation". Section 2-106.

"Contract". Section 1-201.

§ 2-721. Remedies for fraud

Remedies for material misrepresentation or fraud include all remedies available under this article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-721 of the Uniform Commercial Code adopted by the states.

Commentary. This section was drafted to correct the situation by which remedies for fraud have been more circumscribed than the more modern and mercantile remedies for breach of warranty. Thus the remedies for fraud are extended by this section to coincide in scope with those for non-fraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible.

Definitional Cross References

"Contract for sale". Section 2-106.

"Goods". Section 1-201.

"Remedy". Section 1-201.

§ 2-722. Who can sue third parties for injury to goods

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract:

A. A right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

B. If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

C. Either party may with the consent of the other sue for the benefit of whom it may concern.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-722 of the Uniform Commercial Code adopted by the states.

Commentary. This section adopts and extends somewhat the principle of the statutes which provide for suit by the real party in interest. The provisions of this section apply only after identification of the goods. Prior to that time only the seller has a right of action. During the period between identification and final acceptance (except in the case of revocation of acceptance) it is possible for both parties to have the right of action. Even after final acceptance both parties may have the right of action if the seller retains possession or otherwise retains an interest.

Definitional Cross References

"Action". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

§ 2-723. Proof of market price: time and place

A. If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (§ 2-708 or § 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

B. If evidence of a price prevailing at the times or places described in this article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

C. Evidence of a relevant price prevailing at a time or place other than the one described in this article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-723 of the Uniform Commercial Code adopted by the states.

Commentary. This section eliminates the most obvious difficulties arising in connection with the determination of market price, when that is stipulated as a measure of damages by some provision of this article. Where the appropriate market price is not readily available the court is here granted reasonable leeway in receiving evidence of prices current in other comparable markets or at other times comparable to the one in question. In accordance with the general principle of this article against surprise, however a party intending to offer evidence of such a substitute price must give suitable notice to the other party.

This section is not intended to exclude the use of any other reasonable method of determining market price or of measuring damages if the circumstances of the case make this necessary.

Definitional Cross References

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Usage of trade". Section 1-205.

§ 2-724. Admissibility of market quotations

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-724 of the Uniform Commercial Code adopted by the states.

Commentary. This section makes market quotations admissible in evidence while providing for a challenge of the material by showing the circumstances of its preparation.

No explicit provisions as to the weight to be given to market quotations is contained in this section, but such quotations, in the absence of compelling challenge, offer an adequate basis for a verdict.

Market quotations are made admissible when the price or value of goods traded "in any established market" is in issue. The reason of the section does not require that the market be closely organized in the manner of a produce exchange. It is sufficient if transactions in the commodity are frequent and open enough to make a market established by usage in which one price can be expected to affect another and in which an informed report of the range and trend of prices can be assumed to be reasonably accurate.

This section does not in any way intend to limit or negate the application of similar rules of admissibility to other material, whether by action of the courts or by statute. The purpose of the present section is to assure a minimum of mercantile administration in this important situation and not to limit any liberalizing trend in modern law.

Definitional Cross References

"Goods". Section 2-105.

§ 2-725. Statute of limitations in contracts for sale

A. An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

B. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

C. Where an action commenced within the time limited by Subsection (A) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

D. This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act became effective.

History

CJA-1-86, January 29, 1986.

Note. At Subsection (D), "becomes" changed to "became".

Official Comment

Changes. This section is intended to have the same meaning and effect as § 2-725 of the Uniform Commercial Code adopted by the states.

Commentary. This section introduces a uniform statute of limitations for sale contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four-year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

Subsection (A) permits the parties to reduce the period of limitation. The minimum period is set at one (1) year. The parties may not, however, extend the statutory period.

Subsection (B), providing that the cause of action accrues when the breach occurs, states an exception where the warranty extends to future performance.

Subsection (C) states the saving provision included in many state statutes and permits an additional short period for bringing new actions, where suits begun within the four-year period have been terminated so as to leave a remedy still available for the same breach.

Subsection (D) makes it clear that this article does not purport to alter or modify in any respect the law on tolling of the statute of limitations as it now prevails in the various jurisdictions.

Definitional Cross References

"Action". Section 1–201.

"Aggrieved party". Section 1–201.

"Agreement". Section 1–261.

"Contract for sale". Section 2–106.

"Goods". Section 2–105.

"Party". Section 1–201.

"Remedy". Section 1–201.

"Term". Section 1–201.

"Termination". Section 2–106.

Article 3. Commercial Paper

Part 1. Short Title, Form and Interpretation

§ 3–101. Short title

This article shall be known and may be cited as the Navajo Uniform Commercial Code—Commercial Paper.

History

CJA-1-86, January 29, 1986.

§ 3-102. Definitions and index of definitions

A. In this article unless the context otherwise requires:

1. "Issue" means the first delivery of an instrument to a holder or a remitter.

2. An "order" is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession.

3. A "promise" is an undertaking to pay and must be more than an acknowledgment of an obligation.

4. "Secondary party" means a drawer or endorser.

5. "Instrument" means a negotiable instrument.

B. Other definitions to this article and the sections in which they appear are:

"Acceptance". Section 3-410.

"Accommodation party". Section 3-415.

"Alteration". Section 3-407.

"Certificate of deposit". Section 3-104.

"Certification". Section 3-411.

"Check". Section 3-104.

"Definite time". Section 3-109.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder in due course". Section 3-302.

"Negotiation". Section 3-202.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"On demand". Section 3-108.

"Presentation". Section 3-504.

"Protest". Section 3-509.

"Restrictive Indorsement". Section 3-205.

"Signature". Section 3-401.

C. In this article, unless the context otherwise requires:

1. "Account" means any account with a bank and includes a checking, time, interest or savings account;

2. "Banking day" means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions;

3. "Clearing house" means any association of banks or other payors regularly clearing items;

4. "Collecting bank" means any bank handling the item for collection except the payor bank;

5. "Customer" means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank;

6. "Depositary bank" means the first bank to which an item is transferred for collection even though it is also the payor bank;

7. "Documentary draft" means any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft;

8. "Intermediary bank" means any bank to which an item is transferred in course of collection except the depositary or payor bank;

9. "Item" means any instrument for the payment of money even though it is not negotiable but does not include money;

10. "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;

11. "Payor bank" means a bank by which an item is payable as drawn or accepted;

D. In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. Subsection (C) has been modified to adopt certain definitions found in Article 4 of the Uniform Commercial Code which the Navajo Nation has not adopted.

Commentary. 1. The definition in Subsection (A)(1) of this section provides that the delivery may be to a holder or to a remitter.

2. The definitions of "order" (Subsection (A)(2)) and "promise" (Subsection (A)(3)) state principles clearly recognized by the courts. In the case of orders the dividing line between "a direction to pay" and "an authorization or request" may not be self-evident in the occasional unusual, and therefore non-commercial, case. The prefixing of words of courtesy to the direction—as "please pay" or "kindly pay" should not lead to a holding that the direction has degenerated into a mere request. On the other hand informal language—such as "I wish you would pay"—would not qualify as an order and such an instrument would be non-negotiable. The definition of "promise" is intended to make it clear that a mere I.O.U. is not a negotiable instrument, and that such phrases as "Due Currier & Baker seventeen dollars fourteen cents ($17.14), value received" and statements as "I borrowed from P. Shemonia the sum of five hundred dollars ($500.00) with four percent (4%) interest; the borrowed money ought to be paid within four months from the above date" were promises sufficient to make the instruments into notes.

3. The last sentence of Subsection (A)(2) ("order") permits the order to be addressed to one or more persons (as drawees) in the alternative, recognizing the practice of corporations issuing dividend checks and of other drawers who for commercial convenience name a number of drawees, usually in different parts of the country. The section on presentment provides that presentment may be made to any one of such drawees. Drawees in succession are not permitted because the holder should not be required to make more than one presentment, and upon the first dishonor should have his recourse against the drawer and endorsers.

4. Comments on the definitions indexed follow the sections in which the definitions are contained. The Navajo Nation has not adopted all Articles of the Uniform Commercial Code. The definitions indexed in Subsection (B) incorporate certain definitions normally found in Article 4.

5. "Banking Day". Under this definition that part of a business day when a bank is open only for limited functions, e.g., on Saturday evenings to receive deposits and cash checks, but with loan, bookkeeping and other departments closed, is not part of a banking day.

6. "Clearing House". Occasionally express companies, governmental agencies and other non-banks deal directly with a clearing house; hence the definition does not limit the term to an association of banks.

7. "Customer". It is to be noted that this term includes a bank carrying an account with another bank as well as the more typical non-bank customer or depositor.

8. The word "item" is chosen because it is "banking language" and includes non-negotiable as well as negotiable paper calling for money and also similar

paper governed by the Article on Investment Securities (Article (C) (which has not been adopted by the Navajo Nation—rights which would be governed under this article are governed by Navajo law pursuant to 7 N.N.C. § 204)) as well as that governed by this article.

9. "Midnight Deadline". The use of this phrase is an example of the more mechanical approach used in this article. Midnight is selected as a termination point or time limit to obtain greater uniformity and definiteness than would be possible from other possible termination points, such as the close of the banking day or business day.

10. The definitions relating to banks in general exclude a bank to which an item is issued, as such bank does not take by transfer except in the particular case covered where the item is issued to a payee for collection, as where a corporation is transferring balances from one account to another. Thus, the definition of "depositary bank" does not include the bank to which a check is made payable where a check is given in payment of a mortgage. Such a bank has the status of a payee under this article and not that of a collecting bank.

11. The term "payor bank" includes a drawee bank and also a bank at which an item is payable if the item constitutes an order on the bank to pay, for it is then "payable by" the bank. If the "at" item is not an order in the particular state (see § 3-121), then the bank is not a payor, but will be a presenting or collecting bank.

12. Items are sometimes drawn or accepted "payable through" a particular bank. Under this section and 9-120, the "payable through" bank (if it in fact handles the item) will be a collecting (and often a presenting) bank; it is not a "payor bank".

13. The term intermediary bank includes the last bank in the collection process where the payor is not a bar. Usually the last bank is also a presenting bank.

Cross References

Point 3: Section 3-504(C)(1).

Definitional Cross References

"Bank". Section 1-201.

"Delivery". Section 1-201.

"Holder". Section 1-201.

"Money". Section 1-201.

"Person". Section 1-201.

Special Plain Language Comment

This article relies heavily upon the use of technical legal terms which are defined in this section and in Article 1.

§ 3-103. Limitation on scope of Article

A. This article does not apply to money documents of title or investment securities.

B. The provisions of this article are subject to the provisions of the Article on Secured Transactions (Article 9) and, to the extent provided in 7 N.N.C. § 204, the Article on Bank Deposits and collections (Article 4) adopted by the States in which the bank is located.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-103 of the Uniform Commercial Code adopted by the states except that Articles 7 and 8 of the Uniform Commercial Code have not been adopted by the Navajo Nation.

Commentary. 1. This article is restricted to commercial paper—that is to say, to drafts, checks, certificates of deposit and notes as defined in § 3-104(B). Subsection (A) expressly excludes any money, as defined in this Code (§ 1-201), even though the money may be in the form of a bank note which meets all the requirements of § 3-104(A). Money is, of course, negotiable at common law or under separate statutes, but no provision of this article is applicable to it. Subsection (A) also expressly excludes documents of title and investment securities.

2. Instruments which fall within the scope of this article may also be subject to other Articles of the Code. In the case of a negotiable instrument which is subject to Article 9 because it is used as collateral, the provisions of this article continue to be applicable except insofar as there may be conflicting provisions in the Secured Transactions Article. An instrument which qualifies as "negotiable" under this article may also qualify as a "security". The Code does not apply to investment securities as such. An instrument shall be treated as negotiable if it qualified as such unless, without reference to the Code, the law of a state covering the securities shall apply to it.

3. The Navajo Nation has not yet adopted Articles 7 and 8 of the Uniform Commercial Code. Rights which would be governed by these Articles will be governed by Navajo law pursuant to 7 N.N.C. § 204.

Cross References

Point 1: Sections 1-201, 3-104(A) and (B), and 3-107.

Point 2: Article 9 and Section 3-104.

Definitional Cross References

"Document of title". Section 1-201.

"Money" Section 1-201.

§ 3-104. Form of negotiable instruments: "draft"; "check"; "certificate of deposit"; "note"

A. Any writing to be a negotiable instrument within this article must:

1. Be signed by the maker or drawer; and

2. Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article; and

3. Be payable on demand or at a definite time; and

4. Be payable to order or to bearer.

B. A writing which complies with the requirements of this section is:

1. A "draft" ("bill of exchange") if it is an order;

2. A "check" if it is a draft drawn on a bank and payable on demand;

3. A "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;

4. A "note" if it is a promise other than a certificate of deposit.

C. As used in other Articles of this Code, and as the context may require, the terms "draft", "check", "certificate of deposit" and "note" may refer to instruments which are not negotiable within this article as well as to instruments which are so negotiable.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-104 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under Subsection (A)(2) any writing, to be a negotiable instrument within this article, must be payable in money. "Within this article" in Subsection (A) leaves open the possibility that some writings may be made negotiable by other statutes or by judicial decision. The same is true as to any new type of paper which commercial practice may develop in the future.

2. While a writing cannot be made a negotiable instrument within this article by contract or by conduct, nothing in this section is intended to mean that in a particular case a court may not arrive at a result similar to that of negotiability by finding that the obligor is estopped by his conduct from asserting a defense against a bona fide purchaser. Such an estoppel rests upon

ordinary principles of the law of simple contract; it does not depend upon negotiability, and it does not make the writing negotiable for any other purpose. But a contract to build a house or to employ a workman, or equally a security agreement does not become a negotiable instrument by the mere insertion of a clause agreeing that it shall be one.

3. Section 3-112 permits an instrument to carry certain limited obligations or powers in addition to the simple promise or order to pay money. Subsection (A) of this section is intended to say that it cannot carry others.

4. Any writing which meets the requirements of Subsection (A) and is not excluded under § 3-103 is a negotiable instrument, and all sections of this article apply to it, even though it may contain additional language beyond that contemplated by this section. Such an instrument is a draft, a check, a certificate of deposit or a note as defined in Subsection (B). Traveler's checks in the usual form, for instance, are negotiable instruments under this article when they have been completed by the identifying signature.

5. This article requires that the instrument must follow the language of this section, or that a clear equivalent must be found, and that in doubtful cases the decision should be against negotiability.

6. Subsection (C) is intended to make clear the same policy expressed in § 3-805.

Cross References

Sections 3-105 through 3-112, 3-401, 3-402 and 3-403.

Point 1: Section 3-107.

Point 3: Section 3-112.

Point 4: Sections 3-103 and 3-805.

Point 6: Section 3-805.

Definitional Cross References

"Bank". Section 1-201.

"Bearer". Section 1-201.

"Definite time". Section 3-109.

"Money". Section 1-201.

"On demand". Section 3-108.

"Promise". Section 3-102.

"Signed". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

Special Plain Language Comment

Article Three covers two types of written documents; notes, which record a promise of one person to pay another, and drafts, which are an order from one person to another to pay a third person. A check is a draft addressed to a bank. Drafts and notes can be used to pay for transactions, and that use is encouraged by the concept of "negotiability". A negotiable note or draft may be transferred in such a way that the recipient takes it without being bound by any of the claims or defenses which might be used against prior holders of the note or draft.

§ 3-105. When promise or order unconditional

A. A promise or order otherwise unconditional is not made conditional by the fact that the instrument:

1. Is subject to implied or constructive conditions; or

2. States its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transaction; or

3. Refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to repayment or acceleration; or

4. States that it is drawn under a letter of credit; or

5. States that it is secured, whether by mortgage, reservation of title or otherwise; or

6. Indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or

7. Is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or

8. Is limited to payment out of the entire assets or a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

B. A promise or order is not unconditional if the instrument:

1. States that it is subject to or governed by any other agreement; or

2. States that is to be paid only out of a particular fund or source except as provided in this section.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-105 of the Uniform Commercial Code adopted by the states.

Commentary. The section is intended to make it clear that, so far as negotiability is affected, the conditional or unconditional character of the promise or order is to be determined by what is expressed in the instrument itself, and to permit certain specific limitations upon the terms of payment.

1. Subsection (A)(1) rejects the theory of decisions which have held that a recital in an instrument that is given in return for an executory promise gives rise to an implied condition that the instrument is not to be paid if the promise is not performed, and that this condition destroys negotiability. Nothing in the section is intended to imply that language may not be fairly construed to mean what it says, but implications, whether of law or fact, are not to be considered in determining negotiability.

2. The final clause of Subsection (A)(2) is intended to resolve a conflict in the decisions over the effect of such language as, "This note is given for payment as per contract for the purchase of goods of even date, maturity being in conformity with the terms of such contract". It adopts the general commercial understanding that such language is intended as a mere recital of the origin of the instrument and a reference to the transaction for information, but is not meant to condition payment according to the terms of any other agreement.

3. Subsection (A)(3) likewise is intended to resolve a conflict, and to reject cases in which a reference to a separate agreement was held to mean that payment of the instrument must be limited in accordance with the terms of the agreement, and hence was conditioned by it. Such a reference normally is inserted for the purpose of making a record or giving information to anyone who may be interested, and in the absence of any express statement to that effect is not intended to limit the terms of payment. Inasmuch as rights as to prepayment or acceleration has to do with a "speed-up" in payment and since notes frequently refer to separate agreements for a statement of these rights, such reference does not destroy negotiability even though it has mild aspects of incorporation by reference. The general reasoning with respect to subparagraph (3) also applies to a draft which on its face states that it is drawn under a letter of credit (subparagraph (4)). Paragraphs (3) and (4) therefore adopt the position that negotiability is not affected. If the reference goes further and provides that payment must be made according to the terms of the agreement, it falls under Subsection (B)(1).

4. Subsection (A)(5) is intended to settle another conflict in the decisions, over the effect of "title security notes" and other instruments which recite the security given. It rejects cases which have held that the mere statement that the instrument is secured, by reservation of title or otherwise, carries the implied condition that payment is to be made only if the security agreement is fully performed. Again such a recital normally is included only for the

purpose of making a record or giving information, and is not intended to condition payment in any way.

5. Subsection (A)(7) is intended to permit municipal governments, municipal corporations, tribal government corporations or other governments or governmental agencies to draw checks or to issue other short-term commercial paper in which payment is limited to a particular fund or to the proceeds of particular taxes or other sources of revenue. The provision will permit some tribal warrants to be negotiable if they are in proper form. Normally such warrants lack the words "order" or "bearer", or are marked "Not Negotiable", or are payable only in serial order, which make them conditional.

6. Subsection (A)(8) adopts the policy of decisions holding that an instrument issued by an unincorporated association is negotiable although its payment is expressly limited to the assets of the association, excluding the liability of individual members; and recognizing as negotiable an instrument issued by a trust estate without personal liability of the trustee. The policy is extended to a partnership and to any estate. The provision affects only the negotiability of the instrument, and is not intended to change the law of any jurisdiction as to the liability of a partner, trustee, executor, administrator, or any other person on such an instrument.

7. Subsection (B)(1) retains the generally accepted rule that where an instrument contains such language as "subject to terms of contract between maker and payee of this date", its payment is conditioned according to the terms of the agreement and the instrument is not negotiable. The distinction is between a mere recital of the existence of the separate agreement or a reference to it for information, which under Subsection (A)(3) will not affect negotiability, and any language which, fairly construed, requires the holder to look to the other agreement for the terms of payment. The intent of the provision is that an instrument is not negotiable unless the holder can ascertain all of its essential terms from its face. In the specific instance of rights as to prepayment or acceleration, however, there may be a reference to a separate agreement without destroying negotiability.

8. Subsection (B)(2) restates the last sentence of § 3 of the original act. As noted above, exceptions are made by paragraphs (7) and (8) of Subsection (A) in favor of instruments issued by governments or governmental agencies, or by a partnership, unincorporated association, trust or estate.

Cross References

Section 3–104.

Definitional Cross References

"Account". Section 3–102.

"Agreement". Section 1–201.

"Instrument". Section 3–102.

"Issue". Section 3–102.

"Order". Section 3-102.

"Promise". Section 3-102.

Special Plain Language Comment

If a commercial paper is subject to or governed by another agreement, the promise that it carries is conditional and, therefore, the paper is not "negotiable". Mere references to another agreement do not affect negotiability. See § 3-104.

§ 3-106. Sum certain

A. The sum payable is a sum certain even though it is to be paid:

1. With stated interest or by stated installments; or

2. With stated different rates of interest before and after default or a specified date; or

3. With a stated discount or addition if paid before of after the date fixed for payment; or

4. With exchange or less exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee or both upon default.

B. Nothing in this section shall validate any term which is otherwise illegal.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-106 of the Uniform Commercial Code adopted by the states.

Commentary. The language clarifies the effect of references to interest, discounts or additions, exchange, costs and attorney's fees, and acceleration or extension.

1. The section rejects decisions which have denied negotiability to a note with a term providing for discount for early payment on the ground that at the time of issue the amount payable was not certain. It is sufficient that at anytime of payment the holder is able to determine the amount then payable from the instrument itself with any necessary computation. Thus, a demand note bearing interest at six per cent is negotiable. A stated discount or addition for early or late payment does not affect the certainty of the sum as long as the computation can be made, nor do different rates of interest before and after default or a specified date. The computation must be one which can be made

from the instrument itself without reference to any outside source, and this section does not make negotiable a note payable with interest "at the current rate".

2. Paragraph (4) recognizes the occasional practice of making the instrument payable with exchange deducted rather than added.

3. In paragraph (5) "upon default" is substituted for the language of the original Subsection (A)(5) in order to include any default in payment of interest or installments.

4. The section contains no specific language relating to the effect of acceleration clauses on the certainty of the sum payable. This article (§ 3-109, Definite Time) broadly validates acceleration clauses; it is not necessary to state the matter in this section as well.

5. Subsection (B) is intended to make it clear that this section is concerned only with the effect of usurious interest or other illegal obligations upon negotiability, and is not meant to change the law of the Navajo Nation as to the validity of the term itself.

Cross References

Section 3-104.

Point 4: Section 3-109.

Definitional Cross References

"Term". Section 1-201.

Special Plain Language Comment

This section describes when an instrument evidences an obligation for a "sum certain" and thus satisfies one requirement for the instrument to be "negotiable". See § 3-104.

§ 3-107. Money

A. An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in "currency" or "current funds" or "immediately available funds" is payable in money.

B. A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency win purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the date of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-107 of the Uniform Commercial Code adopted by the states.

Commentary. This section makes clear when an instrument is payable in money and states rules applicable to instruments drawn payable in a foreign currency.

1. The term "money" is defined in § 1-201 as a "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency". That definition rejects the narrow view that "money" is limited to legal tender. Legal tender acts do no more than designate a particular kind of money which the obligee will be required to accept in discharge of an obligation. It rejects also the contention sometimes advanced that "money" includes any medium of exchange current and accepted in the particular community, whether it be gold dust, beaver pelts, or cigarettes in occupied Germany. Such unusual "currency" is necessarily of uncertain and fluctuating value, and an instrument intended to pass generally in commerce as negotiable may not be made payable therein.

The test adopted is that of the sanction of government, which recognizes the circulating medium as a part of the official currency of that government. In particular, the provision adopts the position that an instrument expressing the amount to be paid in sterling, francs, lire or other recognized currency of a foreign government is negotiable even though payable in the United States.

2. The provision on "currency" or "current funds" or "immediately available funds" accepts the view that "currency" or "current funds" or "immediately available funds" means that the instrument is payable in money.

3. Either the amount to be paid or the medium of payment may be expressed in terms of a particular kind of money. A draft passing between Toronto and Buffalo may, according to the desire and convenience of the parties, call for payment of 100 United States dollars or of 100 Canadian dollars; and it may require either sum to be paid in either currency. Under this section an instrument in any of these forms is negotiable, whether payable in Toronto or in Buffalo.

4. As stated in the preceding paragraph the intention of the parties in making an instrument payable in a foreign currency may be that the medium of payment shall be either dollars measured by the foreign currency or the foreign currency in which the instrument is drawn. Under Subsection (B) the presumption is, unless the instrument otherwise specifies, that the obligation may be satisfied by payment in dollars in an amount determined by the buying sight rate for the foreign currency on the day the instrument becomes payable. Inasmuch as the buying sight rate win fluctuate from day to day, it might be argued that an instrument expressed in a foreign currency but actually payable in dollars is not for a "sum certain". Subsection (B) makes it clear that for the purposes of negotiability under this article such an instrument, despite exchange fluctuations is for a sum certain.

Cross References

Section 3-104.

Point 1: Section 1-201.

Point 4: Section 3-109.

Definitional Cross References

"Instrument". Section 3-102.

"Money". Section 1-201.

"Order". Section 3-102.

"Promise". Section 3-102.

"Purchase". Section 1-201.

§ 3-108. Payable on demand

Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-108 of the Uniform Commercial Code adopted by the states.

Commentary. The need for certainty in determining the value of an instrument requires that the time when payment can be compelled be determinable from its face. Likewise, the time when the statute of limitations starts to run must be clear. This section makes certain instruments payable on demand, although they do not expressly so state.

Cross References

Sections 3-104, 3-302 and 3-501(D).

Definitional Cross References

"Instrument". Section 3-102.

§ 3-109. Definite time

A. An instrument is payable at a definite time if by its terms it is payable:

1. On or before a stated date or at a fixed period after a stated date; or

2. At a fixed period after sight; or

3. At a definite time subject to any acceleration; or

4. At a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

B. An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-109 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The time of payment is definite if it can be determined from the face of the instrument.

2. An undated instrument payable "thirty days after date" is not payable at a definite time, since the time of payment cannot be determined on its face. It is, however, an incomplete instrument within the provisions of § 3-115 dealing with such instruments and maybe completed by dating it. It is then payable at a definite time.

3. Subsection (A)(3) makes clear that, as far as certainty of time of payment is concerned, a note payable at a definite time but subject to acceleration is no less certain than a note payable on demand, whose negotiability never has been questioned. It is in fact more certain, since it at least states a definite time beyond which the instrument cannot run. Objections to the acceleration clause must be based rather on the possibility of abuse by the holder, which has nothing to do with negotiability and is not limited to negotiable instruments. That problem is now covered by § 1-208.

Subsection (A)(3) is intended to mean that the certainty of time of payment or the negotiability of the instrument is not affected by any acceleration clause, whether acceleration be at the option of the maker or the holder, or automatic upon the occurrence of some event, and whether it be conditional or unrestricted. If the acceleration term it self is uncertain it may fail on ordinary contract principles, but the instrument then remains negotiable and is payable at a definite time.

The effect of acceleration clauses upon a holder in due course is covered by the definition of the holder in due course (§ 3-302 and by the section on notice to purchaser § 3-304(C)). If the purchaser is not aware of any acceleration, his delay in making presentment may be excused under the section dealing with excused presentment (§ 3-511(A)).

4. Subsection (A)(4) adopts the generally accepted rule that a clause providing for extension at the option of the holder, even without a time limit, does not affect negotiability since the holder is given only a right which he would have without the clause. If the extension is to be at the option of the maker or acceptor or is to be automatic, a definite time limit must be stated or the time of payment remains uncertain, and the instrument is not negotiable. Where such a limit is stated, the effect upon certainty of time of payment is the same as if the instrument were made payable at the ultimate date with a term providing for acceleration.

The construction and effect of extension clauses is covered by § 3-118(F) on ambiguous terms and rules of construction, to which reference should be made.

Cross References

Section 3-104.

Point 2: Section 3-115.

Point 3: Section 1-208, 3-118(F), 3-304(C) and 3-511(A).

Point 4: Section 3-118(F).

Definitional Cross References

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Term". Section 1-201.

Special Plain Language Comment

This section describes when an instrument is payable at a "definite time" and thus satisfies one requirement for the instrument to be "negotiable". See § 3-104.

§ 3-110. Payable to order

A. An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee. It maybe payable to the order of:

1. The maker or drawer; or

2. The drawee; or

3. A payee who is not maker, drawer or drawee; or

4. Two or more payees together or in the alternative; or

5. An estate, trust or fund, in which case it is payable to the

order of the representative of such estate, trust or fund or his successors; or

6. An office, or an officer by his title as such, in which case it is payable to the principal but the incumbent of the office or his successors may act as if he or they were the holder; or

7. A partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

B. An instrument not payable to order is not made so payable by such words as "payable upon return of this instrument properly indorsed".

C. An instrument made payable both to order and to bearer is payable to order unless the bearer words are handwritten or typewritten.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-110 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A)(4) is intended to eliminate the word "jointly", which has carried a possible implication of a right of survivorship. Normally, an instrument payable to "A and B" is intended to be payable to the two parties as tenants in common, and there is no survivorship in the absence of express language to that effect. The instrument may be payable to "A and B", in which case it is payable to either A or B individually. It may be made payable to "A and/or B", in which case it is payable either to A or to B singly, or to the two together. The negotiation, enforcement and discharge of the instrument in all such cases are covered by the section on instruments payable to two or more persons (§ 3-116).

2. Subsection (A)(5) is intended to change the result of decisions which have held that an instrument payable to the order of the estate of a decedent was payable to bearer, on the ground that the name of the payee did not purport to be that of any person. The intent in such case is obviously not to make the instrument payable to bearer, but to the order of the representative of the estate. The provision extends the same principle to an instrument payable to the order of "Tilden Trust", or "Community Fund". So long as the payee can be identified it is not necessary that it be a legal entity, and in each case the instrument is treated as payable to the order of the appropriate representative or his successor.

3. Under Subsection (A)(6) an instrument may be made payable to the office itself ("Swedish Consulate") or to the officer by his title as such ("Treasurer of the City Club"). In either case it runs to the incumbent of the office and his successors. The effect of instruments in such a form is covered by the section on instruments payable with words of description (§ 3-117).

4. Instruments made payable to associations are order paper payable as designed and not bearer paper (Subsection (A)(7)). As in the case of incorporated associations, any person having authority from the partnership or association to whose order the instrument is payable may indorse or otherwise deal with the instrument.

5. Subsection (B) is intended to change the result of cases holding that "payable upon return of this certificate properly indorsed" indicated an intention to make the instrument payable to any indorsee and so must be construed as the equivalent of "Pay to order". Ordinarily, the purpose of such language is only to insure return of the instrument with indorsement in lieu of a receipt, and the word "order" is omitted with the intention that the instrument shall not be negotiable.

6. Subsection (C) is directed at occasional instruments reading "Pay to the order of John Doe or bearer". Such language usually is found only where the drawer has filled in the name of the payee on a printed form, without intending the ambiguity or noticing the word "bearer". Under such circumstances the name of the specified payee indicates an intent that the order words shall control. If the word "bearer" is handwritten or typewritten, there is sufficient indication of an intent that the instrument shall be payable to bearer. Instruments payable to "order of bearer" are covered not by this section but by the following § 3-111.

Cross References

Sections 3-104 and 3-111.

Point 1: Section 3-116.

Points 2, 3 and 4: Section 3-117.

Definitional Cross References

"Bearer". Section 1-201.

"Conspicuous". Section 1-201.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Person". Section 1-201.

"Term". Section 1-201.

Special Plain Language Comment

This section describes when an instrument is payable "to order" and thus satisfies one requirement for the instrument to be "negotiable". See § 3-104.

§ 3-111. Payable to bearer

An instrument is payable to bearer when by its terms it is payable to:

A. Bearer or the order of bearer; or

B. A specified person or bearer; or

C. "Cash" or the order of "cash", or any other indication which does not purport to designate a specific payee.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–111 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Language such as "order of bearer" usually results when a printed form is used and the word "bearer" is filled in. Subsection (A) rejects the view that the instrument is payable to order, and adopts the position that "bearer" is the unusual word and should control. Compare Comment 6 to § 3–110.

2. Subsection (C) is reworded to remove any possible implication that "Pay to the order of ____________________" makes the instrument payable to bearer. It is an incomplete order instrument, and falls under § 3–115. Likewise "Pay Treasurer of X Corporation" does not mean pay bearer, even though there may be no such officer. Instruments payable to the order of an estate, trust, fund, partnership, unincorporated association or office are covered by the preceding section. This Subsection applies only to such language as "Pay Cash", "Pay to the order of cash", "Pay bills payable", "Pay to the order of one keg of nails", or other words which do not purport to designate any specific payee.

3. It should be noted that § 3–204 on special indorsement permits bearer paper to be made payable to order, by allowing the special indorsement to control.

Cross References

Sections 3–104, 3–405 and 3–204.

Point 2: Sections 3–110(A)(1) and (6) and 3–115.

Point 3: Section 3–204.

Definitional Cross References

"Bearer". Section 1–201.

"Instrument". Section 3–102.

"Person". Section 1–201.

"Term". Section 1–201.

Special Plain Language Comment

This section describes when an instrument is payable "to bearer" and thus satisfies one requirement for the instrument to be "negotiable". See § 3-104.

§ 3-112. Terms and omissions not affecting negotiability

A. The negotiability of an instrument is not affected by:

1. The omission of a statement of any consideration or of the place where the instrument is drawn or payable; or

2. A statement that collateral has been given to secure obligations either on the instrument or otherwise of an obligor on the instrument or that in case of default on those obligations the holder may realize on or dispose of the collateral; or

3. A promise or power to maintain or protect collateral or to give additional collateral; or

4. A term authorizing a confession of judgment on the instrument if it is not paid when due; or

5. A term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or

6. A term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer; or

7. A statement in a draft drawn in a set of parts (§ 3-801) to the effect that the order is effective only if no other part has been honored.

B. Nothing in this section shall validate any term which is otherwise illegal.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-112 of the Uniform Commercial Code adopted by the states.

Commentary. This section permits the insertion of certain obligations and powers in addition to the simple promise or order to pay money. Under § 3-104, dealing with form of negotiable instruments, the instrument may not contain any other promise, order, obligation or power.

1. Subsection (A)(2) permits a clause authorizing the sale or disposition of collateral given to secure obligations either on the instrument or otherwise of an obligor on the instrument upon any default in those obligations, including a

default in payment of an installment or of interest. It is not limited to default at maturity. The reference to obligations of an obligor on the instrument is intended to recognize so-called cross collateral provisions that appear in collateral note forms used by banks and others throughout the United States and to permit the use of these provisions without destroying negotiability. Paragraph (3) permits a clause containing a promise or power to maintain or protect collateral or to give additional collateral, whether on demand or on some other condition. Such terms frequently are accompanied by a provision for acceleration if the collateral is not given, which is permitted by the section on what constitutes a definite time. Section 1-208 should be consulted as to the construction to be given such clauses under this Code.

2. Paragraph (4) is intended to mean that a confession of judgment may be authorized only if the instrument is not paid when due, and that otherwise negotiability is affected. Subsection (B) is intended to say that any such local rule remains unchanged, and that the clause itself may be invalid, although the negotiability of the instrument is not affected.

3. Paragraph (5) applies not only to any waiver of the benefits of this article, such as presentment, notice of dishonor or protest, but also to a waiver of the benefits of any other law, such as a homestead exemption. Again Subsection (B) is intended to mean that any rule which invalidates the waiver itself is not changed, and that while negotiability is not affected, a waiver of the statute of limitations contained in an instrument may be invalid.

This paragraph is to be read together with § 3-104(A) on form of negotiable instruments. A waiver cannot make the instrument negotiable within this article where it does not comply with the requirements of that section.

Cross References

Sections 3-104 and 3-105.

Point 1: Sections 1-208 and 3-109(A)(3).

Point 3: Section 3-104.

Definitional Cross References

"Draft". Section 3-104.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Promise". Section 3-102.

"Term". Section 1-201.

Special Plain Language Comment

This section describes the provisions which can be added or omitted from an instrument without affecting its "negotiability". See § 3-104.

§ 3-113. Seal

An instrument otherwise negotiable is within this article even though it is under a seal.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-113 of the Uniform Commercial Code adopted by the states.

Commentary. The section is intended to place sealed instruments on the same footing as any other instruments so far as all sections of this article are concerned. It does not affect any other statutes or rules of law relating to sealed instruments except insofar as, in the case of negotiable instruments, they are inconsistent with this article. Thus, a sealed instrument which is within this article may still be subject to a longer statute of limitations than negotiable instruments not under seal, or to such local rules of procedures as that it may be enforced by an action of special assumpsit.

Cross References

Section 3-104.

Definitional Cross References

"Instrument". Section 3-102.

§ 3-114. Date, antedating, postdating

A. The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

B. Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

C. Where the instrument or any signature thereon is dated, the date is presumed to be correct.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-114 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Any fraud or illegality connected with the date of an instrument does not affect its negotiability, but is merely a defense under §§

3-306 and 3-307 to the same extent as any other fraud or illegality.

2. An undated instrument payable "thirty days after date" is uncertain as to time of payment, and does not fall within § 3-109(A)(1) on definite time. It is, however, an incomplete instrument, and the date may be inserted as provided in the section dealing with such instruments (§ 3-115). When the instrument has been dated, this Subsection follows decisions providing that the time of payment is to be determined from the stated date, even though the instrument is antedated or postdated. An antedated instrument may thus be due before it is issued. As to the liability of indorsers in such a case, see § 3-501(D), on indorsement after maturity.

3. As to the meaning of "presumed", see § 1-201.

Cross References

Point 1: Sections 3-306 and 3-307.

Point 2: Sections 3-109(A)(1), 3-115 and 3-501(D).

Point 3: Section 1-201.

Definitional Cross References

"Instrument". Section 3-102.

"Issue". Section 3-102.

"On demand". Section 3-108.

"Presumed". Section 1-201.

"Signature". Section 3-401.

§ 3-115. Incomplete instruments

A. When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect, it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.

B. If the completion is unauthorized, the rules as to material alteration apply (§ 3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-115 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The language "signed while still incomplete in any necessary respect" in Subsection (A) makes it entirely clear that a complete writing which lacks an essential element of an instrument and contains no blanks or spaces or anything else to indicate that what is missing is to be supplied, does not fall within the section. "Necessary" means necessary to a complete instrument. It will always include the promise or order, the designation of the payee, and the amount payable. It may include the time of payment where a blank is left for that time to be filled in; but where it is clear that no time is intended to be stated the instrument is complete, and is payable on demand under § 3-108. It does not include the date if issue, which under § 3-114(A) is not essential, unless the instrument is made payable at a fixed period after that date.

2. The omission of any reference to signature of a blank paper is not intended, however, to mean that any person may not be authorized to write in an instrument over a signature either before or after delivery.

3. Subsection (B) states the rule generally recognized by the courts, that any unauthorized completion is an alteration of the instrument which stands on the same footing as any other alteration. Reference is therefore made to § 3-407 where the effect of alteration is stated. Subsection (C) of that section provides that a subsequent holder in due course may in all cases enforce the instrument as completed.

4. Under this article (§ 3-305 and 3-407) neither non-delivery nor unauthorized completion is a defense against a holder in due course, and it would be illogical that the two together should invalidate the instrument in his hands. A holder in due course sees and takes the same paper, whether it was complete when stolen or completed afterward by the thief, and in each case he relies in good faith on the maker's signature. The loss should fall upon the party whose conduct in signing blank paper has made the fraud possible, rather than upon the innocent purchaser. The result is consistent with the theory of decisions holding the drawer of a check stolen and afterwards filled in to be estopped from setting up the non-delivery against an innocent party.

5. The language on burden of establishing unauthorized completion follows the generally accepted rule that the full burden of proof by a preponderance of the evidence is upon the party attacking the completed instrument. "Burden of establishing" is defined in § 1-201.

Cross References

Point 1: Sections 3-108 and 3-114(A)

Point 3: Section 3-407.

Point 4: Sections 3-305(B), 3-407(C) and 4-401.

Point 5: Section 1-201.

Definitional Cross References

"Alteration". Section 3-407.

"Burden of establishing". Section 1-201.

"Delivery". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Signed". Section 1-201.

§ 3-116. Instruments payable to two or more persons

An instrument payable to the order of two or more persons:

A. If in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;

B. If not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-116 of the Uniform Commercial Code adopted by the states.

Commentary. There is a clear distinction between an instrument payable to "A or B" and one payable to "A and B". The first names either A or B as payee, so that either of them who is in possession becomes a holder as that term is defined in § 1-201 and may negotiate, enforce or discharge the instrument. The second is payable only to A and B together, and both must indorse in order to negotiate the instrument, although one may of course be authorized to sign for the other. Likewise both must join in any action to enforce the instrument, and the rights of one are not discharged without his consent by the act of the other.

If the instrument is payable to "A and/or B", it is payable in the alternative to A, or to B, or to A and B together, and it may be negotiated, enforced or discharged accordingly.

Cross References

Section 1-201.

Definitional Cross References

"Instrument". Section 3-102.

"Person". Section 1-201.

§ 3-117. Instruments payable with words of description

An instrument made payable to a named person with the addition of words describing him:

A. As agent or officer of a specified person is payable to that person's principal, but the agent or officer may act as if he was the holder;

B. As any other fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him;

C. In any other manner is payable to the payee unconditionally and the additional words are without effect on subsequent parties.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-117 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The intent is to include all such descriptions as "John Doe, Treasurer of Town of Framingham", "John Doe, President Home Telephone Co.", "John Doe, Secretary of City Club", or "John Doe, agent of Richard Roe". In all such cases it is commercial understanding that the description is not added for mere identification, but for the purpose of making the instrument payable to the principal, and that the agent or officer is named as payee only for convenience in cashing the check.

2. Subsection (B) covers such description as "John Doe, Trustee of Smithers Trust", "John Doe, Administrator of the Estate of Richard Roe", or "John Doe, Executor under Will of Richard Roe". In such cases the instrument is payable to the individual named, who may negotiate it, enforce it or discharge it, but he or she remains subject to any liability for breach of his obligation as a fiduciary. Any subsequent holder of the instrument is put on notice of the fiduciary position, and under the section on notice to purchaser (§ 3-304) is not a holder in due course if he takes with notice that John Doe has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit, or otherwise in breach of duty.

3. Any other words of description, such as "John Doe, 1121 Main Street", "John Doe, Attorney", or "Jane Doe, unremarried widow", are to be treated as mere identification, and not in any respect as a condition of payment. The same is true of any description of the payee as "Treasurer", "President", "Agent", "Trustee", "Executor", or "Administrator", which does not name the principal or beneficiary. In all such cases the person named may negotiate, enforce or discharge the instrument if he or she is otherwise identified, even though he or she does not meet the description. Any subsequent party dealing with the instrument may disregard the description and treat the paper as payable unconditionally to the individual, and is fully protected in the absence of independent notice of other facts sufficient to affect his position.

Cross References

Point 2: Section 3–304(B).

Definitional Cross References

"Holder". Section 1–201.

"Instrument". Section 3–102.

"Party". Section 1–201.

"Person". Section 1–201.

§ 3–118. Ambiguous terms and rules of construction

The following rules apply to every instrument:

A. Where there is doubt whether the instrument is a draft or a note, the holder may treat it as either. A draft drawn on the drawer is effective as a note.

B. Handwritten terms control typewritten and printed terms, and typewritten control printed.

C. Words control figures except that, if the words are ambiguous, figures control.

D. Unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue.

E. Unless the instrument otherwise specifies, two or more persons who sign as maker, acceptor or drawer or endorser and as a part of the same transaction are jointly and severally liable even through the instrument contains such words as "I promise to pay".

F. Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period. A consent to extension, expressed in the instrument, is binding on secondary parties and accommodation makers. A holder may not exercise his option to extend an instrument over the objection of a maker or acceptor or other party who in accordance with § 3–604 tenders full payment when the instrument is due.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–118 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The purpose of this section is to protect holders and to encourage the free circulation of negotiable paper by stating rules of law which will preclude a resort to parol evidence for any purpose except reformation of the instrument. Except as to such reformation, these rides cannot be varied by any proof that any party intended the contrary.

2. Subsection (A): The provision is not limited to ambiguities of phrasing, but extends to any case where the form of the instrument leaves its character as a draft or a note in doubt.

3. Subsection (B): This provision covers typewriting because of its frequent use in instruments, particularly in promissory notes.

4. Subsection (C) This position is intended to make it clear that figures control only where the words are ambiguous and the figures are not.

5. Subsection (D): This provision is intended to make it clear that where the instrument provides for payment "with interest" without specifying the rate, the judgment rate of interest of the place of payment is to be taken as intended.

6. Subsection (E): This rule applies to any two or more persons who sign in the same capacity, whether as makers, drawers, acceptors or indorsers. It applies only where such parties sign as a part of the same transaction; successive indorsers are, of course, liable severally but not jointly.

7. Subsection (F): This provision has reference to such clauses as, "The makers and indorsers of this note consent that it may be extended without notice to them". Such terms usually are inserted to obtain the consent of the indorsers and any accommodation maker to extension which might otherwise discharge them under § 3-606 dealing with impairment of recourse or collateral. An extension in accord with these terms binds secondary parties. The holder may not force an extension on a maker or acceptor who makes due tender; the holder is not free to refuse payment and keep interest running on a good note or other instrument by extending it over the objection of a maker or acceptor or other party who in accordance with § 3-604 tenders full payment when the instrument is due. Where consent to extension has been given, the Subsection provides that unless otherwise specified the consent is to be construed as authorizing only one extension for not longer than the original period of the note.

Cross References

Sections 3-109, 3-114, 3-402 and 3-606.

Point 7: Sections 3-604 and 3-606.

Definitional Cross References

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3–102.

"Note". Section 3–104.

"Person". Section 1–201.

"Promise". Section 3–102.

"Signed". Section 1–201.

"Term". Section 1–201.

§ 3–119. Other writings affecting instrument

A. As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by another written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

B. A separate agreement does not affect the negotiability of an instrument.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–119 of the Uniform Commercial Code adopted by the states.

Commentary. This section is intended to resolve conflicts as to the effect of a separate writing upon a negotiable instrument.

1. This article does not attempt to state general rules as to when an instrument may be varied or affected by parol evidence, except to the extent indicated by the comment to the preceding section. This section is limited to the effect of a separate written agreement executed as a part of the same transaction. The separate writing is most commonly an agreement creating or providing for a security interest such as a mortgage, chattel mortgage, conditional sale or pledge. It may, however, be any type of contract, including an agreement that upon certain conditions the instrument shall be discharged or is not to be paid, or even an agreement that it is a sham and not to be enforced at all. Nothing in this section is intended to validate any such agreement which is fraudulent or void as against public policy, as in the case of a note given to deceive a bank examiner.

2. Other parties, such as an accommodation indorser, are not affected by the separate writing unless they were also parties to it as a part of the transaction by which they became bound on the instrument.

3. The section applies to negotiable instruments the ordinary rule that

writings executed as a part of the same transaction are to be read together as a single agreement. As between the immediate parties a negotiable instrument is merely a contract, and is no exception to the principle that the courts will look to the entire contract in writing. Accordingly, a note may be affected by an acceleration clause, a clause providing for discharge under certain conditions, or any other relevant term in the separate writing. "May be modified or affected" does not mean that the separate agreement must necessarily be given effect. There is still room for construction of the writing as not intended to affect the instrument at all, or as intended to affect it only for a limited purpose such as foreclosure or other realization of collateral. If there is outright contradiction between the two, as where the note is for one thousand dollars ($1,000) but the accompanying mortgage recites that it is for two thousand dollars ($2,000), the note may be held to stand on its own feet and not to be affected by the contradiction.

4. Under this article a purchaser of the instrument may become a holder in due course although he takes it with knowledge that it was accompanied by a separate agreement, if he has no notice of any defense or claim arising from the terms of the agreement. If any limitation in the separate writing in itself amounts to a defense or claim, as in the case of an agreement that the note is a sham and cannot be indorsed, a purchaser with notice of it cannot be a holder in due course. The section also covers limitations which do not in themselves give notice of any present defense or claim, such as conditions providing that under certain conditions the note shall be extended for one year. A purchaser with notice of such limitations may be a holder in due course, but he takes the instrument subject to the limitation. If he is without such notice, he is not affected by such a limiting clause in the separate writing.

5. Subsection (B) rejects decisions which have carried the rule that contemporaneous writings must be read together to the length of holding that a clause in a mortgage affecting a note destroyed the negotiability of the note. The negotiability of an instrument is always to be determined by what appears on the face of the instrument alone, and if it is negotiable in itself a purchaser without notice of a separate writing is in no way affected by it. If the instrument itself states that it is subject to or governed by any other agreement, it is not negotiable under this article; but if it merely refers to a separate agreement or states that it arises out of such an agreement, it is negotiable.

Cross References

Point 1: Section 3-119.

Point 4: Section 3-304(D)(2).

Point 5: Section 3-105(B)(1) and (A)(3).

Definitional Cross References

"Agreement". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Rights". Section 1-201.

"Terms". Section 1-201.

"Written" and "writing". Section 1-201.

§ 3-120. Instruments "payable through" bank

An instrument which states that it is "payable through" a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-120 of the Uniform Commercial Code adopted by the states.

Commentary. Insurance, dividend or payroll checks, and occasionally other types of instruments, are sometimes made payable "through" a particular bank. This section states the commercial understanding as to the effect of such language. The bank is not named as drawee, and it is not ordered or even authorized to pay the instrument out of the drawer's account or any other funds of the drawer in its hands. Neither is it required to take the instrument for collection in the absence of special agreement to that effect. It is merely designated as a collecting bank through which presentment is properly made to the drawee.

Definitional Cross References

"Bank". Section 1-201.

"Collecting bank". Section 4-105 of the appropriate state commercial code.

"Instrument". Section 3-102.

"Presentment". Section 3-504.

§ 3-121. Instruments payable at bank

A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-121 of the Uniform Commercial Code adopted by the states.

Commentary. In most western states, a note or an acceptance which is payable at a bank is not treated as a draft on the bank, and the bank is not obligated to make payment from the account of the maker or acceptor.

Cross References

Section 3-502.

Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Order". Section 3-102.

§ 3-122. Accrual of cause of action

A. A cause of action against a maker or an acceptor accrues:

1. In the case of a time instrument on the day after maturity;

2. In the case of a demand instrument upon its date or, if no date is stated, on the date of issue.

B. A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate may not be made until on or after the date of maturity.

C. A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.

D. Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment:

1. In the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;

2. In all other cases from the date of accrual of the cause of action.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-122 of the Uniform Commercial Code adopted by the states.

Commentary. 1. It follows the generally accepted rule that action may be brought on a demand note immediately upon issue, without demand, since presentment is not required to charge the maker under this article. An exception is made in the case of certificates of deposit for the reason that banking custom and expectation is that demand will be made before any liability is incurred by the bank, and the additional reason that such certificates are issued with the understanding that they will be held for a considerable length of time, which in many instances exceeds the period of the statute of limitations. As to makers and acceptors of time instruments generally, the cause of action accrues on the day after maturity. As to drawers of drafts (including checks) and all indorsers, the cause of action accrues, in conformity with their underlying contract on the instrument (§§ 3-413 and 3-414), only upon demand made, typically in the form of a notice of dishonor, after the instrument has been presented to and dishonored by the person designated on the instrument to pay it.

2. Closely related to the accrual of a cause of action is the question of when interest begins to run where the instrument is blank on the point. A term in the instrument providing for interest controls. (See § 3-118(D) for the construction of a term which provides for interest but does not specify the rate or the time from which it runs.) In the absence of such a term and except in the case of a maker, acceptor or other primary obligor of a demand instrument, Subsection (D) states the rule that interest at the judgment rate runs from the date the cause of action accrues. In the case of a primary obligor of a demand instrument, interest runs from the date of demand although the cause of action (Subsection (A)(1)) accrues on the stated date of the instrument or on issue. Subsection (D) adopts the position of the majority of the courts that on a demand note interest runs only from demand. This same rule is applied to acceptors and other primary obligors on a demand instrument.

Cross References

Point 1: Sections 3-501, 3-413 and 3-414.

Point 2: Section 3-118(D).

Definitional Cross References

"Action". Section 1-201.

"Certificate of deposit". Section 3-102.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"On demand". Section 3-108.

Special Plain Language Comment

This section describes when the holder of an instrument has a present right to sue (i.e., a "cause of action") under that instrument. Interest will begin to accrue from that date unless otherwise stated in the instrument.

Part 2. Transfer and Negotiation

§ 3-201. Transfer: right to indorsement

A. Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

B. A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.

C. Unless otherwise agreed, any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made, and until that time there is no presumption that the transferee is the owner.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-201 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The section applies to any transfer, whether by a holder or not. Any person who transfers an instrument transfers what ever rights he had in it. The transferee acquires those rights even though they do not amount to "title".

2. The transfer of rights is not limited to transfers for value. An instrument may be transferred as a gift, and the donee acquires whatever rights the donor had.

3. A holder in due course may transfer his rights as such. The rule of this section is that any one may transfer what he has. Its policy is to assure the

holder in due course a free maker for the paper. The provision is not intended and should not be used to permit any holder who has himself been a party to any fraud or illegality affecting the instrument, or who has received notice of any defense or claim against it, to wash the paper clean by passing it into the hands of a holder in due course and then repurchasing it. The operation of the provision is illustrated by the following examples.

A. A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes as a holder in due course. After the instrument is overdue B give it to C, who has notice of the fraud. C succeeds to B's rights as a holder in due course, cutting off the defense.

B. A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes as a holder in due course. A then repurchases the instrument from B. A does not succeed to B's rights as a holder in due course, and remains subject to the defense of fraud.

C. A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes with notice of the fraud. B negotiates it to C, a holder in due course, and then repurchases the instrument from C. B does not succeed to C's rights as a holder in due course, and remains subject to the defense of fraud.

D. The same facts as (C), except that B had no notice of the fraud when he first acquired the instrument, but learned of it while he was a holder and with such knowledge negotiated to C. B does not succeed to C's rights as a holder in due course, and his position is not improved by the negotiation and repurchase.

4. The rights of a transferee with respect to collateral for the instrument are determined by Article 9 (Secured Transactions).

5. Subsection (B) is intended to make it clear that a transfer of a limited interest in the instrument passes the rights of the transferor to the extent of the interest given. Thus, a transferee for security acquires all such rights subject of course to the provisions of Article 9 (Secured Transactions).

6. Subsection (C) applies only to the transfer for value of an instrument payable to order or specially indorsed. It has no application to a gift, or to an instrument payable or indorsed to bearer or indorsed in blank. The transferee acquires, in the absence of any agreement to the contrary, the right to have the indorsement of the transferor. This right is now made enforceable by an action for specific performance. Unless otherwise agreed, it is a right to the general indorsement of the transferor with full liability as indorser, rather than to an indorsement without recourse. The question commonly arises where the purchaser had paid in advance and the indorsement is omitted fraudulently or through oversight; a transferor who is willing to indorse only without recourse or unwilling to indorse at all should make his intentions clear. The agreement for the transferee to take less than an unqualified indorsement need not be an express one, and the understanding may be implied from conduct, from past practice, or from the circumstances of the transaction.

7. Subsection (C) provides that there is no effective negotiation until the indorsement is made. Until that time the purchaser does not become a holder, and if he receives earlier notice of defense against or claim to the instrument he does not qualify a holder in due course under § 3-302(A)(3).

8. The final clause of Subsection (C), which is new, is intended to make it clear that the transferee without indorsement of an order instrument is not a holder and so is not aided by the presumption that he is entitled to recover on the instrument provided in § 3-307(B). The terms of the obligation do not run to him, and he must account for his possession of the unindorsed paper by proving the transaction through which he acquired it. Proof of a transfer to him by a holder is proof that he has acquired the rights of a holder and that he is entitled to the presumption.

Cross References

Sections 3-202 and 3-416.

Point 5: Article 9.

Point 7: Section 3-302(A)(3).

Point 8: Section 3-307(B)

Definitional Cross References

"Bearer". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Notice". Section 1-201.

"Party" § 1-201.

"Presumption". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

Special Plain Language Comment

One of the purposes of this article 3 is to encourage the transfer of commercial paper by allowing a person who receives commercial paper to get payment regardless of whether the person who promised to pay has a defense against an earlier party (such as the store where goods were bought on credit) who was involved with the paper. The policy is limited to persons who have no knowledge of prior defenses when they get the paper. This section sets out the rules that: (1) a person who legally acquired commercial paper also acquires the rights of the former holder, unless he takes with knowledge of a defense; (2) a person who transfers for value is legally required to indorse it (e.g., to sign it over); and (3) unless commercial paper is payable to bearer (such a check payable "to cash"), the person who holds it is not legally presumed to be entitled to payment unless paper is indorsed (e.g., signed over) to that person.

§ 3-202. Negotiation

A. Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order, it is negotiated by delivery with any necessary indorsement; if payable to bearer, it is negotiated by delivery.

B. An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.

C. An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less, it operates only as a partial assignment.

D. Words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-202 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Negotiation is merely a special form of transfer, the importance of which lies entirely in the fact that it makes the transferee a holder as defined in § 1-201. Any negotiation carries a transfer of rights as provided in the section on transfer (§ 3-201(A) and (B)).

2. Any instrument which has been specially indorsed can be negotiated only with the indorsement of the special indorsee as provided in § 3-204 on special indorsement. An instrument indorsed in blank may be negotiated by delivery alone, provided that it bears the indorsement of all prior special indorsees.

3. Subsection (B) follows decisions holding that a purported indorsement on a mortgage or other separate paper pinned or dipped to an instrument is not sufficient for negotiation. The indorsement must be on the instrument itself or on a paper intended for the purpose which is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge.

4. The cause of action on an instrument cannot be split. Any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation. This is true of either "Pay A one-half", or "Pay A two-thirds and B one-third", and neither A nor B becomes a holder. On the other hand an indorsement reading merely "Pay A and B" is effective, since

it transfers the entire cause of action to A and B as tenants in common.

The partial indorsement does, however, operate as a partial assignment of the cause of action. The provision makes no attempt to state the legal effect of such an assignment, which is left to other applicable law. In a jurisdiction in which a partial assignee has any rights, either at law or in equity, the partial indorsee has such rights; and in any jurisdiction where a partial assignee has no rights, the partial indorsee has none.

5. Subsection (D) is intended to reject decisions holding that the addition of such words as "I hereby assign all my right, title and interest in the within note" prevents the signature from operating as an indorsement. Such words usually are added by laymen out of an excess of caution and a desire to indicate formally that the instrument is conveyed, rather than with any intent to limit the effect of the signature.

6. Subsection (D) is also intended to reject decisions which have held that the addition of "I guarantee payment" indicates an intention not to indorse but merely to guarantee. Any signature with such added words is an indorsement, and, if it is made by a holder, is effective for negotiation; but the liability of the indorser may be affected by the words of guarantee as provided in the section on the contract of a guarantor (§ 3-416).

Cross References

Section 3-417.

Point 1: Sections 1-201 and 3-201(A) and (B).

Point 2: Section 3-204.

Point 6: Section 3-416.

Definitional Cross References

"Bearer". Section 1-201.

"Delivery". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Written". Section 1-201.

Special Plain Language Comment

Negotiation is the process through which one person transfers commercial paper to another in a way which gives the second person rights in regard to the paper. A thief gets no rights in the paper unless the paper is payable to bearer. All other types of paper require indorsement in order to be negotiated.

§ 3-203. Wrong or misspelled name

Where an instrument is made payable to a person under a misspelled name or one other than his own, he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-203 of the Uniform Commercial Code adopted by the states.

Commentary. 1. A party whose name is wrongly designated or misspelled may make an indorsement effective for negotiation by signing in his true name only. This is not commercially satisfactory, since any subsequent purchaser may be left in doubt as to the state of the title; but, whether it is done intentionally or through oversight, the party transfers his rights and is liable on his indorsement, and there is a negotiation if identity exists.

2. He may make an effective indorsement in the wrongly designated or misspelled name only. This again is not commercially satisfactory, since his liability as an indorser may require proof of identity.

3. He may indorse in both names. This is the proper and desirable form of indorsement, and any person called upon to pay an instrument or under contract to purchase it may protect his interest by demanding indorsement in both names, and is not in default if such demand is refused.

Cross References

Section 3-401(B).

Definitional Cross References

"Instrument". Section 3-102.

"Person". Section 1-201.

"Signature". Section 3-401.

Special Plain Language Comment

This section recognizes that a person to whom commercial paper is transferred will normally expect the instrument to be signed over to him in both the name of the person to whom the instrument is payable and in that person's real name. For example, if a check is payable to "John Doe", but his real name is "John Does", the check is best transferred by signatures in both names. However, the signature of John Doe in either name does transfer his interest in the instrument.

§ 3-204. Special indorsement; blank indorsement

A. A special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement.

B. An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and maybe negotiated by delivery alone until specially indorsed.

C. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–204 of the Uniform Commercial Code adopted by the states.

Commentary. The principle here adopted is that the special indorser, as the owner even of a bearer instrument, has the right to direct the payment and to require the indorsement of his indorsee as evidence of the satisfaction of his own obligation. The special indorsee may, of course, make it payable to bearer again by himself indorsing in blank.

Cross References

Section 3–202.

Definitional Cross References

"Bearer". Section 1–201.

"Delivery". Section 1–201.

"Instrument". Section 3–102.

"Person". Section 1–201.

"Signature". Section 3–401.

§ 3–205. Restrictive indorsement

An indorsement is restrictive which either:

A. Is conditional; or

B. Purports to prohibit further transfer of the instrument; or

C. Includes the words "for collection", "for deposit", "pay any bank", or like terms signifying a purpose of deposit or collection; or

D. Otherwise states that it is for the benefit or use of the indorser or of another person.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-205 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section with its separate mention of conditional indorsements, those prohibiting transfer, indorsement in the bank deposit or collection process, and other indorsements to a fiduciary, permits separate treatment in subsequent sections where policy so requires.

2. The purpose of this section is generally to require a taker or payor under restrictive indorsement to apply or pay value given consistently with the indorsement, but to provide certain exceptions applying to banks in the collection process (other than depositary banks), and to some other takers and payors.

Cross References

Sections 3-102, 3-202(B), 3-205, 3-206, 3-304, 3-419, and 3-603.

Definitional Cross References

"Instrument". Section 3-102.

"Person". Section 1-201.

§ 3-206. Effect of restrictive indorsement

A. No restrictive indorsement prevents further transfer or negotiation of the instrument.

B. An intermediary bank, or a payor bank which is not the depositary bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment.

C. Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection", "for deposit", "pay any bank", or like terms (§ 3-205(A) and (C)) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement, and, to the extent that he does so, he becomes a holder for value. In addition, such transferee is a holder in due course if he otherwise complies with the requirements of § 3-302 on what constitutes a holder in due course.

D. The first taker under an indorsement for the benefit of the indorser or another person (§ 3-205(D)) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement, and, to the extent that he does so, he becomes a holder for value. In addition, such taker is a holder in due course if he otherwise complies with the requirements of § 3-302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty (§ 3-304(B)).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-206 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsections (A) and (B) apply to all four classes of restrictive indorsements defined in § 3-205. Conditional indorsements and indorsements for deposit or collection, defined in § 3-205(A) and (C), are also subject to Subsection (C); and trust indorsement as defined in § 3-205(D) are subject to Subsection (D). This section negates any implication that under a restrictive indorsement neither the indorsee nor any subsequent taker from him could become a holder in due course. This article also avoids any implication that a discharge is effective against a holder in due course. See § 3-602.

2. Under Subsection (A) an indorsement reading "Pay A only", or any other indorsement purporting to prohibit further transfer, is without effect for that purpose. Such indorsements have rarely appeared in reported American cases. Ordinarily, further negotiation will be contemplated by the indorser, if only for bank collection. The indorsee becomes a holder, and the indorsement does not of itself give notice to subsequent parties of any defense or claim of the indorser. Hence this section gives such an indorsement the same effect as an unrestricted indorsement.

3. Subsection (B) permits an intermediary bank (§§ 3-102(C) and 4-105) or a payor bank which is not a depositary bank (§ 3-102(C)) to disregard any restrictive indorsement except that of the bank's immediate transferor. Such banks ordinarily handle instruments, especially checks, in bulk and have no practicable opportunity to consider the effect of restrictive indorsements. Subsection (B) does not affect the rights of the restrictive indorser against parties outside the bank collection process or against the first bank in the collection process; such rights are governed by Subsections (C) and (D) and § 3-603.

4. Conditional indorsements are treated by this section like indorsements for deposit or collection. Under Subsection (C) any transferee under such an indorsement except an intermediary bank becomes a holder for value to the extent that he acts consistently with the indorsement in paying or applying any value given by him for or on the security of the instrument. Subsection (C) permits a transferee under a conditional indorsement to become a holder in due

course free of the conditional indorser's claim.

5. Of the indorsements covered by this section those "for collection", "for deposit" and "pay any bank" are overwhelmingly the most frequent. Indorsements "for collection" or "for deposit" may be either special or blank, indorsements "pay any bank" are almost invariably destined to be lodged in a bank for collection. Subsection (C) requires any transferee other than an intermediary bank to act consistently with the purpose of collection, and § 3-603 lays down a similar rule for payors not covered by Subsection (B).

6. Subsection (D), applying to trust indorsements other than those for deposit or collection (§ 3-205(D)) is similar to Subsection (C); but in Subsection (D) the, duty to act consistently with the indorsement is limited to the first taker under it. If an instrument is indorsed "Pay T in trust for B" or "Pay T for B" or "Pay T for account of B" or "Pay T as agent for B", whether B is the indorser or a third person, T is of course subject to liability for any breach of his obligation as fiduciary. But trustees commonly and legitimately sell trust assets in transactions entirely outside the bank collection process; the trustee therefore has power to negotiate the instrument and make his transferee a holder in due course. Whether transferees from T have notice of breach of trust such as to deny them the status of holders in due course is governed by the section on notice to purchasers (§ 3-304); the trust indorsement does not of itself give such notice. Payors are immunized either by Subsection (B) of this section or by § 3-603: payment to the trustee or to a purchaser from the trustee is "consistent with the terms" of the trust indorsement under § 3-603(A)(2).

7. Sections 3-306 sand 3-419 are explicitly made subject to the rules stated in this section.

Cross References

Point 1: Sections 3-205 and 3-602.

Point 2: Section 3-205(B).

Point 3: Sections 3-102(C), 3-419(D) and 3-603.

Point 4: Section 3-205(A).

Point 5: Sections 3-205, 3-603.

Point 6: Sections 3-205, 3-304 and 3-603.

Point 7: Sections 3-306, 3-419.

Definitional Cross References

"Bank". Section 1-201.

"Depositary bank". Section 3-102(C).

"Holder in due course". Section 3-302.

"Intermediary bank". Section 3–102(C).

"Negotiation". Sections 3–102(B) and 3–202.

"Payor bank". Section 3–102(C).

"Restrictive indorsement". Section 3–205.

"Transfer". Section 3–201.

Special Plain Language Comment

This section and § 3–205 address the effect on the rights of the parties when the holder of an instrument transfers it with a "restrictive indorsement", such as "for deposit only in account No. 10".

§ 3–207. Negotiation effective although it maybe rescinded

A. Negotiation is effective to transfer the instrument although the negotiation is:

1. Made by an infant, a corporation exceeding its powers, or any other person without capacity; or

2. Obtained by fraud, duress or mistake of any kind; or

3. Part of an illegal transaction; or

4. Made in breach of duty.

B. Except as against a subsequent holder in due course, such negotiation is in an appropriate case subject to rescission, the declaration of a constructive trust or any other remedy permitted by law.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–207 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This provision applies to negotiation which may be rescinded even though the party's lack of capacity, or the illegality, is of a character which goes to the essence of the transaction and makes it entirely void, and even though the party negotiating has incurred no liability and is entitled to recover the instrument and have his indorsement canceled.

2. It is inherent in the character of negotiable paper that any person in possession of an instrument which by its terms runs to him is a holder, and that anyone may deal with him as a holder. The principle finds its most extreme application in the well settled rule that a holder in due course may take the paper even from a thief and be protected against the claim of the

rightful owner. Where there is actual negotiation, even in an entirely void transaction, it is no less effective. The policy of this provision is that any person to whom an instrument is negotiated is a holder until the instrument has been recovered from his possession; and that any person who negotiates an instrument thereby parts with all his rights in it until such recovery. The remedy of any such claimant is to recover the paper by replevin or otherwise; to impound it or to enjoin its enforcement, collection or negotiation; to recover its proceeds from the holder; or to intervene in any action brought by the holder against the obligor. As provided in the section on the rights of one not a holder in due course (§ 3-306) his claim is not a defense to the obligor unless he himself defends the action.

3. Negotiation under this article always includes delivery (§ 3-202, and see § 1-201(N)). Acquisition of possession by a thief can therefore never be negotiation under this section. But delivery by the thief to another person may be.

4. Nothing in this section is intended to impose any liability on the party negotiating. He may assert any defense available to him under §§ 3-305 to 3-307.

5. A holder in due course takes the instrument free from all claims to it on the part of any person (§ 3-305(A)). Against him there can be no rescission or other remedy, even though the prior negotiation may have been fraudulent or illegal in its essence and entirely void. As against any other party the claimant may have any remedy permitted by law. This section is not intended to specify what that remedy may be, or to prevent any court from imposing conditions or limitations such as prompt action or return of the consideration received. All such questions are left to the law of the particular jurisdiction. Section 3-207(B) gives no right where it would not otherwise exist. The section is intended to mean that any remedies afforded by the applicable law are cut off only by a holder in due course, and that other parties, such as a *bona fide* purchaser with notice that the instrument is overdue, take it subject to the claim as provided in Subsection (A) of the section on the rights of one not a holder in due course (§ 3-306).

Cross References

Point 2: Sections 1-201 and 3-306(D).

Point 3: Sections 1-201 and 3-202.

Point 4: Sections 3-305, 3-306 and 3-307.

Point 5: Sections 3-305(A) and 3-306(A).

Definitional Cross References

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Person". Section 1-201.

"Remedy". Section 1-201.

Special Plain Language Comment

This section addresses the rights of a person to whom an instrument has been transferred by "negotiation" even though the transfer is for various reasons voidable.

§ 3-208. Reacquisition

Where an instrument is returned to or reacquired by a prior party, he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course, and, if indorsement has been canceled, is discharged as against subsequent holders in due course as well.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-208 of the Uniform Commercial Code adopted by the states.

Commentary. The phrase "returned to or required by" is employed in order to make it clear that the section is applied to a return by an indorsee who does not himself indorse. "Discharged" is intended to make it clear that the discharge of the intervening party is included within the rule of the section on effect of discharge against a holder in due course (§ 3-602) and is not effective against a subsequent holder in due course who takes without notice of it.

The reacquirer may keep the instrument himself or he may further negotiate it. On further negotiation he may or may not cancel intervening indorsements. In any case intervening indorsers are discharged as to the reacquirer, since if he attempted to enforce it against them they would have an action back against him. Where the reacquirer negotiates without canceling the intervening indorsements, the section provides that such indorsers are discharged except against subsequent holders in due course. The intervening indorser whose indorsement is stricken is, in conformity with § 3-605, discharged even as against subsequent holders in due course.

Cross References

Sections 3-602, 3-603(B) and 3-605.

Definitional Cross References

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

Special Plain Language Comment

This section addresses the rights of a holder who transfers an instrument and later reacquires it.

Part 3. Rights of a Holder

§ 3-301. Rights of a holder

The holder of an instrument, whether or not he is the owner, may transfer or negotiate it and, except as otherwise provided in § 3-603 on payment or satisfaction, discharge it or enforce payment in his own name.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-301 of the Uniform Commercial Code adopted by the states.

Commentary. The section states in one provision all the rights of a holder, and to make it clear that every holder has such rights. The only limitations are those found in § 3-603 on payment or satisfaction. That Section provides (with stated exceptions) that payment to a holder discharges the liability of the party paying even though made with knowledge of a claim of another person to the instrument, unless the adverse claimant posts indemnity or procures the issuance of appropriate legal process restraining the payment. Thus, payment to a holder in an adverse claim situation would not give discharge if the adverse claimant had followed either of the procedures provided for in the "unless" clause of § 3-603; nor would a discharge result from payment in two other specific situations described in § 3-603.

Cross References

Sections 1-201, 3-307 and 3-603(A).

Definitional Cross References

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Rights". Section 1-201.

Special Plain Language Comment

This section describes the rights which a person has whenever he possesses an instrument as a "holder". Because these rights are very broad, owners of instruments should be very careful who they allow to hold their instruments. See §§ 3-302 and 3-306.

§ 3-302. Holder in due course

A. A holder in due course is a holder who takes the instrument:

1. For value; and

2. In good faith; and

3. Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

B. A payee may be a holder in due course.

C. A holder does not become a holder in due course of an instrument:

1. By purchase of it at judicial sale or by taking it under legal process; or

2. By acquiring it in taking over an estate; or

3. By purchasing it as part of a bulk transaction not in regular course of business of the transferor.

D. A purchase of a limited interest can be a holder in due course only to the extent of the interest purchased.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-302 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The language "without notice that it is overdue" is *intended* to make it clear that the purchaser of an instrument which is in fact overdue may be a holder in due course if he takes it without notice that it is overdue. Such notice is covered by the section on notice to purchaser (§ 3-304).

2. Subsection (B) is intended to settle the long continued conflict over the status of the payee as a holder in due course. The position here taken is that the payee may become a holder in due course to the same extent and under the same circumstances as any other holder. This is true whether he takes the instrument by purchase from a third person or directly from the obligor. All that is necessary is that the payee meet the requirements of this section. In the following cases, among others, the payee is a holder in due course:

A. A remitter, purchasing goods from P, obtains a bank draft payable to P and forwards it to P, who takes it for value, in good faith and without notice as required by this section.

B. The remitter buys the bank draft payable to P, but it is forwarded by the bank directly to P, who takes it in good faith and without notice in payment of the remitter's obligation to him.

C. A and B sign a note as co-makers. A induces B to sign by fraud, and without authority from B delivers the note to P, who takes it for value, in good faith and without notice.

D. A defrauds the maker into signing an instrument payable to P. P pays A for it in good faith and without notice, and the maker delivers the instrument directly to P.

E. D draws a check payable to P and gives it to his agent to be delivered to P in payment of D's debt. The agent delivers it to P, who takes it in good faith and without notice in payment of the agent's debt to P. But as to this case see § 3-304(B), which may apply.

F. D draws a check payable to P but blank as to the amount, and gives it to his agent to be delivered to P. The agent fills in the check with an excessive amount, and P takes it for value, in good faith and without notice.

G. D draws a check blank as to the name of the payee, and gives it to his agent to be filled in with the name of A and delivered to A. The agent fills in the name of P, and P takes the check in good faith, for value and without notice.

3. Subsection (C) is intended to state existing case law. It covers a few situations in which the purchaser takes the instrument under unusual circumstances which indicate that he is merely a successor in interest to the prior holder and can acquire no better rights. (If such prior holder was himself a holder in due course, the purchaser succeeds to that status under § 3-201 on Transfer.) The provision applies to a purchaser at an execution sale, a sale in bankruptcy or a sale by a state bank commissioner of the assets of an insolvent bank. It applies equally to an attaching creditor or any other person who acquires the instrument by legal process, even under an antecedent claim; and equally to a representative, such as an executor, administrator, receiver or assignee for the benefit of creditors, who takes over the instrument as part of an estate, even though he is representing antecedent creditors. Subsection (C)(3) applies to bulk purchases lying outside of the ordinary course of business of the seller. It applies, for example, when a new partnership takes over for value all of the assets of an old one after a new member has entered the firm, or to a reorganized or consolidated corporation taking over in bulk the assets of a predecessor. It has particular application to the purchase by one bank of a substantial part of the paper held by another bank which is threatened with insolvency and seeking to liquidate its assets.

4. A purchaser of a limited interest—as a pledgee in a security transaction—may become a holder in due course, but he may enforce the instrument over defenses only to the extent of his interest, and defenses good against the pledgor remain available insofar as the pledgor retains an equity in the instrument. This is merely a special application of the general rule (§ 1-201) that a purchaser of a limited interest acquires rights only to the extent of the interest purchased.

Cross References

Sections 1-201, 3-303, 3-305 and 3-306.

Point 1: Section 3-304(E).

Point 3: Section 3-201.

Point 4: Section 1-201.

Definitional Cross References

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Notice of dishonor". Section 3-508.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 3-303.

Special Plain Language Comment

This section defines the key term "holder in due course". Such a person has the rights of a "holder" as described in § 3-301 plus additional rights stated in § 3-305.

§ 3-303. Taking for value

A holder takes the instrument for value:

A. To the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

B. When he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

C. When he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-303 of the Uniform Commercial Code adopted by the states.

Commentary. 1. A holder who does not himself give value cannot qualify as a holder in due course in his own right merely because value has previously been given for the instrument.

2. In this article value is divorced from consideration (§ 3-408). The latter is important only on the question of whether the obligation of a party can be enforced against him; while value is important only on the question of whether the holder who has acquired that obligation qualifies as a particular kind of holder.

3. Subsection (A) requires that the agreed consideration shall actually have been given. An executory promise to give value is not itself value, except as provided in Subsection (C). The underlying reason of this policy is that when the purchaser learns of a defense against the instrument or a defect in the title he is not required to enforce the instrument, but is free to rescind the transaction for breach of the transferor's warranty (§ 3-417). There is thus not the same necessity for giving him the status of a holder in due course, cutting off claims and defenses, as where he has actually paid value. A common illustration is the bank credit not drawn upon, which can be and is revoked when a claim or defense appears.

4. Subsection (A) limits the language of the original Section 27, eliminating the attaching creditor or any other person who acquires a lien by legal process. Any such lienor has been uniformly held not to be a holder in due course.

5. Subsection (B) adopts the generally accepted rule that the holder takes for value when he takes the instrument as security for an antecedent debt, even though there is no extension of time or other concession, and whether or not the debt is due. The provision extends the same rule to any claim against any person; there is no requirement that the claim arise out of contract. In particular the provision is intended to apply to an instrument given in payment of or as security for the debt of a third person, even though no concession is made in return.

6. Subsection (C) states generally recognized exceptions to the rule that an executory promise is not value. A negotiable instrument is value because it carries the possibility of negotiation to a holder in due course, after which the party who gives it cannot refuse to pay. The same reasoning applies to any irrevocable commitment to a third person, such as a letter of credit issue when an instrument is taken.

Cross References

Sections 3-302 and 3-415.

Point 1: Section 3-415.

Point 2: Section 3-408.

Point 3: Section 3-417.

Definitional Cross References

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Security interest". Section 1-201.

Special Plain Language Comment

This section describes when a "holder" of an instrument gives "value" and thus satisfies one of the requirements for being a "holder in due course" under § 3-302.

§ 3-304. Notice to purchaser

A. The purchaser has notice of a claim or defense if:

1. The instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or

2. The purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.

B. The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.

C. The purchaser has notice that an instrument is overdue if he has reason to know:

1. That any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or

2. That acceleration of the instrument has been made; or

3. That he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be thirty (30) days.

D. Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim:

1. That the instrument is antedated or postdated;

2. That it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof;

3. That any party has signed for accommodation;

4. That an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;

5. That any person negotiating the instrument is or was a fiduciary;

6. That there has been default in payment of interest on the instrument or in payment of any other instrument, except one of the same series.

E. The filing or recording of a document does not of itself constitute notice within the provisions of this article to a person who would otherwise be a holder in due course.

F. To be effective, notice must be received at such time and in such manner as to give a reasonable opportunity to act on it.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-304 of the Uniform Commercial Code adopted by the states.

Commentary. 1. "Notice" is defined in § 1-201.

2. An instrument may be blank as to some unnecessary particular, may contain minor erasures, or even have an obvious change in the date, as where "January 2, 1948" is changed to "January 2, 1949", without even exciting suspicion. Irregularity is properly a question of notice to the purchaser of something wrong, and is so treated here.

3. "Voidable" obligation in Subsection (A)(2) is intended to limit the provision to notice of defense which will permit any party to avoid his original obligation on the instrument, as distinguished from a set-off or counterclaim.

4. Notice that one party has been discharged is not notice to the purchaser of an infirmity in the obligation of other parties who remain liable on the instrument. A purchaser with notice that an indorser is discharged takes subject to that discharge as provided in the section on effect of discharge against a holder in due course (§ 3-602) but is not prevented from taking the obligation of the maker in due course. If he has notice that all parties are

discharged he cannot be a holder in due course.

5. Subsection (B) specifies the same elements as notice of improper conduct of a fiduciary. Under Subsection (D)(5) mere notice of the existence of the fiduciary relation is not enough in itself to prevent the holder from taking in due course, and he is free to take the instrument on the assumption that the fiduciary is acting properly. The purchaser may pay cash into the hands of the fiduciary without notice of any breach of the obligation. Section 3-206 should be consulted for the effect of a restrictive indorsement.

6. Subsection (C) provides that reason to know of an overdue installment or other part of the principal amount is notice that the instrument is overdue and thus prevents the purchaser from taking in due course. On the other hand Subsection (D)(6) makes notice that interest is overdue insufficient, on the basis of banking and commercial practice, the decisions under the original Act, and the frequency with which interest payments are in fact delayed. Notice of default in payment of any other instrument, except an uncured default in another instrument of the same series, is likewise insufficient.

7. Subsection (C) provides that the purchaser may take accelerated paper, or a demand instrument on which demand has in fact been made, as a holder in due course if he takes without notice of the acceleration or demand. The presumption that any negotiation has taken place before the instrument was in fact overdue is of importance only in aid of a holder in due course. Under this section it is not conclusive that the instrument was in fact overdue when it was negotiated, if the holder takes without notice of that fact.

The "reasonable time after issue" is retained, but paragraph (3) adds a presumption, as that term is defined in that Act (§ 1-201), that a domestic check is stale after 30 days.

8. Subsection (D)(1) rejects decisions holding that an instrument known to be antedated or postdated is not "regular". Such knowledge does not prevent a holder from taking in due course.

9. Subsection (D)(2) is to be read together with the provisions of this article as to when a promise or order is unconditional and as to other writings affecting the instrument (§§ 3-105 and 3-119). Mere notice of the existence of any executory promise or a separate agreement does not prevent the holder from taking in due course, and such notice may even appear in the instrument itself. If the purchaser has notice of any default in the promise or agreement which gives rise to a defense or claim against the instrument, he is on notice to the same extent as in the case of any other information as to the existence of a defense or claim.

10. Subsection (D)(4) follows the policy under which any person in possession of an instrument has prima facie authority to fill blanks. It is intended to mean that the holder may take in due course even though a blank is filled in his presence, if he is without notice that the filling is improper. Section 3-407 on alteration should be consulted as to the rights of subsequent holders following such an alteration.

11. Subsection (E) removes any uncertainty as to the effect of "constructive notice" through public filing or recording.

12. Subsection (F) means that notice must be received with a sufficient margin of time to afford a reasonable opportunity to act on it, and that a notice received by the president of a bank one minute before the bank's teller cashes a check is not effective to prevent the bank from becoming a holder in due course. See in this connection the provision on notice to an organization, § 1-201(AA).

Cross References

Sections 3-201 and 3-302.

Point 1: Section 1-201.

Point 4: Section 3-602.

Point 5: Section 3-206.

Point 7: Section 1-201.

Point 9: Sections 3-105(A)(2) and (3) and 3-119.

Point 10: Section 3-407.

Point 12: Section 1-201.

Definitional Cross References

"Accommodation party". Section 3-415.

"Agreement". Section 1-201.

"Alteration". Section 3-407.

"Bank". Section 1-201.

"Check". Section 3-104.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Negotiation". Section 3-202.

"Notice". Section 1-201.

"Party". Section 1-201.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Promise". Section 3-102.

"Purchaser". Section 1-201.

"Reasonable time". Section 1-204.

"Signed". Section 1-201.

"Term". Section 1-201.

Special Plain Language Comment

If a person has notice of a defense or a claim on a check, note or other piece of commercial paper, he cannot become a holder in due course. Therefore, defining "notice" is very important in order to determine when a purchaser of commercial paper can enforce it free of such claims or defenses. This section describes the basic situations in which a purchaser has notice.

§ 3-305. Rights of a holder in due course

To the extent that a holder is a holder in due course he takes the instrument free from:

A. All claims to it on the part of any person; and

B. All defenses of any party to the instrument with whom the holder has not dealt except:

1. Infancy, to the extent that it is a defense to a simple contract; and

2. Such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

3. Such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

4. Discharge in insolvency proceedings; and

5. Any other discharge of which the holder has notice when he takes the instrument.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-305 of the Uniform Commercial code as adopted by the states.

Commentary. 1. This section applies to any person who is himself a holder in due course, and equally to any transferee who acquires the rights of one (§ 3-

201). "Takes" is used because a holder in due course may still be subject to any claims or defenses which arise against him after he has taken the instrument.

2. The language "all claims to it on the part of any person" is to make it clear that the holder in due course takes the instrument free not only from any claim of legal title but also from all liens, equities or claims of any other kind. This includes any claim for rescission of a prior negotiation, in accordance with the provisions of the section on reacquisition (§ 3-208).

3. "All defenses" includes non-delivery, conditional delivery or delivery for a special purpose. Under this article such non-delivery or qualified delivery is a defense (§§ 3-306 and 3-307), and the defendant has the full burden of establishing it.

The effect of this section, together with the sections dealing with incomplete instruments (§ 3-115) and alteration (§ 3-407) is to cut off the defense of non-delivery of an incomplete instrument against a holder in due course.

4. Under Subsection (B)(1) the defense of infancy may be asserted against a holder in due course, even though its effect is to render the instrument voidable but not void. The policy is one of protection of the infant against those who take advantage of him, even at the expense of occasional loss to an innocent purchaser. No attempt is made to state when infancy is available as a defense or the conditions under which it maybe asserted. In some jurisdictions it is held that an infant cannot rescind the transaction or set up the defense unless he restores the holder to his former position, which in the case of a holder in due course is normally impossible. In other states an infant who has misrepresented his age may be estopped to assert his infancy. Such questions are left to Navajo law, as an integral part of the policy of the tribe as to the protection of infants.

5. Subsection (B)(2) covers mental incompetence, guardianship, ultra vires acts or lack of corporate capacity to do business, any remaining incapacity of married women, or any other incapacity apart from infancy. Such incapacity is largely statutory. Its existence and effect is left to Navajo law. If under Navajo law the effect is to render the obligation of the instrument entirely null and void, the defense may be asserted against a holder in due course. If the effect is merely to render the obligation voidable at the election of the obligor, the defense is cut-off.

6. Duress is a matter of degree. An instrument signed at the point of a gun is void, even in the hands of a holder in due course. One signed under threat to prosecute the son of the maker for theft may be merely voidable so that the defense is cut-off. Illegality is most frequently a matter of gambling or usury, but may arise in many other forms under various statutes. All such matters are left to Navajo law. If under that law the effect of the duress or the illegality is to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise it is cut-off.

7. Subsection (B)(3) recognizes the defense of "real" or "essential" fraud, sometimes called fraud in the essence or fraud in the factum, as effective against a holder in due course. The common illustration is that of the maker who is tricked into signing a note in the belief that it is merely a receipt of

some other document. The theory of the defense is that his signature on the instrument is ineffective because he did not intend to sign such an instrument at all. Under this provision the defense extends to an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms.

The test of the defense here stated is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge. In determining what is a reasonable opportunity all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education and business experience; his ability to read or to understand English, the representations made to him and his reason to rely on them or to have confidence in the person making them; the presence or absence of any third person who might read or explain the instrument to him, or any other possibility of obtaining independent information; and the apparent necessity, or lack of it, for acting without delay.

Unless the misrepresentation meets this test, the defense is cut off by a holder in due course.

8. Paragraph (4) is inserted to make it clear that any discharge in bankruptcy or other insolvency proceedings, as defined in this article, is not cut-off when the instrument is purchased by a holder in due course.

9. Under Subsection (B)(5) notice of any discharge which leaves other parties liable on this instrument does not prevent the purchaser from becoming a holder in due course. The obvious case is that of the cancellation of an indorsement, which leaves the maker and prior indorsers liable. As to such parties the purchaser may be a holder in due course, but he takes the instrument subject to the discharge of which he has notice. If he is without such notice, the discharge is not effective against him (§ 3-602).

Cross References

Point 1: Section 3-201(A).

Point 2: Section 3-208.

Point 3: Sections 3-115(B), 3-306(C), 3-307(B) and 3-407(A)(3).

Point 9: Sections 3-304(A)(2) and 3-602.

Definitional Cross References

"Contract". Section 1-201.

"Holder in due course". Section 3-302.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1–201.

"Person". Section 1–201.

"Term". Section 1–201.

Special Plain Language Comment

A person who signs a negotiable instrument can rescind the obligation if he or she was too young, was defrauded into signing, has been discharged in bankruptcy or, if the holder has knowledge of any other discharge (reason for being let off). However, other defenses which may exist in favor of the person obligated on the instrument will not be effective against persons to whom the original payee may transfer the instrument and who are "holders in due course". See § 3–306.

§ 3–306. Rights of one not a holder in due course

Unless he has the rights of a holder in due course any person takes the instrument subject to:

A. All valid claims to it on the part of any person; and

B. All defenses of any party which would be available in an action on a simple contract; and

C. The defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (§ 3–408); and

D. The defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–306 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Any transferee who acquires the rights of a holder in due course under the transfer section of this article (§ 3–201) is included within the provisions of the preceding § 3–305. This section covers any person who neither qualifies in his own right as a holder in due course nor has acquired the rights of one by transfer. In particular, the section applies to a bona fide purchaser with notice that the instrument is overdue.

2. "All valid claims to it on the part of any person" includes not only claims of legal title, but all liens, equities, or other claims of right against the instrument or its proceeds. It includes claims to rescind a prior negotiation and to recover the instrument or its proceeds.

3. Subsection (C) mentions want or failure of consideration in order to make it clear that either is a defense which the defendant has the burden of establishing under the following section of this article. The following section, which places the full burden of establishing the defense of non-delivery, conditional delivery or delivery for a special purpose upon the defendant, makes any presumption unnecessary.

4. Subsection (D) is a detailed and explicit statement of the policy that the contract of the obligor is to pay the holder of the instrument, and the claims of other persons against the holder are generally not his concern. He is not required to set up such a claim as a defense, since he usually will have no satisfactory evidence of his own on the issue; and the provision that he may not do so is intended as much for his protection as for that of the holder. The claimant who has lost possession of an instrument so payable or indorsed that another may become a holder has lost his rights on the instrument, which by its terms no longer runs to him. The provision includes all claims for rescission of a negotiation, whether based in incapacity, fraud, duress, mistake, illegality, breach of trust or duty or any other reason. It includes claims based on conditional delivery or delivery for a special purpose. It includes claims of legal title, lien, constructive trust or other equity against the instrument or its proceeds. The exception made in the case of theft is based on the policy which refuses to aid a proved thief to recover, and refuses to aid him indirectly by permitting his transferee to recover unless the transferee is a holder in due course. The exception concerning restrictive indorsements is intended to achieve consistency with § 3-603 and related sections.

Nothing in this section is intended to prevented the claimant from intervening in the holder's action against the obligor or defending the action for the latter and asserting his claim in the course of such intervention or defense. Nothing here stated is intended to prevent any interpleader, deposit in court or other available procedure under which the defendant may bring the claimant into court or be discharged without himself litigating the claim as a defense. Compare § 3-803 on vouching in other parties alleged to be liable.

Cross References

Section 3-302.

Point 1: Sections 3-201(A) and 3-305.

Point 2: Section 3-207.

Point 3: Sections 3-305 and 3-307(B)

Point 4: Section 3-803.

Definitional Cross References

"Action". Section 1-201.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

Special Plain Language Comment

This section explains the defenses which may be asserted with respect to an instrument against a holder of the instrument who does not qualify as a "holder in due course". See § 3-302.

§ 3-307. Burden of establishing signatures, defenses and due course

A. Unless specifically denied in the pleadings, each signature on an instrument is admitted. When the effectiveness of a signature is put in issue:

1. The burden of establishing it is on the party claiming under the signature; but

2. The signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

B. When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

C. After it is shown that a defense exists, a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-307 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The purpose in Subsection (A) of requiring a specific denial in the pleadings is to give the plaintiff notice that he must meet a claim of forgery or lack of authority as to the particular signature, and to afford him an opportunity to investigate and obtain evidence. Where local rules of pleading permit, the denial may be on information and belief, or it may be a denial of knowledge or information sufficient to form a belief. It need not be under oath unless the local statutes or rules require verification. In the absence of such specific denial the signature stands admitted, and is not in issue. Nothing in this section is intended, however, to prevent amendment of the pleading in a proper case.

The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in the definitions section of this Code (§ 1-201). The burden is on the party claiming under the signature, but he is aided by the presumption that it is genuine or authorized [as] stated in paragraph (2). "Presumption" is also defined in this Code (§ 1-201). It means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized the plaintiff is not required to prove that it is authentic. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of the defendant or more accessible to him. He is therefore required to make some sufficient showing of the grounds for his denial before the plaintiff is put to his proof. His evidence need not be sufficient to require a directed verdict in his favor, but it must be enough to support his denial by permitting a finding in his favor. Until he introduces such evidence the presumption requires a finding for the plaintiff. Once such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff.

Under paragraph (2) this presumption does not arise where the action is to enforce the obligation of a purported signer who has died or become incompetent before the evidence is required, and so is disabled from obtaining or introducing it. "Action" of course includes a claim asserted against the estate of a deceased or an incompetent.

2. Subsection (B) states that once signatures are proved or admitted, a holder makes out his case by mere production of the instrument, and is entitled to recover in the absence of any further evidence. The defendant has the burden of establishing any and all defenses, but by a preponderance of the total evidence. The provision applies only to a holder, as defined in this Code (§ 1-201). Any other person in possession of an instrument must prove his right to it and account for the absence of any necessary indorsement. If he establishes a transfer which gives him the rights of a holder (§ 3-201), this provision becomes applicable, and he is then entitled to recover unless the defendant establishes a defense.

3. Subsection (C) concerns the doctrine that until it is shown that a defense exists, the issue as to whether the holder is a holder in due course does not arise. In the absence of a defense any holder is entitled to recover, an there is no occasion to say that he is deemed prima facie to be a holder in due course. When it is shown that a defense exists, the plaintiff may, if he so elects, seek to cut off the defense by establishing that he is himself a holder in due course, or that he has acquired the rights of a prior holder in due course (§ 3-201). On this issue he has the fun burden of proof by a preponderance of the total evidence. "In all respects" means that he must sustain this burden by affirmative proof that the instrument was taken for

value, that it was taken in good faith, and that it was taken without notice (§ 3-302).

Nothing in this section is intended to say that the plaintiff must necessarily prove that he is a holder in due course. He may elect to introduce no further evidence, in which case a verdict may be directed for the plaintiff or the defendant, or the issue of the defense may be left to the jury, according to the weight and sufficiency of the defendant's evidence. He may elect to rebut the defense itself by proof to the contrary, in which case again a verdict may be directed for either party or the issue may be for the jury. This Subsection means only that if the plaintiff claims the rights of a holder in due course against the defense he has the burden of proof upon that issue.

Cross References

Sections 3-305, 3-306, 3-401, 3-403 and 3-404.

Point 1: Section 1-201.

Point 2: Sections 1-201 and 3-201(A).

Point 3: Sections 3-201(A) and 3-302.

Definitional Cross References

"Action". Section 1-201.

"Burden of establishing". Section 1-201.

"Defendant". Section 1-201.

"Genuine". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

Special Plain Language Comment

If the parties to an instrument have a dispute about their respective rights and obligations, the Court follows various rules for resolving the dispute, including those specified in this section to determine who has the burden of convincing the Court on certain common issues.

Part 4. Liability of Parties

§ 3-401. Signature

A. No person is liable on an instrument unless his signature appears thereon.

B. A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-401 of the Uniform Commercial Code adopted by the states.

Commentary. 1. No one is liable on an instrument unless and until he has signed it. The chief application of the rule has been in cases holding that a principal whose name does not appear on an instrument signed by his agent is not liable on the instrument even though the payee knew when it was issued that it was intended to be the obligation of one who did not sign. An allonge is part of the instrument to which it is affixed. Section 3-202(B).

Nothing in this section is intended to prevent any liability arising apart from the instrument itself. The party who does not sign may still be liable on the original obligation for which the instrument was given, or for the breach of any agreement to sign, or in tort for misrepresentation, or even on an oral guaranty of payment where the Statute of Frauds is satisfied. He may of course be liable under any separate writing. The provision is not intended to prevent an estoppel to deny that the party has signed, as where the instrument is purchased in good faith reliance upon his assurance that a forged signature is genuine.

2. A signature may be handwritten, typed, printed or made in any other manner. It need not be subscribed, and may appear in the body of the instrument, as in the case of "I, John Doe, promise to pay ... " without any other signature. It may be made by mark or even by thumbprint. It may be made in any name, including any trade name or assumed name, however false and fictitious, which is adopted for the purpose. Parol evidence is admissible to identify the signer, and when he is identified the signature is effective.

This section is not intended to affect any Navajo statute or rule of law requiring a signature by mark to be witnessed, or any signature to be otherwise authenticated or requiring any form of proof. It is to be read together with the provision under which a person paying or giving value for the instrument may require indorsement in both the right name and the wrong one; and with the provision that the absence of an indorsement in the right name may make an instrument so irregular as to call its ownership into question and put a purchaser upon notice which will prevent his taking as a holder in due course.

Cross References

Sections 3-202(B), 3-402 through 3-406.

Point 1: Section 3-410.

Point 2: Section 3-203.

Definitional Cross References

"Person". Section 1-201.

"Instrument". Section 3-102.

"Signed". Section 1-201.

"Written". Section 1-201.

§ 3-402. Signature in ambiguous capacity

Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-402 of the Uniform Commercial Code adopted by the states.

Commentary. The review language is intended to say that any ambiguity as to the capacity in which a signature is made must be resolved by a rule of law that it is an indorsement. Parol evidence is not admissible to show any other capacity, except for the purpose of reformation of the instrument as it may be permitted under the rules of the particular jurisdiction. The question is to be determined from the face of the instrument alone, and unless the instrument itself makes it clear that he has signed in some other capacity the signer must be treated as an indorser.

The indication that the signature is made in another capacity must be clear without reference to anything but the instrument. It maybe found in the language used. Thus, if John Doe signs after "I, John Doe, promise to pay", he is clearly a maker; and "John Doe, witness" is not liable at all. The capacity may be found in any clearly evidenced purpose of the signature, as where a drawee signing in an unusual place on the paper has no visible reason to sign at all unless he is an acceptor. It may be found in usage or custom. Thus, by long established practice, judicially noticed or otherwise established, a signature in the lower right hand corner of an instrument indicates an intent to sign as the maker of a note or the drawer of a draft.

Any similar clear indication of an intent to sign in some other capacity may be enough to remove the signature from the application of this section.

Cross References

Section 3-401.

Definitional Cross References

"Instrument". Section 3–102.

"Signature". Section 3–401.

§ 3–403. Signature by authorized representative

A. A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases or representation. No particular form of appointment is necessary to establish such authority.

B. An authorized representative who signs his own name to an instrument:

1. Is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

2. Except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

C. Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–403 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The definition of "representative" in this Code (§ 1–201) includes an officer of a corporation or association, a trustee, an executor or administrator of an estate, or any person empowered to act for another. It is not intended to mean that a trust or an estate is necessarily a legal entity with the capacity to issue negotiable instruments, but merely that if it can issue them they may be signed by the representative.

The power to sign for another may be an express authority, or it may be implied in law or in fact, or it may rest merely upon apparent authority. It may be established as in other cases of representation, and when relevant parol evidence is admissible to prove or to deny it.

2. Subsection (B) applies only to the signature of a representative whose authority to sign for another is established. If he is not authorized his signature has the effect of an unauthorized signature (§ 3-404). Even though he is authorized the principal is not liable on the instrument, under the provisions (§ 3-401) relating to signatures, unless the instrument names him and clearly shows that the signature is made on his behalf.

3. Assuming that Peter Pringle is a principal and Arthur Adams is his agent, an instrument might, for example, bear the following signatures affixed by the agent:

A. "Peter Pringle", or

B. "Arthur Adams", or

C. "Peter Pringle by Arthur Adams, Agent", or

D. "Arthur Adams, Agent", or

E. "Peter Pringle Arthur Adams".

<BULLET> signature in form (A) does not bind Adams if authorized (§§ 3-401 an 3-404).

<BULLET> signature as in (B) personally obligates the agent and parol evidence is inadmissible under Subsection (B)(1) to disestablish his obligation.

The unambiguous way to make the representation clear is to sign as in Subsection (C). Any other definite indication is sufficient, as where the instrument reads "Peter Pringle promises to pay" and it is signed "Arthur Adams, Agent". Adams is not bound if he is authorized (§ 3-404).

Section (B)(2) admits parol evidence in litigation between the immediate parties to prove signature by the agent in his representative capacity.

Cross References

Point 1: Section 1-201.

Point 2: Sections 3-401(A), 3-404 and 3-405.

Definitional Cross References

"Instrument". Section 3-102.

"Person". Section 1-201.

"Representative". Section 1-201.

"Signature". Section 3-401.

§ 3-404. Unauthorized signatures

A. Any unauthorized signature is wholly inoperative as that person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signed in favor of any person who in good faith pays the instrument or takes it for value.

B. Any unauthorized signature may be ratified for all purposes of this article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-404 of the Uniform Commercial Code adopted by the states.

Commentary. 1. "Unauthorized signature" is a defined term (§ 1-201). It includes both a forgery and a signature made by an agent exceeding his actual or apparent authority.

2. The final clause of Subsection (B) states that generally accepted rule that the unauthorized signature, while it is wholly inoperative as that of the person whose name is signed, is effective to impose liability upon the actual signer or to transfer any rights that he may have in the instrument. His liability is not in damages for breach of a warranty of his authority, but is full liability on the instrument in the capacity in which he has signed. It is, however, limited to parties who take or pay the instrument in good faith; and one who knows that the signature is unauthorized cannot recover from the signer on the instrument.

3. Subsection (B) settles the conflict which has existed in the decisions as to whether a forgery may be ratified. A forged signature may at least be adopted; and the word "ratified" is used in order to make it clear that the adoption is retroactive and that it may be found from conduct as well as from express statements. Thus, it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature; and although the forger is not an agent, the ratification is governed by the same rules and principles as if he were.

This provision makes ratification effective only for the purposes of this article. The unauthorized signature becomes valid so far as its effect as a signature is concerned. The ratification relieves the actual signer from liability on the signature. It does not of itself relieve him from liability to the person whose name is signed. It does not in any way affect the criminal law. No policy of the criminal law requires that the person whose name is forged shall not assume liability to others on the instrument; but he cannot affect the rights of the government. While the ratification may be taken into account with other relevant facts in determining punishment, it does not relieve the signer of criminal liability.

4. The words "or is precluded from denying it" in Subsection (A) recognize the

possibility of an estoppel against the person whose name is signed, as where he expressly or tacitly represents to an innocent purchaser that the signature is genuine; and to recognize the negligence which precludes a denial of the signature.

Cross References

Sections 3-307, 3-401, 3-403 and 3-405.

Point 1: Section 1-201.

Point 4: Section 3-406.

Definitional Cross References

"Good faith". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Unauthorized signature". Section 1-201.

"Value". Section 3-303.

§ 3-405. Imposters; signature in name of payee

A. An indorsement by any person in the name of a named payee is effective if:

1. An impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or

2. A person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

3. An agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

B. Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-405 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section recognizes as effective indorsement of the types of paper covered no matter by whom made. This solution is thought preferable to making such instruments bearer paper; on the face of things they are payable to order and a subsequent taker should require what purports to be a regular chain of indorsements. On the other hand, it is unduly restrictive to require that the actual indorsement be made by the impostor or other fraudulent actor. In most cases the person whose fraud procured the instrument to be issued will himself indorse; when some other third person indorses it will most probably be a case of theft or a second independent fraud superimposed upon the original fraud. In neither case does there seem to be sufficient reason to reverse the rule of the section. To recapitulate: the instrument does not become bearer paper, a purportedly regular chain in indorsements is required, but any person – first thief, second impostor or third murderer – can effectively indorse in the name of the payee.

2. Subsection (A)(1) rejects decisions which distinguish between face-to-face imposture and imposture by mail and hold that where the parties deal by mail the dominant intent of the drawer is to deal with the name rather than with the person so that the resulting instrument may be negotiated only by indorsement of the payee whose name has been taken in vain. The result of the distinction has been under some prior law, to throw the loss in the mail imposture forward to a subsequent holder or to the drawee. Since the maker or drawer believes the two to be one and the same, the two intentions cannot be separated, and the "dominant intent" is a fiction. The position here taken is that the loss, regardless of the type of fraud which the particular imposter has committed, should fall upon the maker or drawer. "Impostor" refers to impersonation, and does not extend to a false representation that the party is the authorized agent of the payee. The maker or drawer who takes the precaution of making the instrument payable to the principal is entitled to have his indorsement.

3. Subsection (A)(2) is based not on whether the named payee is "fictitious", but whether the signer intends that he shall have no interest in the instrument. The following situations illustrate the application of the Subsection:

A. The drawer of a check, for his own reasons, makes it payable to P knowing that P does not exist.

B. The drawer makes the check payable in the name of P. A person named P exists, but the drawer does not know it.

C. The drawer makes the check payable to P, an existing person whom he knows, intending to receive the money himself and that P shall have no interest in the check.

D. The treasurer of a corporation draws its check payable to P, who to the knowledge of the treasurer does not exist.

E. The treasurer of a corporation draws its check payable to P. P exists but the treasurer has fraudulently added his name to the payroll intending that he shall not receive the check.

F. The president and the treasurer of a corporation both sign its check payable to P. P does not exist. The treasurer knows it but the president does not.

G. The same facts as F, except that P exists and the treasurer knows it, but intends that P shall have no interest in the check.

In all cases stated an indorsement by any person in the name of P is effective.

4. Subsection (A)(3) includes the padded payroll cases, where the drawer's agent or employee prepares the check for signature or otherwise furnishes the signing officer with the name of the payee. The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or, if he is not, is at least in a better position to cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee.

The provision applies only to the agent or employee of the drawer and only to the agent or employee who supplies him with the name of the payee. The following situations illustrate its application:

A. An employee of a corporation prepares a padded payroll for its treasurer, which includes the name of P. P does not exist, and the employee knows it, but the treasurer does not. The treasurer draws the corporation's check payable to P.

B. The same facts as A, except that P exists and the employee knows it but intends him to have no interest in the check. In both cases an indorsement by any person in the name of P is effective and the loss falls on the corporation.

5. The section is not intended to affect criminal liability for forgery or any other crime, or civil liability to the drawer or to any other person. It is to be read together with the section under which an unauthorized signer is personally liable on the signature to any person who takes the instrument in good faith (3-404(A)).

Cross References

Sections 3-401, 3-403, 3-404 and 3-406.

Point. 5: Section 3-404(A).

Definitional Cross References

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Person". Section 1-201.

"Signature". Section 3-401.

§ 3-406. Negligence contributing to alteration or unauthorized signature

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-406 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section adopts the doctrine which held that a drawer who so negligently draws an instrument as to facilitate its material alteration is liable to a drawee who pays the altered instrument in good faith. It should be noted that the rule as stated in the section requires that the negligence "substantially" contribute to the alteration.

2. The section extends the above principle to the protection of a holder in due course and of payors who may not technically be drawees. It rejects decisions which have held that the maker of a note owes no duty of care to the holder because at the time the instrument is drawn there is no contract between them. By drawing the instrument and "setting it afloat upon a sea of strangers" the maker or drawer voluntarily enters into a relation with later holders which justifies his responsibility. In this respect an instrument so negligently drawn as to facilitate alteration does not differ in principle from an instrument containing a blank which may be filled.

The holder in due course under the rules governing alteration (§ 3-407) may enforce the altered instrument according to its original tenor. Where negligence of the obligor has substantially contributed to the alteration, this section gives the holder the alternative right to enforce the instrument as altered.

3. No attempt is made to define negligence which will contribute to an alteration. The question is left to the court or the jury upon the circumstances of the particular cases. Negligence usually has been found where spaces are left in the body of the instrument in which words or figures maybe inserted. No unusual precautions are required, and the section is not intended to change decisions holding that the drawer of a bill is under no duty to use sensitized paper, indelible ink or a protectograph; or that it is not negligence to leave spaces between the lines or at the end of the instrument in which a provision for interest or the like can be written.

4. The section applies only where the negligence contributes to the alteration. It must afford an opportunity of which advantage is in fact taken. The section

approves decisions which have refused to hold the drawer responsible where he has left spaces in a check but the payee erased all the writing with chemicals and wrote in an entirely new check.

5. This section does not make the negligent party liable in tort for damages resulting from the alteration. Instead it stops him from asserting it against the holder in due course or drawee. The reason is that in the usual case the extent of the loss, which involves the possibility of ultimate recovery from the wrongdoer, cannot be determined at the time of litigation, and the decision would have to be made on the unsatisfactory basis of burden of proof. The holder or drawee is protected by an estoppel, and the task of pursuing the wrongdoer is left to the negligent party. Any amount in fact recovered from the wrongdoer must be held for the benefit of the negligent party under ordinary principles of equity.

6. The section protects parties who act not only in good faith (§ 1-201) but also in observance of the reasonable standards of their business. Thus, any bank which takes or pays an altered check which ordinary banking standards would require it to refuse cannot take advantage of the estoppel.

7. The section applies the same rule to negligence which contributes to a forgery or other unauthorized signature, as defined in this Code (§ 1-201). The most obvious case is that of the drawer who makes use of a signature stamp or other automatic signing device and is negligent in looking after it. The section extends, however, to cases where the party has notice that forgeries of his signature have occurred and is negligent in failing to prevent further forgeries by the same person. It extends to negligence which contributes to a forgery of the signature of another, as in the case where a check is negligently mailed to the wrong person having the same name as the payee. As in the case of alteration, no attempt is made to specify what is negligence, and the question is one for the court or the jury on the facts of the particular case.

Cross References

Sections 3-401 and 3-404.

Point 2: Section 3-407(C).

Point 6: Section 1-201.

Point 7: Section 1-201.

Definitional Cross References

"Alteration". Section 3-407.

"Good faith". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Unauthorized signature". Section 1-201.

§ 3-407. Alteration

A. Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in:

1. The number or relations of the parties; or

2. An incomplete instrument, by completing it otherwise than as authorized; or

3. The writing as signed, by adding to it or by removing any part of it.

B. As against any person other than a subsequent holder in due course:

1. Alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

2. No other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

C. A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an. incomplete instrument has been completed, he may enforce it as completed.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-407 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) is a general definition. Any alteration is material only as it may change the contract of a party to the instrument; and the addition or deletion of words which do not in any way affect the contract of any previous signer is not material. But any change in the contract of a party, however slight, is a material alteration; and the addition of one cent to the amount payable, or an advance of one (1) day in the date of payment, will operate as a discharge if it is fraudulent.

Specific mention is made of a change in the number or relations of the parties in order to make it clear that any such change is material only if it changes the contract of one who has signed. The addition of a co-maker or a surety does not change in most jurisdictions the contract of one who has already signed as maker and should not be held material as to him. The addition of the name of an alternative payee is material, since it changes his obligation. Subsection (A)(3) makes special mention of a change in the writing signed in order to cover occasional cases of addition of sticker clauses, scissoring or perforating instruments where the separation is not authorized.

2. Subsection (A)(2) is to be read together with § 3-115 on incomplete instruments. Where an instrument contains blanks or is otherwise incomplete, it maybe completed in accordance with the authority given and is then valid and effective as completed. If the completion is unauthorized and has the effect of changing the contract of any previous signer, this provision follows the generally accepted rule in treating it as a material alteration which may operate as a discharge.

3. A material alteration does not discharge any party unless it is made by the holder. Spoliation by any meddling stranger does not affect the rights of the holder. It is of course intended that the acts of the holder's authorized agent or employee, or of his confederates, are to be attributed to him.

A material alteration does not discharge any party unless it is made for a fraudulent purpose. There is no discharge where a blank is filled in the honest belief that it is as authorized; or where a change is made with a benevolent motive such as a desire to give the obligor the benefit of a lower interest rate. Changes favorable to the obligor are unlikely to be made with any fraudulent intent; but if such an intent is found the alteration may operate as a discharge.

The discharge is a personal defense of the party whose contract is changed by the alteration, and anyone whose contract is not affected cannot assert it. The contract of any party is necessarily affected, however, by the discharge of any party against whom he has a right of recourse on the instrument. Assent to the alteration given before or after it is made will prevent the party from asserting the discharge. "Or is precluded from asserting the defense" is added in Subsection (B)(1) to recognize the possibility of an estoppel or other ground barring the defense which does not rest on assert.

If the alteration is not material or if it is not made for a fraudulent purpose there is no discharge, and the instrument may be enforced according to its original tenor. Where blanks are filled or an incomplete instrument is otherwise completed there is no original tenor, but the instrument may be enforced according to the authority in fact given.

4. Subsection (C) provides that a subsequent holder in due course takes free of the discharge in all cases. The provision is merely one form of the general rule governing the effect of discharge against a holder in due course (§ 3-602). The holder in due course may enforce the instrument according to its original tenor. In this connection reference should be made to the section giving the holder in due course the right, where the maker's or drawer's negligence has substantially contributed to the alteration, to enforce the instrument in its altered from (§ 3-406). Reference should also be made to Article 4 covering a bank's right to charge its customer's account in the case of altered instruments. Article 4 has not been adopted by the Navajo Nation. Rights which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

Where blanks are filled or an incomplete instrument is otherwise completed, this Subsection places the loss upon the party who left the instrument incomplete and permitting the holder to enforce it in its completed form. As indicated in the comment to § 3-115 on incomplete instruments, this result is intended even though the instrument was stolen from the maker or drawer and completed after the theft.

There is no inconsistency between Subsection (C) and Subsection (B)(2). The holder in due course may elect to enforce the instrument either as provided in that paragraph or as provided in Subsection (C).

It should be noted that a purchaser who takes the instrument with notice of any material alteration, including the unauthorized completion of an incomplete instrument, takes with notice of a claim or defense and cannot be a holder in due course (§ 3-304).

Cross References

Sections 3-305, 3-306 and 3-307.

Point 2: Section 3-115.

Point 4: Sections 3-115, 3-304(B) and 3-602.

Definitional Cross References

"Contract". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Signed". Section 1-201.

"Writing". Section 1-201.

Special Plain Language Comment

This section describes the effect on the rights of a holder of an instrument which has been altered by adding or deleting words or terms.

§ 3-408. Consideration

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (§ 3-305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this Code, under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense *pro tanto* whether or not the failure is in an ascertained or liquidated amount.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-408 of the Uniform Commercial Code adopted by the states.

Commentary. 1. "Consideration" is distinguished from "value" throughout this article. "Consideration" refers to what the obligor has received for his obligation, and is important only on the question of whether his obligation can be enforced against him.

2. The "except" clause is intended to remove the difficulties which have arisen where a note or a draft, or an indorsement of either, is given as payment or as security for a debt already owed by the party giving it, or by a third person. The provision is intended to change the result of decisions holding that where no extension of time or other concession is given by the creditor the new obligation fails for lack of legal consideration. It is intended also to mean that an instrument given for more or less than the amount of a liquidated obligation does not fail by reason of the common law rule that an obligation for a lesser liquidated amount cannot be consideration for the surrender of a greater.

3. With respect to the necessity or sufficiency of consideration other obligations on an instrument are subject to the ordinary rules of contract law relating to contracts not under seal. Promissory estoppel or any other equivalent or substitute for consideration is to be recognized as in other contract cases.

Cross References

Point 1: Section 3-303.

Point 3: Sections 3-306(C) and 3-307(B).

Definitional Cross References

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Rights". Section 1-201.

Special Plain Language Comment

This section explains the extent to which an instrument may not be enforceable when the maker of the instrument neither receives any personal benefit from the transaction nor obtains the benefit of his bargain by having some other party suffer a detriment at this request (e.g., where the maker gives a note in order to induce a creditor of the maker's relative to forgive a debt owing to that creditor).

§ 3-409. Draft not an assignment

A. A check or other draft does not in itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

B. Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-409 of the Uniform Commercial Code adopted by the states.

Commentary. 1. A check or other draft does not of itself operate as an assignment in law or equity. The assignment may, however, appear from other facts, and particularly from other agreements, express or implied; and when the intent to assign is clear the check may be the means by which the assignment is effected.

2. The drawee is not liable on the instrument until he accepts; but he remains subject to any other liability to the holder. Under state law, payor banks are accountable for the amount of any demand item which they retain beyond midnight of the day on which the item is received. See § 4-302 of the commercial code of the applicable state law pursuant to 7 N.N.C. § 204 for the payor banks liability for later return. Such a bank, if it does not either make prompt settlement or return on an item received by it will become liable to a holder of the item.

3. Subsection (B) is intended to make it clear that this section does not in any way affect any liability which may arise apart from the instrument itself. The drawee who fails to accept may be liable to the drawer or to the holder for breach of the terms of a letter of credit or any other agreement by which he is obligated to accept. He may be liable in tort or upon any other basis because of his representation that he has accepted, or that he intends to accept. The section leaves unaffected any liability of any kind apart from the instrument.

Cross References

Sections 3-410, 3-411, 3-412 and 3-415.

Definitional Cross References

"Acceptance". Section 3-410.

"Check". Section 3-104.

"Contract". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-104.

§ 3-410. Definition and operation of acceptance

A. Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification.

B. A draft may be accepted although it has not been signed by the drawer or is otherwise incomplete or is overdue or has been dishonored.

C. Where the draft is payable at a fixed period after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-410 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under § 3-417 a person obtaining acceptance gives a warranty against alteration of the instrument before acceptance.

2. Subsection (A) adopts the rule that acceptance must be written on the draft. Good commercial and banking practice does not sanction acceptance by any separate writing because of the dangers and uncertainties arising when it becomes separated from the draft. The instrument is now forwarded to the drawee for his acceptance upon it, or reliance is placed upon the obligation of the separate writing itself, as in the case of a letter of credit.

Nothing in this section is intended to eliminate any liability of the drawee in contract, tort or otherwise arising from the separate writing or any other obligation or representation, as provided in § 3-409.

Subsection (A) provides for acceptance by delay or refusal to return the instrument but the drawee maybe liable for a conversion of the instrument under § 3-419.

3. Subsection (A) states the generally recognized rule that the mere signature of the drawee on the instrument is a sufficient acceptance. Customarily the signature is written vertically across the face of the instrument; but since the drawee has no reason to sign for any other purpose his signature in any other place, even on the back of the instrument, is sufficient. It need not be accompanied by such words as "Accepted", "Certified", or "Good". It must not,

however, bear any words indicating an intent to refuse to honor the bill; and nothing in this provision is intended to change such decisions as *Norton v. Knapp,* 64 Iowa 112, 19 N.W. 867 (1884), holding that the drawee's signature accompanied by the words "Kiss my foot" is not an acceptance.

4. The final sentence of Subsection (A) expressly states the generally recognized rule, that an acceptance written on the draft takes effect when the drawee notifies the holder or gives notice according to his instructions. Acceptance is thus an exception to the usual rule that no obligation on an instrument is effective until delivery.

5. The purpose of Subsection (C) is to provide a definite date of payment where none appears on the instrument. An undated acceptance of a draft payable "thirty days after sight" is incomplete; and unless the acceptor himself writes in a different date the holder is authorized to complete the acceptance according to the terms of the draft by supplying a date of presentment. Any date which the holder chooses to write in is effective providing his choice of date is made in good faith. Any different agreement not written on the draft is not effective, and parol evidence is not admissible to show it.

Cross References

Sections 3-411, 3-412 and 3-418.

Point 1: Section 3-417.

Point 2: Sections 3-401(A), 3-409(B) and 3-419.

Point 5: Section 3-412.

Definitional Cross References

"Delivery". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Honor". Section 1-201.

"Notification". Section 1-201.

"Presentment". Section 3-504.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Written". Section 1-201.

§ 3-411. Certification of a check

A. Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged.

B. Unless otherwise agreed a bank has no obligation to certify a check.

C. A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-411 of the Uniform Commercial Code adopted by the states.

Commentary. 1. While certification procured by a holder discharges the drawer and other prior parties, certification procured by the drawer leaves him liable. Any certification procured by a holder discharged the drawer and prior indorsers. Any indorsement made after a certification so procured remains effective; and where it is intended that any indorser shall remain liable notwithstanding certification, he may indorse with the words "after certification" to make his liability clear.

2. Subsection (B) states the generally recognized rule that in the absence of agreement a bank is under no obligation to certify a check, because it is a demand instrument calling for payment rather than acceptance. The bank may be liable for breach of any agreement with the drawer, the holder, or any other person by which it undertakes to certify. Its liability is not on the instrument, since the drawee is not so liable until acceptance (§ 3-409(A)). Any liability is for breach of the separate agreement.

3. Subsection (C) recognizes the banking practice of certifying a check which is returned for proper indorsement in order to protect the drawer against a longer contingent liability. It is consistent with the provision of § 3-410(B) permitting certification although the check has not been signed or is otherwise incomplete.

Cross References

Sections 3-412, 3-413, 3-417 and 3-418.

Point 2: Section 3-409(A)

Point 3: Section 3-410(B)

Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Check". Section 3-104.

"Holder". Section 1-201.

§ 3-412. Acceptance varying draft

A. Where the drawee's proffered acceptance in any manner varies the draft as presented the holder may refuse the acceptance and treat the draft as dishonored in which case the drawee is entitled to have his acceptance canceled.

B. The terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at such bank or place.

C. Where the holder assents to an acceptance varying the terms of the draft each drawer and indorser who does not affirmatively assent is discharged.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-412 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section applies to conditional acceptances, acceptances for part of the amount, acceptances to pay at a different time from that required by the draft, or to the acceptance of less than all of the drawees. It applies to any other engagement changing the essential terms of the draft.

2. Where the drawee offers such a varied engagement the holder has an election. He may reject the offer, insist on acceptance of the draft as presented, and treat the refusal to give it as a dishonor. In that event, the drawee is not bound by his engagement, and is entitled to have it canceled. After any necessary notice of dishonor and protest the holder may have his recourse against the drawer and indorsers.

If the holder elects to accept the offer, this section does not invalidate the drawee's varied engagement. It remains his effective obligation, which the holder may enforce against him. By his assent, however, the holder discharges any drawer or indorser who does not also assent which must be affirmatively expressed. Mere failure to object within a reasonable time is not assent which will prevent the discharge.

3. Subsection (B) provides that the terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States unless the acceptance states that the draft is to be paid only at such bank or place. Section 3-504(D) provides that a draft accepted payable at a bank in the United States must be presented at the bank designated.

Cross References

Sections 3-410 and 3-413.

Point 3: Section 3-504(D).

Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Term". Section 1-201.

"Written". Section 1-201.

§ 3-413. Contract of maker, drawer and acceptor

A. The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to § 3-115 on incomplete instruments.

B. The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse.

C. By making, drawing or accepting the party admits as against all subsequent parties including the drawee the existence of the payee and his then capacity to indorse.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-413 of the Uniform Commercial Code adopted by the states.

Commentary. This section should be read in connection with the sections on incomplete instruments (§ 3-115), negligence contributing to alteration or unauthorized signature (§ 3-406), alteration (§ 3-407), acceptances (§ 3-412) and finality of payment or acceptance varying a draft (§ 3-418). Thus a maker who signs an incomplete note engages under this section to pay it according to its tenor at the time he signs it, but by virtue of § 3-115 and 3-407 the note may thereafter be completed and enforced against him. In the same way, if the maker's negligence substantially contributes to alteration of the instrument, he will become liable on his note as altered under § 3-406. When a holder assents to an acceptance varying a draft (§ 3-412) he can of course hold the acceptor only according to the form of acceptance to which the holder agreed. Section 3-418 applies the rule of *Plice v. Neal* both to acceptance and payment; thus an acceptor may not, after acceptance, assert that the drawer's signature is unauthorized.

Subsection (A) applies to all drafts (including checks) the rule that the acceptance relates to the instrument as it was at the time of its acceptance and not (in case of alteration before acceptance) to its original tenor. It should be noted that under § 3-417 a person who obtains acceptance warrants to the acceptor that the instrument has not been materially altered.

Cross References

Sections 3-115, 3-406, 3-407, 3-412, 3-417 and 3-418.

Definitional Cross References

"Contract". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Protest". Section 3-509.

§ 3-414. Contract of indorser; order of liability

A. Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

B. Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-

414 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) states the contract of indorsement-that if the instrument is dishonored and any protest or notice of dishonor which may be necessary under § 3-501 is given, the indorser will pay the instrument. The indorser's engagement runs to any holder (whether or not for value) and to any indorser subsequent to him who has taken the instrument up. An indorser may disclaim his liability on the contract of indorsement, but only if the indorsement itself so specifies. Since the disclaimer varies the written contract of indorsement, the disclaimer itself must be written on the instrument and cannot be proved by parol evidence. The customary manner of disclaiming the indorser's liability under this section is to indorse "without recourse". Apart from such a disclaimer all indorsers incur this liability, without regard to whether or not the indorser transferred the instrument for value or received consideration for his indorsement.

2. In addition to his liability on the contract of indorsement, an indorser, if a transferor, gives the warranties stated in § 3-417.

3. As in the case of acceptor's liability (§ 3-413), this section conditions the indorser's liability on the tenor of the instrument at the time of his indorsement. Thus if a person indorses an altered instrument, he assumes liability as indorser on the instrument as altered.

4. Subsection (B) states two presumptions: One is that the indorsers are liable to one another in the order in which they have in fact indorsed. The other is that they have in fact indorsed in the order in which their names appear. Parol evidence is admissible to show that they have indorsed in another order, or that they have otherwise agreed as to their liability to one another.

Cross References

Point 1: Section 3-501.

Point 2: Section 3-417.

Point 3: Section 3-413.

Point 4: Section 3-118(E).

Definitional Cross References

"Contract". Section 1-201.

"Dishonor". Section 3-507.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Presumed". Section 1-201.

"Protest". Section 3-509.

"Signature". Section 3-401.

§ 3-415. Contract of accommodation party

A. An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

B. When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

C. As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

D. An indorsement which shows that it is not in the chain of title is notice of its accommodation character.

E. An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-415 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) recognizes that an accommodation party is always a surety (which includes a guarantor), and it is his only distinguishing feature. He differs from other sureties only in that his liability is on the instrument and he is a surety for another party to it. His obligation is therefore determined by the capacity in which he signs. An accommodation maker or acceptor is bound on the instrument without any resort of his principal, while an accommodation indorser may be liable only after presentment, notice of dishonor and protest. The Subsection recognizes the defenses of a surety in accordance with the provisions subjecting one not a holder in due course to all simple contract defenses, as well as his rights against his principal after payment. Under Subsection (C) except as against a holder in due course without notice of the accommodation, parol evidence is admissible to prove that the party has signed for accommodation. In any case, however, under Subsection (D) an indorsement which is not in the chain of title (the irregular or anomalous indorsement) is notice to all subsequent takers of the instrument of the accommodation character of the indorsement.

2. In Subsection (A) the essential characteristic is that the accommodation party is a surety, and not that he has signed gratuitously. He may be a paid

surety, or receive other compensation from the party accommodated. He may even receive it from the payee, as where A and B buy goods and it is understood that A is to pay for all of them and that B is to sign a note only as a surety for A.

3. The obligation of the accommodation party is supported by any consideration for which the instrument is taken before it is due. Subsection (B) is intended to change occasional decisions holding that there is no sufficient consideration where an accommodation party signs a note after it is in the hands of a holder who has given value. The party is liable to the holder in such a case even though there is no extension of time or other concession. This is consistent with the provision as to antecedent obligations as consideration (§ 3-408). The limitation to "before it is due" is one of suretyship law, by which the obligation of the surety is terminated at the time limit unless in the meantime the obligation of the principal has become effective.

4. As a surety the accommodation party is not liable to the party accommodated; but he is otherwise liable on the instrument in the capacity in which he has signed. This general statement of the rule makes unnecessary a detailed list of obligations.

5. Subsection (E) is intended to ensure that under ordinary principles of suretyship the accommodation party who pays is subrogated to the rights of the holder paid, and should have his recourse on the instrument.

Cross References

Sections 3-305, 3-408, 3-604 and 3-606.

Point 1: Section 3-306.

Point 3: Section 3-408.

Definitional Cross References

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Signed". Section 1-201.

"Writing". Section 1-201.

§ 3-416. Contract of guarantor

A. "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.

B. "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

C. Words of guaranty which do not otherwise specify guarantee payment.

D. No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.

E. When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.

F. Any guaranty written on the instrument is enforceable notwithstanding any Statute of Frauds.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–416 of the Uniform Commercial Code adopted by the states.

Commentary. The section, states the commercial understanding as to the meaning and effect of words of guaranty added to a signature.

An indorser who guarantees payment waives not only presentment, notice of dishonor and protest, but also all demand upon the maker or drawee. Words of guaranty do not affect the character of the indorsement as an indorsement (§ 3–202(D)); but the liability of the indorser becomes indistinguishable from that of a co-maker. A guaranty of collection likewise waives formal presentment, notice of dishonor and protest, but requires that the holder first proceed against the maker or acceptor by suit and execution, or show that such proceeding would be useless.

Subsection (F) is concerned chiefly with the type of Statute of Frauds which provides that no promise to answer for the debt, default or miscarriage of another is enforceable unless it is evidenced by a writing which states the consideration for the promise. It is unusual to state any consideration when a guaranty is added to a signature on a negotiable instrument, which in itself sufficiently shows the nature of the transaction; and such statutes have commonly been held not to apply to such guaranties.

Cross References

Sections 3–202(D) and 3–415.

Definitional Cross References

"Holder". Section 1–201.

"Insolvent". Section 1–201.

"Instrument". Section 3–102.

"Notice of dishonor". Section 3–508.

"Party". Section 1–201.

"Presumption". Section 1–201.

"Protest". Section 3–509.

"Signature". Section 3–401.

"Written". Section 1–201.

§ 3–417. Warranties of presentment and transfer

A. Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that:

1. He has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

2. He has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith:

a. To a maker with respect to the maker's own signature; or

b. To a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

c. To an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

3. The instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith:

a. To the maker of a note; or

b. To the drawer of a draft whether or not the drawer is also the drawee; or

c. To the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance proved "payable as originally drawn" or equivalent terms; or

d. To the acceptor of a draft with respect to an alteration made after the acceptance.

B. Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that:

1. He has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

2. All signatures are genuine or authorized; and

3. The instrument has not been materially altered; and

4. No defense of any party is good against him; and

5. He has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

C. By transferring "without recourse" the transferor limits the obligation stated in Subsection (B)(4) to a warranty that he has no knowledge of such a defense.

D. A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-417 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The obligations imposed by this section are stated in terms of warranty. Warranty terms, which are not limited to sale transactions, are used with the intention of bringing in all the usual rules of law applicable to warranties, and in particular the necessity of reliance in good faith and the availability of all remedies for breach of warranty, such as rescission of the transaction or an action for damages. Like other warranties, those stated in this section may be disclaimed by agreement between the immediate parties. In the case of an indorser, disclaimer of his liability as a transferor, to be effective, must appear in the form of the indorsement, and no parol proof of "agreement otherwise" is admissible. For corresponding warranties in the case of items in the bank collection process, Article 4 should be consulted. The Navajo Nation has not adopted Article 4 of the Uniform Commercial Code. The rights of parties which would be governed under Article 4 are governed by Navajo law pursuant to 7 N.N.C. § 204.

2. Subsection (A) is intended to state the undertaking to a party who accepts or pays of one who obtains payment or acceptance of any prior transferor. It is closely connected with the following section on the finality of acceptance or payment (§ 3-418), and should be read together with it.

3. Subsection (A)(1) retains the generally accepted rifle that the party who accepts or pays does not "admit" the genuineness of indorsements, and may recover from the person presenting the instrument when they turn out to be forged. The justification for the distinction between forgery of the signature of the drawer and forgery of an indorsement is that the drawee is in a position to verify the drawer's signature by comparison with one in his hands, but has ordinarily no opportunity to verify an indorsement.

4. Subsection (A)(2) recognizes and deals with competing equities of parties accepting or paying instruments bearing unauthorized maker's or drawer's signatures and those obtaining acceptances or receiving payment. The warranties prescribed and exceptions thereto follow closely principles established at common law.

The basic warranty that the person obtaining payment or acceptance and any prior transferor warrants that he does not have knowledge that the signature of the maker or drawer is unauthorized stems from the general principle that one who presents an instrument knowing that the signature of the maker or drawer is forged or unauthorized commits an obvious fraud upon the party to whom presentment is made. However, few cases present this simple fact situation. If the signature of a maker or drawer has been forged, the parties include the dishonest forger himself and usually one or more innocent holders taking from him. Frequently, the state of knowledge of a holder is difficult to determine and sometimes a holder takes such a forged instrument in perfect good faith but subsequently learns of the forgery. Since in different fact situations holders have equities of varying strength, it is necessary to have some exceptions to the basic warranty.

The exceptions apply only in favor of a holder in due course and, within the provisions of § 3-201, to all subsequent transferees from a holder in due course. Since a condition of the status of a holder in due course under § 3-302(A)(1) is that the holder takes the instrument without notice of any defense against it, this condition presupposes that at the time of taking such a holder had no knowledge of the unauthorized signature. Consequently, the warranty of Subsection (A)(2) is pertinent in the case of a holder in due course only in the relatively few cases where he acquires knowledge of the forgery after the taking but before the presentment. In this situation the holder in due course must continue to act in good faith to be exempted from the basic warranty.

The first exemption from the warranty by such a holder, made by Subsection (A)(2)(a), is that the warranty does not run to a maker of a note with respect to the maker's own signature. Since a maker of a note is presumed to know his own signature, if he fails to detect a forgery of his own signature and pays the note, he should not be permitted to recover such payment from a holder in due course acting in good faith. Similarly, under Subsection (A)(2)(b) a drawer of a draft is presumed to know his own signature and if he fails to detect a forgery of his own signature and pays a draft he may not recover that payment from a holder in due course acting in good faith. This rule applies if the drawer pays the instrument as drawer and also if he pays the instrument as drawee in a case where he is both drawer and drawee.

A drawee of a draft is presumed to know the signature of his customer, the drawer. However, under Subsection (A)(2) and subparagraph (c) of this Subsection this presumption is not strong enough to deprive such a drawee (either in accepting or paying an instrument) of the warranty of no knowledge of the unauthorized drawer's signature, unless the holder in due course took the instrument and became such a holder after the drawee's acceptance; or obtained the acceptance without knowledge that the drawer's signature was unauthorized. In the former case, the holder taking after and thereby presumably in reliance on the acceptance should be protected as against the drawee who accepted without detecting the unauthorized signature. In the latter case the holder, having no knowledge of the unauthorized signature at the time of the drawee's acceptance, would not be charged with this warranty and would be entitled to enforce such acceptance under § 3-418, even if thereafter he acquired knowledge of the unauthorized signature prior to enforcement of the acceptance. Such right of the holder to enforce the acceptance would be valueless if immediately upon enforcing it and obtaining payment the holder became obligated to return the payment by reason of breach of the warranty of no knowledge at the time of payment.

5. Subsection (A)(3) retains the common law rule, which has permitted a party paying a materially altered instrument in good faith to recover, and a party who accepts such an instrument to avoid such acceptance. As in the case of Subsection (A)(2) this warranty is not imposed against a holder in due course acting in good faith in favor of a maker of a note or a drawer of a draft on the ground that such maker or drawer should know the form and amount of the note or draft which he has signed. The exception made by Subsection (A) (3)(c) in the case of a holder in due course of a draft accepted after the alteration is based on the principle that an acceptance is an undertaking relied upon in good faith by an innocent party. The attempt to avoid this result by certifying checks "payable as originally drawn" leaves the subsequent purchaser in uncertainty as to the amount for which the instrument is certified, and so defeats the entire purpose of certification, which is to obtain the definite obligation of the bank to honor a definite instrument. Subsection (A)(3)(c) accordingly provides that such language is not sufficient to impose on the holder in due course the warranty of no material alteration where the holder took the draft after the acceptance and presumably in reliance on it.

Subsection (A)(3)(d) exempts a holder in due course from the warranty of no material alteration to the acceptor of a draft with respect to an alteration made after the acceptance. A drawee accepting a draft has an opportunity of ascertaining the form and particularly the amount of the draft accepted. If, thereafter, the draft is materially altered and is thereupon presented for payment to the acceptor, the acceptor has the necessary information in its records to verify the form and particularly the amount of the draft. If in spite of this available information it pays the draft, there is as much reason to leave the responsibility for such payment upon the acceptor (as against a holder in due course acting in good faith) as there is in the case of a maker or drawer paying a materially altered note or draft.

6. Under § 3-201 parties taking from or holding under a holder in due course, within the limits of that section, will have the same rights under § 3-417(A) as a holder in due course. Of course such parties claiming under a holder in

due course must act in good faith and be free from fraud, illegality and notice as provided in § 3-201.

7. The liabilities imposed by Subsection (B) in favor of the immediate transferee apply to all present who transfer an instrument for consideration whether or not the transfer is accompanied by indorsement. Any consideration sufficient to support a simple contract will support those warranties.

8. Subsection (B) extends the warranties of any indorser beyond the immediate transferee in all cases. Where there is an indorsement the warranty runs with the instrument and the remote holder may sue the indorser-warrantor directly and thus avoid a multiplicity of suits which might be interrupted by the insolvency of an intermediate transferor. The language of Subsection (B)(1) covers the case of the agent who transfers for another.

9. Subsection (B)(4) resolves a conflict in the decisions as to whether the transferor warrants that there are no defenses to the instrument good against him. The position taken is that the buyer does not undertake to buy an instrument incapable of enforcement, and that in the absence of contrary understanding the warranty is implied. Even where the buyer takes as a holder in due course who will cut off the defense, he still does not undertake to buy a lawsuit with the necessity of proving his status. Subsection (C) however provides that an indorsement "without recourse" limits the (B)(4) warranty to one that the indorser has no knowledge of such defenses. With this exception the liabilities of a "without recourse" indorser under this section are the same as those of any other transferor. Under § 3-414 "without recourse" in an indorsement is effective to disclaim the general contract of the indorser stated in that section.

10. The transferor does not warrant against difficulties of collection, apart from defenses, or against impairment of the credit of the obligor or even his insolvency in the commercial sense. The buyer is expected to determine such questions for himself before he takes the obligation. If insolvency proceedings as defined in this Code (§ 1-201) have been instituted against the party who is expected to pay and the transferor knows it, the concealment of that fact amounts to a fraud upon the buyer, and the warranty against knowledge of such proceedings is provided accordingly.

11. Subsection (D) applies only to a selling agent, as distinguished from an agent for collection. It follows the rule generally accepted that an agent who makes the disclosure warrants his good faith and authority and may not by contract assume a lesser warranty.

Cross References

Sections 3-404, 3-405, 3-406 and 3-414.

Point 2: Section 3-418.

Point 4: Sections 3-201, 3-302 and 3-418.

Point 9: Section 3-414.

Point 10: Section 1-201.

Definitional Cross References

"Acceptance". Section 3-410.

"Alteration". Section 3-407.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Genuine". Section 1-201.

"Good faith". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Party". Section 1-201.

"Person". Section 1-201.

"Signature". Section 3-401.

"Term". Section 1-201.

§ 3-418. Finality of payment or acceptance

Except for recovery of bank payments as provided in other applicable law as provided under 7 N.N.C. § 204 and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. The phrase "other applicable law" was substituted for a reference to Uniform Commercial Code Article 4, which has not been adopted by the Navajo Nation. Rights of parties which would be governed under Article 4 are governed by Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. This section follows the common law rule under which a drawee who accepts or pays an instrument on which the signature of the drawer is forged is bound on his acceptance and cannot recover back his payment. The traditional justification for the result is that the drawee is in a superior position to detect a forgery because he has the maker's signature and is expected to know and compare it; a less fictional rationalization is that it is highly desirable to end the transaction on an instrument when it is paid rather than reopen and tip set a series of commercial transactions at a later date when the forgery is discovered.

The rule as stated in the section is not limited to drawees, but applies equally to the maker of a note or to any other party who pays an instrument.

2. The section follows the same rule regarding the payment of overdrafts, or any other payment made in error as to the state of the drawer's account. The same argument for finality applies, with the additional reason that the drawee is responsible for knowing the state of the account before he accepts or pays.

3. The section makes payment or acceptance final only in favor of a holder in due course, or a transferee who has the rights of a holder in due course under the shelter principle. If no value has been given for the instrument, the holder loses nothing by the recovery of the payment or the avoidance of the acceptance, and is not entitled to profit at the expense of the drawee; and if he has given only an executory promise or credit he is not compelled to perform it after the forgery or other reason for recovery is discovered. If he has taken the instrument in bad faith or with notice he has no equities as against the drawee.

4. The section rejects decisions permitting recovery on the basis of mere negligence of the holder in taking the instrument. If such negligence amounts to a lack of good faith as defined in this Code (§ 1-201) or to notice under the rules (§ 3-304) relating to notice to a purchaser of an instrument, the holder is not a holder in due course and is not protected; but otherwise the holder's negligence does not affect the finality of the payment or acceptance.

5. This section is to be read together with the preceding section, which states the warranties given by the person obtaining acceptance or payment. It is also limited by any applicable bank collection provisions permitting a payor bank to recover a payment improperly paid if it returns in a timely manner the item or sends notice of dishonor. All states have such a provision arising under Article 4. The Navajo Nation has not adopted Article 4 of the Uniform Commercial Code. The rights of parties which would be governed under Article 4 are governed by Navajo law pursuant to 7 N.N.C. § 204. The rights of a banker under such provisions are sharply limited in time, and terminate in any case when a bank has made final payment.

Cross References

Sections 3-302, 3-303 and 3-417.

Point 2: Section 3-201(A).

Point 4: Sections 1-201, 3-302 and 3-304.

Point 5: Section 3-417.

Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1–201.

"Holder in due course". Section 3–302.

"Instrument". Section 3–102.

"Presentment". Section 3–504.

§ 3–419. Conversion of instrument: innocent representative

A. An instrument is converted when:

1. A drawee to whom it is delivered for acceptance refuses to return it on demand; or

2. Any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

3. It is paid on a forged indorsement.

B. In an action against a drawee under Subsection (A) the measure of the drawee's liability is the face amount of the instrument. In any other action under Subsection (A) the measure of liability is presumed to be the face amount of the instrument.

C. Subject to the provisions of this Code concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

D. An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (§§ 3–205 and 3–206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–419 of the Uniform Commercial Code adopted by the states.

Commentary. 1. A negotiable instrument is the property of the holder. It is a mercantile specialty which embodies rights against other parties, and a thing of value. This section adopts the generally recognized rule that a refusal to return it on demand is a conversion. The provision is not limited to drafts presented for acceptance, but extends to any instrument presented for payment, including a note presented to the maker. The action is not on the instrument, but in tort for its conversion.

The detention of an instrument voluntarily delivered is not wrongful unless and until there is demand for its return. Demand for a return at a particular time may, however, be made at the time of delivery; or it may be implied under the circumstances or understood as a matter of custom. If the holder is to call for the instrument and fails to do so, he is to be regarded as extending the time. "Refuses" is meant to cover any intentional failure to return the instrument, including its intentional destruction. It does not cover a negligent loss or destruction, or any other unintentional failure to return. In such a case the party may be liable in tort for any damage sustained as a result of his negligence, but he is not liable as a converter under this section.

2. Subsection (A)(3) adopts the prevailing view of decisions holding that payment on a forged indorsement is not an acceptance, but that even though made in good faith it is an exercise of dominion and control over the instrument inconsistent with the rights of the owner, and results in liability for conversion.

3. Subsection (B) adopts the rule generally applied to the conversion of negotiable instruments, that the obligation of any party on the instrument is presumed, in the sense that the term is defined in this Code (§ 1-201), to be worth its face value. Evidence is admissible to show that for any reason such as insolvency or the existence of a defense the obligation is in fact worth less, or even that it is without value. In the case of the drawee, however, the presumption is replaced by a rule of absolute liability.

4. Subsection (C) is intended to adopt the rule of decisions which have held that a representative, such as a broker or a depositary bank, who deals with a negotiable instrument for his principal in good faith is not liable to the true owner for conversion of the instrument or otherwise, except that he may be compelled to turn over to the true owner the instrument itself or any proceeds of the instrument remaining in his hands. The provisions of Subsection (C) are, however, subject to the provisions of this Code concerning restrictive indorsements (§§ 3-205, 3-206 and related sections).

5. The provisions of this section are not intended to eliminate any liability on warranties of presentment and transfer (§ 3-417). Thus a collecting bank might be liable to a drawee bank which had been subject to liability under this section, even though the collecting bank might not be liable directly to the owner of the instrument.

Cross References

Sections 3-409, 3-410, 3-411 and 3-603.

Point 3: Section 1-201.

Point 4: Sections 1-201, 3-205 and 3-206.

Point 5: Section 3-417.

Definitional Cross References

"Acceptance". Section 3-410.

"Action". Section 1-201.

"Bank". Section 1-201.

"Collecting bank". Section 3-102.

"Good faith". Section 1-201.

"Instrument". Section 3-102.

"Intermediary bank". Section 3-102.

"On demand". Section 3-108.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Representative". Section 1-201.

Part 5. Presentment, Notice of Dishonor and Protest

§ 3-501. When presentment, notice of dishonor and protest necessary or permissible

A. Unless excused (§ 3-511) presentment is necessary to charge secondary parties as follows:

1. Presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may at his option present for acceptance any other draft payable at a stated date;

2. Presentment for payment is necessary to charge any indorser;

3. In the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in § 3-502(A)(2).

B. Unless excused (§ 3-511):

1. Notice of any dishonor is necessary to charge any indorser;

2. In the case of any drawer, the acceptor of a draft payable at bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor or maker only as stated in § 3-502(A)(2).

C. Unless excused (§ 3-511) protest of any dishonor is necessary to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states, territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.

D. Notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge who has indorsed an instrument after maturity.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-501 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Part 5 assembles in one place all provisions as to when any such proceeding is necessary. It eliminates some of the requirements and simplifies others. The effect of unexcused delay in any such proceeding as a discharge is covered by the next section, and the sections following prescribe the details of the proceedings.

2. The words "necessary to charge" mean that the necessary proceeding is a condition precedent to any right of action against the drawer or indorser. He is not liable and cannot be sued without the proceedings, however long delayed. Under some circumstances delay is excused. If it is not excused it may operate as a discharge under the next section. Under some circumstances the proceeding may be entirely excused and the drawer or indorser is then liable as if the proceeding had been duly taken. Section 3-511 states the circumstances under which delay may be excused or the proceeding entirely excused.

3. The last sentence of the Subsection states the rule of the decisions that the holder may at his option present any time draft for acceptance, and is not required to wait until the due date to know whether the drawee will accept it; but that if he does make presentment and acceptance is refused, he must give notice of dishonor. There is not similar right to present for acceptance a draft payable on demand, since a demand draft entitles the holder to immediate payment but not to acceptance.

4. Drawers of drafts other than checks are not wholly discharged by failure to make due presentment but, like drawers of checks, are discharged only as they may have suffered loss as provided in § 3-502(A)(2). Subsection (A)(3) applies the check rule to such makers and acceptors of domicile paper and the result in the cases referred to in the preceding sentence is reversed. Under this section presentment for payment is not necessary to charge primary parties (makers and acceptors of undomiciled paper).

5. Under Subsection (B) the rules as to necessity of notice of dishonor run parallel with the rules as to necessity of presentment stated in Subsection (A).

6. Subsection (C) eliminates the requirement of protest except upon dishonor of a draft which on its face appears to be either drawn or payable outside of the states, territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico. The requirement is left as to such international drafts because it is generally required by foreign law, which this article cannot affect. The formalities of protest are covered by § 3-509 on protest, and substitutes for protest as proof of dishonor are provided for in § 3-510 on evidence of dishonor and of notice.

This provision retains the rule permitting the holder at his option to make protest of any dishonor of any other instrument. Even where not required protest may have definite convenience where process does not run to another state and the taking of depositions is a slow and expensive matter. Even where the instrument is drawn and payable entirely within a state there maybe convenience in saving the trip of a witness from Buffalo to New York to testify to dishonor, where the substitute evidence of dishonor and notice of dishonor cannot be relied on. Either required or optional protest is presumptive evidence of dishonor (§ 3-510).

7. Subsection (D) provides that as to indorsers after maturity neither presentment nor notice of dishonor nor protest is necessary. Like primary parties therefore they will remain liable on the instrument for the period of the applicable statute of limitations.

Cross References

Point 1: Sections 3-502 through 3-508.

Point 2: Sections 3-413, 3-414 and 3-511.

Point 3: Sections 3-413, 3-414 and 3-511.

Point 4: Section 3-502.

Point 6: Sections 3-413, 3-414, 3-509, 3-510 and 3-511.

Point 8: Section 3-108.

Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Certificate of Deposit". Section 3-104.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Note". Section 3–104.

"Notice of dishonor". Section 3–508.

"Party". Section 1–201.

"Presentment". Section 3–504.

"Protest". Section 3–509.

"Secondary party". Section 3–102.

"Signature". Section 3–401.

Special Plain Language Comment

When commercial paper matures, the maker's liability on a note and the acceptor's liability on a draft become final. In order to charge a party who is secondarily liable, such as an indorser or an accommodation party, the paper must be presented for acceptance or payment. In some cases, if after the paper is presented and after it is not paid or accepted by the party primarily obligated to do so, (which is called "dishonor"), the presenting party must provide notice of the dishonor in order to charge indorsers or drawers. Protest is a certificate stating that a dishonor has occurred.

Presentment, notice of dishonor and protest can all be waived by agreement, including an agreement in the note or draft, (see § 3–511).

§ 3–502. Unexcused delay; discharge

A. Where without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due:

1. Any indorser is discharged; and

2. Any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor or maker is not otherwise discharged.

B. Where without excuse a necessary protest is delayed beyond the time when it is due any drawer or indorser is discharged.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–

502 of the Uniform Commercial Code adopted by the states.

Commentary. This section is the complement of the preceding section.

1. The circumstances under which presentment or notice of dishonor or protest or delay therein are excused are stated in § 3—511. When not excused delay operates as a discharge as provided in this section.

2. Subsection (A)(2) applies to any drawer, as well as to the makers and acceptors of drafts and notes payable at a bank. The rule provides for discharge only where the drawer of a check has sustained loss through the delay. This section expressly limits the rule to loss sustained through insolvency of the drawee or payor.

The purpose of the rule is to avoid hardship upon the holder through complete discharge, and unjust enrichment of the drawer or other party who normally has received goods or other consideration for the issue of the instrument. He is "deprived of funds" in any case where bank failure or other insolvency of the drawee or payor has prevented him from receiving the benefit of funds which would have paid the instrument if it had been duly presented.

Subsection (A)(2) states a right to discharge liability by written assignment to the holder of rights against the drawee or payor as to the funds which cover the particular instrument. The assignment is intended to give the holder an effective right to claim against the drawee or payor.

3. Subsection (B) states that any unexcused delay of a required protest is a complete discharge of all drawers and indorsers.

Cross References

Point 1: Section 3–511(A).

Point 2: Section 3–501.

Point 3: Section 3–509.

Definitional Cross References

"Bank". Section 1–201.

"Draft". Section 3–104.

"Holder". Section 201.

"Insolvent". Section 1–201.

"Instrument". Section 3–102.

"Note". Section 3–104.

"Notice of dishonor". Section 3–508.

"Presentment". Section 3–504.

"Protest". Section 3-509.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Written". Section 1-201.

§ 3-503. Time of presentment

A. Unless a different time is expressed in the instrument the time for any presentment is determined as follows:

1. Where an instrument is payable at or a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable;

2. Where an instrument is payable after sight it must either be presented for acceptance or negotiated within a reasonable time after date or issue whichever is later;

3. Where an instrument shows the date on which it is payable, presentment for payment is due on that date;

4. Where an instrument is accelerated, presentment for payment is due within a reasonable time after the acceleration;

5. With respect to the liability of any secondary party, presentment for acceptance or payment of any other instrument is due within a reasonable time after such party becomes liable thereon.

B. A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

1. With respect to the liability of the drawer, 30 days after date or issue whichever is later; and

2. With respect to the liability of an indorser, seven days after his indorsement.

C. Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.

D. Presentment to be sufficient must be made at a reasonable hour, and if at a bank, during its banking day.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-503 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section states in one place all of the rules applicable to the time of presentment. Excused delay is covered by § 3-511 on waiver and excuse, and the effect of unexcused delay by § 3-502 on discharge.

2. Subsection (A) contains provisions stating the commercial understanding as to the presentment of instruments payable after sight, and of accelerated paper.

3. Subsection (B) provides specific time limits which are presumed, as that term is defined in this Act (§ 1-201), to be reasonable for uncertified checks drawn and payable within the continental limits of the United States. Court decisions which set a time limit of one day after the receipt of the instrument proved to be too short a time for some holders, such as the department store or other large business clearing many checks through their books shortly after the first of the month, as well as the farmer or other individual at a distance from a bank.

The time limit provided differs as to drawer and indorser. The drawer, who has himself issued the check and normally expects to have it paid and charged to this account is reasonably required to stand behind it for a longer period, especially in view of the protection now provided by Federal Deposit Insurance. The 30 days specified coincides with the time after which a purchaser has notice that a check has become stale (§ 3-304(C)(3)). The indorser, who has normally merely received the check and passed it on, and does not expect to have to pay it, is entitled to know more promptly whether it is to be dishonored, in order that he may have recourse against the person with whom he has dealt.

4. Subsection (C) is intended to make allowance for the increasing practice of closing banks or businesses on Saturday or other days of the week. It is not intended to mean that any drawee or obligor can avoid dishonor of instruments by extended closing.

Cross References

Point 1: Sections 3-501, 3-502, 3-505, 3-506 and 3-511.

Point 3: Sections 1-201 and 3-304(C)(3).

Definitional Cross References

"Acceptance". Section 3-410.

"Bank" Section 1-201.

"Banking day". Section 3-102.

"Check". Section 3-104.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

"Presumed". Section 1-201.

"Reasonable time". Section 1-204.

"Secondary party". Section 3—102.

"Usage of trade". Section 1-205.

§ 3-504. How presentment made

A. Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.

B. Presentment may be made:

1. By mail, in which event the time of presentment is determined by the time of receipt of the mail; or

2. Through a clearing house; or

3. At the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or payor anyone authorized to act for him is present or accessible at such place presentment is excused.

C. It may be made:

1. To any one of two or more makers, acceptors, drawees or other payors; or

2. To any person who has authority to make or refuse the acceptance or payment.

D. A draft accepted or a note made payable at a bank in the United States must be presented at such bank.

E. In the cases described below presentment may be made in the manner and with the result stated below:

1. Unless otherwise instructed, a collecting bank may present an item not payable by, through or at a bank by sending to the party to accept or pay a written notice that the bank holds the item for acceptance or payment. The notice must be sent in. time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under § 3-505 by the close of the bank's next banking day after it knows of the requirement.

2. Where presentment is made by notice and neither honor nor request for compliance with a requirement under § 3-505 is received by the close of business on the day after maturity or in the case of demand items, by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any secondary party by sending him notice of facts.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-504 of the Uniform Commercial Code adopted by the states, except that the manner of presentment for banks normally found in § 4-210 of the Official Text of the Uniform Commercial Code has been included in Subsection (E) because the Navajo Nation has not yet adopted Article 4 of the Uniform Commercial Code.

Commentary. 1. This section is intended to simplify the rules as to how presentment is made and to make it clear that any demand upon the party to pay is a presentment no matter where or how. Exhibition of the instrument and similar technical requirements are not required unless insisted upon by the party to pay (§ 3-505).

2. Subsection (B)(1) authorizes presentment by mail directly to the obligor. The presentment is sufficient and the instrument is dishonored by non-acceptance or non-payment even though the party making presentment may be liable for improper collection methods. "Through a clearing house" means that presentment is not made when the demand reaches the clearing house, but when it reaches the obligor. Subsection (E) should also be consulted for the methods of presenting which may properly be employed by a collecting bank.

3. Subsection (C)(1) states that the holder is entitled to expect that any one of the named parties will pay or accept, and should not be required to go to the trouble and expense of making separate presentment to a number of them.

4. Section 3-412 provides that an acceptance made payable at a bank in the United States does not vary the draft. Subsection (D) of this section makes it clear that a draft so accepted must be presented at the bank so designated. The same rule is applied to notes made payable at a bank. The rule of the Subsection is in conformity with the provisions of § 3-501 on presentment and § 3-502 on the effect of failure to make presentment with reference to domiciled paper.

5. Codifies a practice extensively followed in presentation of trade acceptances and documentary and other drafts drawn on non-bank payors. It imposes a duty on the payor to respond to the notice of the item if the item is not to be considered dishonored. Notice of such a dishonor charges parties secondarily liable.

6. A drawee not receiving notice is not, of course, liable to the drawer for wrongful dishonor.

7. A bank so presenting an instrument must be sufficiently close to the drawee to be able to exhibit the instrument on the day it is requested to do so or the next business day at the latest.

Cross References

Point 1: Sections 3-501, 3-502, 3-505 and 3-511.

Point 5: Sections 3-412, 3-502 and 3-502.

Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Clearing house". Section 3-102.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Party". Section 1-201.

"Person". Section 1-201.

§ 3-505. Rights of party to whom presentment is made

A. The party to whom presentment is made may without dishonor require:

1. Exhibition of the instrument; and

2. Reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and

3. That the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and

4. A signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

B. Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-505 of the Uniform Commercial Code adopted by the states.

Commentary. 1. In the first instance a mere demand for acceptance of payment is sufficient presentment, and if the payment is unqualifiedly refused nothing more is required. The party to whom presentment is made may, however, require exhibition of the instrument, its production at the proper place, identification of the party making presentment, and a signed receipt on the instrument, or its surrender on full payment. Failure to comply with any such requirement invalidates the presentment and means that the instrument is not dishonored. The time for presentment is, however, extended to give the person presenting a reasonable opportunity to comply with the requirements.

2. "Reasonable identification" means identification reasonable under all the circumstances. If the party on whom demand is made knows the person making presentment, no requirement of identification is reasonable, while if the circumstances are suspicious a great deal may be required. The requirement applies whether the instrument presented is payable to order or to bearer.

Cross References

Point 1: Sections 3-504 and 3-506.

Definitional Cross References

"Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

"Reasonable time". Section 1-204.

"Signed". Section 1-201.

§ 3-506. Time allowed for acceptance or payment

A. Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.

B. Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination to determine whether it is properly payable, but payment must be made in any event before the close of business on the day of presentment.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-506 of the Uniform Commercial Code adopted by the states.

Commentary. This section does not purport to cover drafts presented under a letter of credit.

In the law of the states § 4-301 on deferred posting governs the right of a payor bank to recover tentative settlements made by it on the day an item is received. That right does not survive final payment. Article 4 of the Uniform Commercial Code has not been adopted by the Navajo Nation. Rights of parties which would be governed under Article 4 are governed pursuant to Navajo law 7 N.N.C. § 204.

Definitional Cross References

"Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Documentary draft". Sections 3-102.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Presentment". Section 3-504.

§ 3-507. Dishonor; holder's right of recourse; term allowing representment

A. An instrument is dishonored when:

1. A necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline (§ 3-102); or

2. Presentment is excused and the instrument is not duly accepted or paid.

B. Subject to any necessary notice of dishonor and protest, the holder has upon dishonor an immediate right of recourse against the drawers and indorsers.

C. Return of an instrument for lack of proper indorsement is not dishonor.

D. A term in a draft or an indorsement thereof allowing a stated time for representment in the event of any dishonor of the draft by non-acceptance if a time draft or by non-payment if a sight draft gives the holder as against any secondary party bound by the term an option to waive the dishonor without affecting the liability of the secondary party and he may present again up to the end of the stated time.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. A definition of the midnight deadline has been included in § 3-102 because Article 4 of the Uniform Commercial Code has not been adopted by the Navajo Nation.

Commentary. 1. The language of the section conforms to the provisions of the preceding section as to the time allowed for acceptance or payment.

2. Subsection (C) states the general banking and commercial understanding that the time within which a payor bank must return items, and the methods of returning, under § 3-411(C) a bank may certify an item so returned.

Cross References

Point 1: Sections 3-503, 3-504, 3-505 and 3-508.

Point 2: Section 3-411.

Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Presentment". Section 3–504.

"Protest". Section 3–509.

"Right". Section 1–201.

"Seasonably". Section 1–204.

"Secondary party". Section 3–102.

"Term". Section 1–201.

§ 3–508. Notice of dishonor

A. Notice of dishonor maybe given to any person who may be liable on the instrument by or on behalf of the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument. In addition an agent or bank in whose hands the instrument is dishonored may give notice to his principal or customer or to another agent or bank from which the instrument was received.

B. Any necessary notice must be given by a bank before its midnight deadline and by any other person before midnight of the third business day after dishonor or receipt of notice of dishonor.

C. Notice may be given in any reasonable manner. It may be oral or written and in any terms which identify the instrument and state that it has been dishonored. A misdescription which does not mislead the party notified does not vitiate the notice. Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient.

D. Written notice is given when sent although it is not received.

E. Notice to one partner is notice to each although the firm has been dissolved.

F. When any party is in insolvency proceedings instituted after the issue of the instrument notice maybe given either to the party or to the representative of his estate.

G. When any party is dead or incompetent notice may be sent to his last known address or given to his personal representative.

H. Notice operates for the benefit of all parties who have rights on the instrument against the party notified.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-508 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Notice is normally given by the holder or by an indorser who has himself received notice. Subsection (A) is intended to encourage and facilitate notice of dishonor by permitting any party who may be compelled to pay the instrument to notify any party who maybe liable on it. Thus an indorser may notify another indorser who is not liable to the one who gives notice, even when the latter has not received notice from any other party to the instrument.

2. Except as to collecting banks, as to which Article 4 controls, the time within which necessary notice must be given is extended to three (3) days after dishonor or receipt of notice from another party. The Navajo Nation has not adopted Article 4 of the Uniform Commercial Code. The rights of parties which would be governed under that Article are governed pursuant to Navajo law pursuant to 7 N.N.C. § 204. This period is intended to give the party a margin of time within which to ascertain what is required of him and get out an ordinary business letter.

3. Subsection (C) approves the bank practice of returning the instrument bearing a stamp, ticket or other writing, or a notice of debit of the account, as sufficient notice.

4. Subsection (G) permits notice to be sent to the last known address of a party who is dead or incompetent rather than to his personal representative. The provision is intended to save time, as the name of the personal representative often cannot easily be ascertained, and mail addressed to the original party will reach the representative.

Cross References

Sections 3-501, 3-507 and 3-511.

Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Dishonor". Section 3-507.

"Holder". Section 1-201.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Notifies". Section 1-201.

"Party". Section 1-201.

"Persons". Section 1–201.

"Representatives". Section 1–201.

"Rights". Section 1–201.

"Send". Section 1–201.

"Written" and "writing". Section 1–201.

§ 3–509. Protest; noting for protest

A. A protest is a certificate of dishonor made under the hand and seal of a United States consul or vice-consul or a notary public or other person authorized to verify dishonor by the law of the place where dishonor occurs. It maybe made upon information satisfactory to such person.

B. The protest must identify the instrument and certify either that due presentment has been made or the reason why it is excused and that the instrument has been dishonored by non-acceptance or nonpayment.

C. The protest may also certify that notice of dishonor has been given to all parties or to specified parties.

D. Subject to Subsection (E) any necessary protest is due by the time that notice of dishonor is due.

E. If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time thereafter as of the date of the noting.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–509 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Protest is not necessary except on drafts drawn or payable outside of the United States. Section 3–501(C) also permits the holder at his option to make protest on dishonor of any other instrument. This section is intended to simplify either necessary or optional protest when it is made.

2. "Protest" has been used to mean the act of making protest, and sometimes loosely to refer to the entire process of presentment, notice of dishonor and protest. In this article it is given its original, technical meaning, that of the official certificate of dishonor.

3. Protest need not be made at the place of dishonor. Any necessary delay in finding the proper officer to make protest is excused under § 3–511.

4. "Information satisfactory to such person" does away with the requirement

occasionally stated, that the person making protest must certify as of his own knowledge. The requirement has been more honored in the breach than in the observance, and in practice protest has been made upon hearsay which the officer regards as reliable, upon the admission of the person who has dishonored, or at most upon re-presentment, which is only indirect proof of the original dishonor. There is seldom any possible motive for false protest, and the basis on which it is made is never questioned. Subsection (A) leaves to the certifying officer the responsibility for determining whether he has satisfactory information. The provision is not intended to affect any personal liability of the officer for making a false certificate.

5. The protest need not be in any particular form, so long as it certifies the matters stated in Subsection (B). It need not be annexed to the instrument, and may be forwarded separately, but annexation may identify the instrument. If the instrument is lost, destroyed, or wrongfully withheld, protest is still sufficient if it identifies the instrument; but the owner must prove his rights as in any action under this article on a lost, destroyed or stolen instrument (§ 3-804).

6. Subsection (C) recognizes the practice of including in the protest a certification that notice of dishonor has been given to all parties or to specified parties. The next section makes such a certification presumptive evidence that the notice has been given.

7. Protest is normally forwarded with notice of dishonor. Subsection (D) extends the time for making a necessary protest to coincide with the time for giving notice of dishonor. Any delay due to circumstances beyond the holder's control is excused under § 3-511 on waiver or excuse. Any protest which is not necessary but merely optional with the holder may be made at any time before it is used as evidence.

8. Subsection (E) retains from the original Section 155 the provision permitting the officer to note the protest and extend it formally later.

Cross References

Point 1: Sections 3-501(C) and 3-511.

Point 3: Section 3-511(A).

Point 5: Section 3-804.

Point 6: Section 3-510(A)

Point 7: Sections 3-508(B) and 3-511(A).

Definitional Cross References

"Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

§ 3-510. Evidence of dishonor and notice of dishonor

The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

A. A document regular in form as provided in the preceding section which purports to be a protest;

B. The purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

C. Any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is not evidence of who made the entry.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-510 of the Uniform commercial Code adopted by the states.

Commentary. 1. Subsection (A) states the generally accepted rule that a protest is not only admissible as evidence, but creates a presumption, as that term is defined in this Code (§ 1-201), of the dishonor which it certifies. The rule is extended to include the giving of any notice of dishonor certified by the protest. The provision also relieves the holder of the necessity of proving that a document regular in form which purports to be a protest is authentic, or that the person making it was qualified. Nothing in the provision is intended to prevent the obligor from overthrowing the presumption by evidence that there was in fact no dishonor, that notice was not given, or that the protest is not authentic or not made by a proper officer.

2. Subsection (B) recognizes as the full equivalent of protest the stamp, ticket or other writing of the drawee, payor or presenting bank. The drawee's statement that payment is refused on account of insufficient funds always has been commercially acceptable as full proof of dishonor. It should be satisfactory evidence in any court. It is therefore made admissible, and creates a presumption of dishonor. The provision applies only where the stamp or writing states reasons for refusal which are consistent with dishonor. Thus the following reasons for refusal are not evidence of dishonor, but of justifiable refusal to pay or accept:

— Indorsement missing

— Signature missing

— Signature illegible

— Forgery

— Payee altered

— Date altered

— Post dated

— Not on us

On the other hand the following reasons are satisfactory evidence of dishonor, consistent with due presentment, and are within this provision:

— Not sufficient funds

— Account garnisheed

— No account

— Payment stopped

3. Subsection (C) recognizes as the full equivalent of protest any books or records of the drawee, payor bank or any collecting bank kept in its usual course of business, even though there is not evidence of who made the entries. The provision, as well as that of Subsection (B), rests upon the inherent improbability that bank records or those of the drawee, will show any dishonor which has not in fact occurred, or that the holder will attempt to proceed on the basis of dishonor if he could in fact have obtained payment.

Cross References

Sections 3-501 and 3-508.

Point 1: Section 1-201.

Definitional Cross References

"Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Presumption". Section 1-201.

"Protest". Section 3-509.

"Writing". Section 1-201.

§ 3-511. Waived or excused presentment, protest or notice of dishonor or delay therein

A. Delay in presentment, protest or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.

B. Presentment or notice or protest as the case may be is entirely excused when:

1. The party to be charged has waived it expressly or by implication either before or after it is due; or

2. Such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or

3. By reasonable diligence the presentment or protest cannot be made or the notice given.

C. Presentment is also entirely excused when:

1. The maker, acceptor or drawee of any instrument except a documentary draft is dead or in insolvency proceedings instituted after the issue of the instrument; or

2. Acceptance or payment is refused but not for want of proper presentment.

D. Where a draft has been dishonored by non-acceptance a later presentment for payment and any notice of dishonor and protest for non-payment are excused unless in the meantime the instrument has been accepted.

E. A waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required.

F. Where a waiver of presentment or notice or protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-511 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Delay in making presentment either for payment or for acceptance, in giving notice of dishonor or in making protest is excused when the party has acted with reasonable diligence and the delay is not his fault.

This is true where an instrument has been accelerated without his knowledge, or demand has been made by a prior holder immediately before his purchase. It is true under any other circumstance where the delay is beyond his control.

2. The waiver may be express or implied, oral or written, and before or after the proceeding waived is due. It may be, and often is, a term of the instrument when it is issued.

3. A party who has no right to require or reason to expect that the instrument will be honored is not entitled to presentment, notice or protest. This is of course true where he has himself dishonored the instrument or has countermanded payment. It is equally true, for example, where he is an accommodated party and has himself broken the accommodation agreement.

4. The excuse is established only by proof that reasonable diligence has been exercised without success, or that reasonable diligence would in any case have been unsuccessful.

5. Subsection (C)(1) excuses presentment in situations where immediate payment or acceptance is impossible or so unlikely that the holder cannot reasonably be expected to make presentment. He is permitted instead to have his immediate recourse upon the drawer or indorser, and let the latter file any necessary claim in probate or insolvency proceedings. The exception for the documentary draft is to preserve any profit on the resale of goods for the creditors of the drawee if his representative can find the funds to pay.

6. Subsection (C)(2) includes any case where payment or acceptance is definitely refused and the refusal is not on the ground that there has been no proper presentment. The purpose of presentment is to determine whether or not the maker, acceptor or drawee will pay or accept, and when that question is clearly determined the holder is not required to go through a useless ceremony. The provision applies to a definite refusal stating no reasons.

Cross References

Sections 3-501, 3-502, 3-503, 3-507 and 3-509.

Definitional Cross References

"Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Right". Section 1-201.

Part 6. Discharge

§ 3-601. Discharge of parties

A. The extent of the discharge of any party from liability on an instrument is governed by the sections on:

1. Payment or satisfaction (§ 3-603); or

2. Tender of payment (§ 3-604); or

3. Cancellation or renunciation (§ 3-605); or

4. Impairment of right of recourse or of collateral (§ 3-606); or

5. Reacquisition of the instrument by a prior party (§ 3-208); or

6. Fraudulent and material alteration (§ 3-407); or

7. Certification of a check (§ 3-411); or

8. Acceptance varying a draft (§ 3-412); or

9. Unexcused delay in presentment or notice of dishonor or protest (§ 3-502).

B. Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money.

C. The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument:

1. Reacquires the instrument in his own right; or

2. Is discharged under any provision of this article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral (§ 3-606).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-601 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) contains an index referring to all of the sections of this article which provide for the discharge of any party. The list is exclusive so far as the provisions of this article are concerned, but it is not intended to prevent or affect any discharge arising apart from this Code, as for example a discharge in bankruptcy or a statutory provision for discharge if the instrument is negotiated in a gaming transaction.

2. A negotiable instrument is in itself merely a piece of paper bearing a writing, and strictly speaking is incapable of being discharged. It is the parties who may be discharged from liability on their contracts on the instrument. This section distinguishes between the discharge of a single party and the discharge of all parties.

So far as the discharge of any one party is concerned a negotiable instrument differs from any other contract only in the special rules arising out of its character to which Subsection (A)(1)-(9) are an index, and in the effect of the discharge against a subsequent holder in due course (§ 3-602). Subsection (B) specifically recognizes the possibility of a discharge by agreement.

The discharge of any party is a defense available to that party as provided in sections on rights of those who are and are not holders in due course (§§ 3-305 and 3-306). He has the burden of establishing the defense (§ 3-307).

3. Subsection (C) states a general principle regarding the discharge of all parties from liability on their contracts on the instrument. The principle is that all parties to an instrument are discharged when no party is left with rights against any other party on the paper.

When any party reacquires the instrument in his own right his own liability is discharged; and any intervening party to whom he was liable is also discharged as provided in § 3-208 on reacquisition. When he is left with no right of action against an intervening party and no right of recourse against any prior party, all parties are obviously discharged. The instrument itself is not necessarily extinct, since it may be reissued or renegotiated with a new and further liability; and if it subsequently reaches the hands of a holder in due course without notice of the discharge he may still enforce it as provided in § 3-602 on effect of discharge against a holder in due course.

Under § 3-606 on impairment of recourse or collateral, the discharge of any party discharges those who have a right of recourse against him, except in the case of a release with reservation of rights or a failure to give notice of dishonor. A discharge of one who has himself no right of action or recourse on the instrument may thus discharge all parties. Again the instrument itself is not necessarily extinct, and if it is negotiated to a subsequent holder in due course without notice of the discharge he may enforce it as provided in § 3-602 on effect of discharge against a holder in due course.

4. The language "any party who has himself no right of action or recourse on the instrument" is intended to include accommodation maker or acceptor. Under § 3-415 on accommodation parties, an accommodation maker or acceptor, although he is primarily liable on the instrument in the sense that he is obligated to pay it without recourse upon another, has himself a right of recourse against the accommodated payee; and his reacquisition or discharge leaves the

accommodated party liable to him. The accommodated payee, although he is not primarily liable to others, has no right of action or recourse against the accommodation maker, and his reacquisition or discharge may discharge all parties.

Cross References

Sections 3-406, 3-411, 3-412, 3-509, 3-603, 3-604 and 3-605.

Point 2: Sections 3-305, 3-306, 3-307 and 3-602.

Point 3: Sections 3-208, 3-602 and 3-606.

Point 4: Section 3-415.

Definitional Cross References

"Action". Section 1-201.

"Agreement". Section 1-201.

"Alteration". Section 3-407.

"Certification". Section 3-411.

"Check". Section 3-104.

"Contract". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Money". Section 1-201.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Rights". Section 1-201.

§ 3-602. Effect of discharge against holder in due course

No discharge of any party provided by this article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-602 of the Uniform Commercial Code adopted by the states.

Commentary. The section rests on the principle that any discharge of a party provided under any section of this article is a personal defense of the party, which is cut-off when a subsequent holder in due course takes the instrument without notice of the defense. Thus where an instrument is paid without surrender such a subsequent purchase cuts off the defense. This section applies only to discharges arising under the provisions of this article, and it has no application to any discharge arising apart from it, such as a discharge in bankruptcy.

Under § 3-304(A)(2) on notice to purchaser it is possible for a holder to take the instrument in due course even though he has notice that one or more parties have been discharged, so long as any party remains undischarged. Thus he may take with notice that an indorser of a note has been released, and still be a holder in due course as to the liability of the maker. In that event, the holder in due course is subject to the defense of the discharge of which he had notice when he took the instrument.

Cross References

Sections 3-302, 3-304, 3-305 and 3-601.

Definitional Cross References

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1-201.

§ 3-603. Payment or satisfaction

A. The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This Subsection does not, however, result in the discharge of the liability:

1. Of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

2. Of a party (other than an intermediary bank or a payor bank which is not a depositary bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.

B. Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee (§ 3-201).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-603 of the Uniform Commercial Code adopted by the states.

Commentary. 1. A purchaser with notice of payment at or after maturity cannot be a holder in due course, and therefore is cut off by the section. One who takes without notice of the payment and the maturity should be protected against failure to take up the instrument. The matter is now covered by § 3-602.

2. The practice of payment of a draft "for honor" is obsolete and it is today almost entirely unknown. Therefore, Subsection (B) eliminates any reference to it and provides that any person may pay with the consent of the holder.

3. Payment to the holder discharges the party who makes it from his own liability on the instrument, and a part payment discharges him *pro tanto*. The same is true of any other satisfaction. It adopts as a general principle the position that a payor is not required to obey an order to stop payment received from an indorser. However, this general principle is qualified by the provisions of Subsection (A)(1) and (2) respecting persons who acquire an instrument by theft, or through a restrictive indorsement (§ 3-205). These provisions are thus consistent with § 3-306 covering the rights of one not a holder in due course.

When the party to pay is notified of an adverse claim to the instrument he has normally no means of knowing whether the assertion is true. The "unless" clause of Subsection (B) follows statutes which have been passed in many jurisdictions on adverse claims to bank deposits. The paying party may pay despite notification of the adverse claim unless the adverse claimant supplies indemnity deemed adequate by the paying party or procures the issuance of process restraining payment in an action in which the adverse claimant and the holder of the instrument are both parties. If the paying party chooses to refuse payment and stand suit, even though not indemnified or enjoined, he is free to do so, although, under § 3-306(D) on the rights of one not a holder in due course, except where theft or taking through a restrictive indorsement is alleged the payor must rely on the third party claimant to litigate the issue and may not himself defend on such a ground. His contract is to pay the holder of the instrument, and he performs it by making such payment. Except in cases of theft or restrictive indorsement there is no good reason to put him to inconvenience because of a dispute between two other parties unless he is indemnified or served with appropriate process.

4. Subsection (B) provides that with the consent of the holder payment maybe made by anyone, including a stranger. The same result is reached under § 3-

415(E) on accommodation parties. Upon payment and surrender of the paper the payor succeeds to the rights of the holder, subject to the limitation found in § 3-201 on transfer that one who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

5. Payment discharges the liability of the person making it. It discharges the liability of other parties only as:

A. The discharge of the payor discharges others who have a right of recourse against him under § 3-606; or

B. Reacquisition of the instrument discharges intervening parties under § 3-208 on reacquisition; or

C. The discharge of one who has himself no right of recourse on the instrument discharges all parties under § 3-601 on discharge of parties.

Cross References

Sections 3-604 and 3-606.

Point 1: Section 3-601(C).

Point 3: Sections 3-205 and 3-306(D).

Point 4: Sections 3-201 and 3-415(E).

Point 5: Sections 3-606, 3-208, and 3-601.

Definitional Cross References

"Action". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Order". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

§ 3-604. Tender of payment

A. Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs and attorney's fees.

B. The holder's refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender.

C. Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-604 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Subsection (A) states the generally accepted rule as to the effect of tender.

2. Subsection (B) states that the party discharged is one who has a right of recourse against the party making tender, whether the latter be a prior party or a subsequent one who has been accommodated.

3. Subsection (C) states that if an instrument is payable at any one of two or more specified places, the maker or acceptor must be able and ready to pay at each of them. This Subsection reverses decisions which held that makers and acceptors of notes and drafts payable at a bank were not discharged by failure of a holder to make due presentment of such paper at the designated bank. See § 3-501 on necessity of presentment, § 3-504 on how presentment is made, and § 3-502 on effect of delay in presentment.

Cross References

Section 3-601.

Point 3: Sections 3-501, 3-502 and 3-504.

Definitional Cross References

"Holder". Section 1-201.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Party". Section 1-201.

"Right". Section 1-201.

§ 3-605. Cancellation and renunciation

A. The holder of an instrument may even without consideration discharge any party:

1. In any manner apparent on the face of the instrument or the

indorsement, as by intentionally canceling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or

2. By renouncing his rights by a writing signed and delivered or by surrender of the instrument of the party to be discharged.

B. Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-605 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Cancellation must be done in such a manner as to be apparent on the face of the instrument, and the methods stated, which are supported by the decisions, are exclusive.

2. Subsection (B) is intended to make it clear that the striking of an indorsement, or any other cancellation or renunciation does not affect the title.

Definitional Cross References

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Writing". Section 1-201.

§ 3-606. Impairment of recourse or of collateral

A. The holder discharges any party to the instrument to the extent that without such party's consent the holder:

1. Without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such

person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

2. Unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

B. By express reservation of rights against a party with a right of recourse the holder preserves:

1. All his rights against such party as of the time when the instrument was originally due; and

2. The right of the party to pay the instrument as of that time; and

3. All rights of such party to recourse against others.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-605 of the Uniform Commercial Code adopted by the states.

Commentary. 1. The words "any party to the instrument" provide suretyship defense which are not limited to parties who are "secondarily liable", but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or outside of it, including an accommodation maker or acceptor known to the holder to be so.

2. Consent may be given in advance, and is commonly incorporated in the instrument; or it maybe given afterward. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge.

3. The words "to the knowledge of the holder" exclude the latent surety, as for example the accommodation maker where there is nothing on the instrument to show that he has signed for accommodation and the holder is ignorant of that fact. In such a case the holder is entitled to proceed according to what is shown by the face of the paper or what he otherwise knows, and does not discharge the surety when he acts in ignorance of the relation.

4. This section retains the right of the holder to release one party, or to postpone his time of payment, while expressly reserving rights against others. Subsection (B) states the generally accepted rule as to the effect of such an express reservation of rights.

5. Subsection (A)(2) has been generally recognized as available to indorsers or accommodation parties. As to when a holder's actions in dealing with collateral may be "unjustifiable", the section on rights and duties with respect to collateral in the possession of a secured party (§ 9-207) should be

consulted.

Cross References

Point 5: Section 9–207.

Definitional Cross References

"Agreement". Section 1–201.

"Holder". Section 1–201.

"Instrument". Section 3–102.

"Notice of dishonor". Section 3–508.

"Party". Section 1–201.

"Person". Section 1–201.

"Rights". Section 1–201.

Part 7. Advice of International Sight Draft

§ 3–701. Letter of advice of international sight draft

A. A "letter of advice" is a drawer's communication to the drawee that a described draft has been drawn.

B. Unless otherwise agreed when a bank receives from another bank a letter of advice of an international sight draft the drawee bank may immediately debit the drawer's account and stop the running of interest *pro tanto*. Such a debit and any resulting credit to any account covering outstanding drafts leaves in the drawer full power to stop payment or otherwise dispose of the amount and creates no trust or interest in favor of the holder.

C. Unless otherwise agreed and except where a draft is drawn under a credit issued by the drawee, the drawee of an international sight draft owes the drawer no duty to pay an unadvised draft but if it does so and the draft is genuine, may appropriately debit the drawer's account.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–701 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Checks drawn by one international bank on the account it carries (in currency foreign to itself) in another international bank are still handled under practices which reflect older conditions, but which have a real, continuing reason in the typical, European rule that a bank paying a check in good faith and in ordinary course can charge its depositor's account notwithstanding forgery of a necessary indorsement. To decrease the risk that forgery will prove successful, the practice is to send a letter of advice that a draft has been drawn and will be forthcoming. Subsection (C) recognizes that a drawer who sends no such letter forfeits any rights for improper dishonor, while still permitting the drawee to protect his delinquent drawer's credit.

2. Subsection (B) clarifies for American courts, the meaning of another international practice: that of charging the drawer's account on receipt of the letter of advice. This practice involves no conception of trust or the like and the rule of § 3-409(A), (Draft not an assignment) still applies. The debit has to do with the payment of interest only. The section recognizes the fact.

Cross References

Point 2: Section 3-409(A)

Definitional Cross References

"Account". Section 3-102.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Genuine". Section 1-201.

"Holder". Section 1-201.

Part 8. Miscellaneous

§ 3-801. Drafts in a set

A. Where a draft is drawn in a set of parts, each of which is numbered and expressed to be an order only if no other part has been honored, the whole of the parts constitutes one draft but a taker of any part may become a holder in due course of the draft.

B. Any person who negotiates, indorses or accepts a single part of a draft drawn in a set thereby becomes liable to any holder in due course of that part as if it were the whole set, but as between different holders in due course to whom different parts have been negotiated the holder whose title first accrues has all rights to the draft and its proceeds.

C. As against the drawee the first presented part of a draft drawn in a set is the part entitled to payment, or if a time draft to acceptance and payment. Acceptance of any subsequently presented part renders the drawee liable thereon under Subsection (B). With respect both to a holder and to the drawer payment of a subsequently presented part of a draft payable at sight has the same effect as payment of a check notwithstanding an effective stop order. The drawee of such a part is subrogated to the rights: (1) of any holder in due course thereof against the drawer or any other holder; (2) of the payee or other holder against the drawer either on the items or under the transaction out of which it arose; and (3) of the drawer against the payee or any other holder of this part of the draft with respect to the transaction out of which it arose.

D. Except as otherwise provided in this section, where any part of a draft in a set is discharged by payment or otherwise the whole draft is discharged.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section has been amended to include, in Subsection (C), the rights of subrogation available to the drawer of a draft in parts upon improper acceptance of a subsequently presented part of such a draft which is found on § 4-407 of the Official Text.

Commentary. 1. Drafts in a set customarily contain such language as "Pay _______ this first of exchange (second unpaid)", with equivalent language in the second part. Today a part also commonly bears conspicuous indication of its number. At least the first factor is necessary to notify the holder of his rights, and is therefore necessary in order to make this section apply. Subsection (A) so provides, thus stating in the statute a matter left previously to a commercial practice long uniform but expensive to establish in court.

2. Payment of the part of the draft subsequently presented is improper and the drawee may not charge it to the account of the drawer, but someone has probably been unjustly enriched in the total transaction, at the expense of the drawee. So the drawee is like a bank which has paid a check over an effective stop payment order, an is subrogated to the same rights as a bank would have in that situation.

3. A statement in a draft drawn in a set of parts to the effect that the order is effective only if no other part has been honored does not render the draft non-negotiable as conditional

See § 3-112(A)(7).

Cross References

Point 3: Section 3-112.

Definitional Cross References

"Acceptance". Section 3-410.

"Check". Section 3-104.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Holder in due course". Section 3–302.

"Honor". Section 1–201.

"Person". Section 1–201.

"Rights". Section 1–201.

§ 3–802. Effect of instrument on obligation for which it is given

A. Unless otherwise agreed where an instrument is taken for an underlying obligation:

1. The obligation is *pro tanto* discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

2. In any other case the obligation is suspended *pro tanto* until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.

B. The taking in good faith of a check which is not post-dated does not of itself so extend the time on the original obligation as to discharge a surety.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3–802 of the Uniform Commercial Code adopted by the states.

Commentary. 1. This section is intended to settle conflicts as to the effect of an instrument as payment of the obligation for which it is given.

2. Where a holder procures certification of a check, the drawer is discharged under § 3–411 on check certification. Thereafter the original obligation is regarded as paid, and the holder must look to the certifying bank. The circumstances may indicate a similar intent in other transactions, and the question may be one of fact of the jury. Subsection (A)(1) states a rule discharging the obligation pro tanto when the instrument taken carries the obligation of a bank as drawer, maker or acceptor and there is no recourse on the instrument against the underlying obligor.

3. It is commonly said that a check or other negotiable instrument is "conditional payment". By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation until the instrument is due, but if the instrument is not paid on due presentment the right to sue on the obligation is "revived". Subsection (A)(2) states this result in terms of

suspension of the obligation, which is intended to include suspension of the running of the statute of limitations. On dishonor of the instrument the holder is given his option to sue either on the instrument or on the underlying obligation. If, however, the original obligor has been discharged on the instrument (see § 3-601) he is also discharged on the original obligation.

4. Subsection (B) is intended to remove any implication that a check given in payment of an obligation discharges a surety. The check is taken as a means of immediate payment; the 30-day period for presentment specified in § 3-503 does not affect the surety's liability.

Cross References

Point 2: Sections 1-201, 3-411 and 3-60 1.

Point 4: Section 3-503.

Definitional Cross References

"Action". Section 1-201.

"Bank". Section 1-201.

"Check". Section 3-104.

"Dishonor". Section 3-507.

"Good faith". Section 1-201.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Presentment". Section 3-504.

§ 3-803. Notice to third party

Where a defendant is sued for breach of an obligation for which a third person is answerable over under this article he may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over to him under this article. If the notice states that the person notified may come in and defend and that if the person notified does not do so he will, in any action against him by the person giving the notice, be bound by any determination of fact common to the two litigations, then unless after seasonable receipt of the notice the person notified does come in and defend, he is so bound.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-

803 of the Uniform Commercial Code adopted by the states.

Commentary. The section conforms to the analogous provision in § 2-607. It extends to such liabilities as those arising from forged indorsements even though not "on the instrument", and is intended to make it clear that the notification is not effective until received. In *Hartford Accident & Indemnity Co. v. First Nat. Bank & Trust Co.,* 281 N.Y. 162, 22 N.E.2d 324, 123 A.L.R. 1149 (1939), the common law doctrine of "vouching in" was held inapplicable where the party notified had no direct liability to the party giving the notice. In that case the drawer of a check, sued by the payee whose indorsement had been forged, gave notice to a collecting bank. In a second action the drawee was held liable to the drawer; but in an action by the drawee for judgment over against the collecting bank the determination of fact in the first action was held not conclusive. This section does not disturb this result; the section is limited to cases where the person notified is "answerable over" to the person giving the notice.

Cross References

Section 2-607.

Definitional Cross References

"Action". Section 1-201.

"Defendant". Section 1-201.

"Instrument". Section 3-102.

"Notifies". Section 1-201.

"Person". Section 1-201.

"Right". Section 1-201.

"Seasonably". Section 1-204.

"Written". Section 1-201.

§ 3-804. Lost, destroyed or stolen instruments

The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-804 of the Uniform Commercial Code adopted by the states.

Commentary. This section is intended to provide a method of recovery on instruments which are lost, destroyed or stolen. The plaintiff who claims to be the owner of such an instrument is not a holder as that term is defined in this Code since he is not in possession of the paper, and he does not have the holder's prima facie right to recover under the section on the burden of establishing signatures. He must prove his case. He must establish the terms of the instrument and his ownership, and must account for its absence.

If the claimant testifies falsely, or if the instrument subsequently turns up in the hands of a holder in due course, the obligor may be subjected to double liability. The court is therefore authorized to require security indemnifying the obligor against loss by reason of such possibilities. There may be cases in which so much time has elapsed, or there is so little possible doubt as to the destruction of the instrument and its ownership that there is no good reason to require the security. The requirement is therefore not an absolute one, and the matter is left to the discretion of the court.

Cross References

Sections 1-201 and 3-307.

Definitional Cross References

"Action". Section 1-201.

"Defendant". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Term". Section 1-201.

§ 3-805. Instruments not payable to order or to bearer

This article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 3-805 of the Uniform Commercial Code adopted by the states.

Commentary. This section covers the "non-negotiable instrument". As it has been used by most courts, this term has been a technical one of art. It does not refer to a writing, such as a note containing an express condition, which is not negotiable and is entirely outside of the scope of this article and to be treated as a simple contract. It refers to a particular type of instrument which meets all requirements as to form of a negotiable instrument except that it is not payable to order or to bearer. The typical example is the check reading merely "Pay John Doe".

Such a check is not a negotiable instrument under this article. At the same time it is still a check, a mercantile specialty which differs in many respects from a simple contract. Commercial and banking practice treats it as a check, and a long line of decisions have made it clear that it is subject to the law merchant as distinguished from ordinary contract law. Although the Negotiable Instruments Law was held by its terms not to apply to such "non-negotiable instruments", it has been recognized as a codification and restatement of the law merchant, and has in fact been applied to them by analogy.

Thus the holder of the check reading "Pay A" establishes his case by production of the instrument and proof of signatures; and the burden of proving want of consideration of any other defense is upon the obligor. Such a check passes by indorsement and delivery without words of assignment, and the indorser undertakes greater liabilities than those of an assignor. This section resolves a conflict in the decisions as to the extent of that undertaking by providing in effect that the indorser of such an instrument is not distinguished from any indorser of a negotiable instrument. The indorser is entitled to presentment, notice of dishonor and protest, and the procedure and liabilities in bank collection are the same. The rules as to alteration, the filling of blanks, accommodation parties, the liability of signing agents, discharge, and the like are those applied to negotiable instruments.

In short, the "non-negotiable instrument" is treated as a negotiable instrument, so far as its form permits. Since it lacks words of negotiability there can be no holder in due course of such an instrument, and any provision of any section of this article peculiar to a holder in due course cannot apply to it. With this exception, such instruments are covered by all sections of this article.

Cross References

Section 3-104.

Definitional Cross References

"Bearer". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Term". Section 1-201.

Article 4. [Reserved]

Article 5. [Reserved]

Article 6. [Reserved]

Article 7. [Reserved]

Article 8. [Reserved]

Article 9. Secured Transactions; Sales of Accounts and Chattel Paper

Part 1. Short Title, Applicability and Definitions

§ 9-101. Short title

This article shall be known and may be cited as the Navajo Uniform Commercial Code—Secured Transactions.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This article sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. In many respects this Code is based upon and similar to the Uniform Commercial Code adopted by most of the states in the United States. The Official Comments to this Code describe the reasons for most of the variations from the version proposed in such other states.

Commentary. Consumer installment sales and consumer loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification. While this article applies generally to security interests in consumer goods, it is not designed to supersede such consumer legislation. See Official Comments to §§ 9-102 and 9-203.

The aim of this article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty. Under this article the traditional distinctions among security devices based largely on form, are not retained. The Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of other descriptive terms which had grown up at common law and under a 100-year accretion of statutes in other states. This does not mean that the old forms may not be used, and § 9-102(B) makes it clear that they may be.

This article does not determine whether "title" to collateral is in the secured party or in the debtor and adopts neither a "title theory" nor a "lien theory" of security interests. Rights, obligations and remedies under the Article do not depend on the location of title (§ 9-202). The location of title may become important for other purposes (as, for example, in determining the incidence of taxation), and in such a case the parties are left free to contract as they will. In this connection the use of a form which has traditionally been regarded as determinative of title (e.g., the conditional sale contract) could reasonably be regarded as evidencing the parties' intention with respect to title to the collateral.

Under the Article distinctions based on form (except as between pledge and non-possessory interests) are no longer controlling. For some purposes there are distinctions based on the type of property which constitutes the collateral (e.g., industrial and commercial equipment, business inventory, farm products, consumer goods, accounts receivable, documents of title and other intangibles), and where appropriate, the Article states special rules applicable to financing transactions involving a particular type of property. The objectives include statutory simplification and a considerable degree of flexibility in financing transactions. The scheme of the Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines.

The Article's flexibility and simplified formalities should make it possible for new forms of secured financing, as they develop, to fit comfortably under its provisions, thus avoiding the necessity (so apparent in the states) of year by year passing new statutes and tinkering with the old ones to allow legitimate business transactions to go forward.

The rules set out in this article are principally concerned with the limits of the secured party's protection against purchasers from and creditors of the debtor. Except for procedures on default and certain other provisions, freedom of contract generally prevails between the immediate parties to the security transaction.

§ 9-102. Policy and subject matter of Article

A. Except as otherwise provided in § 9-104 on excluded transaction, this Article applies:

1. To any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures, including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

2. To any sale of accounts or chattel paper.

B. This article applies to security interests created by contract, including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in § 9-310.

C. The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a lien, transaction or interest to which this article does not apply. Security for any obligation is automatically transferred with a transfer of the obligation, subject to the effects of compliance or non-compliance with the requirements for perfection of such security interests or liens under applicable law.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-102 of the Uniform Commercial Code adopted by the states. Variations are only for the purpose of clarification or emphasis.

Commentary. The main purpose of this section is to bring all consensual security interests in personal property and fixtures under this article, except for certain types of transactions excluded by § 9-104. In addition certain sales of accounts and chattel paper are brought within this article to avoid difficult problems of distinguishing between transactions intended for security and those not so intended. As to security interests in fixtures, see § 9-313(A).

1. Except for sales of accounts and chattel paper, the principal test whether a transaction comes under this article is: is the transaction intended to have effect as security? For example, § 9-104 excludes certain transactions where the security interest (such as a mechanic's or artisan's lien) arises under statute or common law by reason of status, rather than by consent of the parties. Transactions in the form of consignment or leases are subject to this article if the understanding of the parties or the effect of the arrangement shows that a security interest was intended. (As to consignments the provisions of §§ 2-326, 9-114 and 9-408 should be consulted.) When it is found that a security interest as defined in § 1-201(KK) was intended, this article applies regardless of the form of the transaction or the name by which the parties may have characterized it. The list of traditional security devices in § 9-102(B) is illustrative only; other old devices, as well as any new ones which the ingenuity of the parties or lawyers may invent, are included, so long as the requisite intent is found. The controlling definition is that contained in § 9-102(A).

The Article does not abolish existing security devices, but instead specifies new requirements with which all such secured transactions must comply. The conditional sale or bailment-lease, for example, is not prohibited; but even though it is used, the rules of this article govern such transactions.

2. If an obligation is to repay borrowed money and is not part of chattel paper, the obligation is either an instrument or a general intangible. A sale of an instrument or general intangible is not within this article, but a transfer intended to have effect as security for an obligation of the transferor is covered by § 9-102(A)(1). In either case the nature of the transaction is not affected by the fact that collateral is transferred with the instrument or general intangible. Such a transfer is treated as a transfer by operation of law, whether or not it is articulated in the agreement. See Comment 4 below for an illustration. However, the rights and priorities associated with such collateral depend upon compliance with applicable law, including those requiring recording or filing in order to accomplish the perfection of such a security interest or lien or to establish priority over competing security interests or liens.

An assignment of accounts or chattel paper as security for an obligation is covered by § 9-102(A)(1). Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by § 9-102(B)(2) whether intended for security or not, unless excluded by § 9-104. The buyer then is treated as a secured party, and his interest as a security interest. See §§ 9-105(A)(13), and 1-201(KK). Certain sales which have nothing to do with commercial financing transactions are excluded by § 9-104(F). See also § 9-302(A)(5), exempting from filing casual or isolated assignments, and § 9-302(B), preserving the perfected status of a security interest against the original debtor when a secured party assigns his interest.

3. In general, problems of choice of law in this article as to the validity of security agreements are governed by § 1-105. Problems of choice of law as to perfection of security interests and the effect of perfection or non-perfection thereof, including rules requiring reperfection, are governed by § 9-103.

4. Section 9-102(C) recognizes that one secured transaction can result in further secured transactions. For example, Farmer A may sell 50 sheep to Farmer B in exchange for a promissory note which is secured by a security interest in those sheep. Farmer A may endorse and deliver that secured note to his Bank as security for a loan. Pursuant to § 9-102, since the Bank has a security interest in the note, the Bank also becomes the secured party with respect to the 50 sheep that secure that note. If Farmer B defaults on his note, the Bank may enforce the security interest in the note by proceeding against the 50 sheep for the account of Farmer A and subject to the terms of the security and other agreements between Farmer A and the Bank.

5. While most sections of this article apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral. An index of sections where such special rules are stated as follows:

<COL>SECTION<COL> ACCOUNTS

<COL>9-102(A)(2)<COL>Sale of accounts subject to Article

<COL>9-103(A)<COL>When Article applies; conflict of laws rules

<COL>9-104(F)<COL>Certain sales of accounts excluded from Article

<COL>9-106<COL>Definitions

<COL>9-205<COL>Permissible for debtor to make collections

<COL>9-206(A)<COL>Agreement not to assert defenses against assignee

<COL>9-301(A)(4)<COL>Unperfected security interest subordinate to certain transferees

<COL>9-302(A)(5)<COL>What assignments need not be filed

<COL>9-306(E)<COL>Rule when goods whose sale gave rise to an account return to seller's possession

<COL>9-318(A)<COL>Rights of assignee subject to defenses

<COL>9-318(B)<COL>Modification of contract after assignment of contract right

<COL>9-318(C)<COL>When account debtor may pay assignor

<COL>9-318(D)<COL>Term prohibiting assignment ineffective

<COL>9-401<COL>Place of filing

<COL>9-502<COL>Collection rights of secured party

<COL>9-504(B)<COL>Rights on default where underlying transaction was sale of accounts or contract rights

<COL><COL>

<COL>SECTION<COL> CHATTEL PAPER

<COL>9-102(A)(2)<COL>Sale subject to Article

<COL>9-104(F)<COL>Certain sales excluded from Article

<COL>9-105(A)(2)<COL>Definition

<COL>9-205<COL>Permissible for debtor to make collections

<COL>9-206(A)<COL>Agreement not to assert defenses against assignee

<COL>9-207(A)<COL>Duty of secured party in possession to preserve rights against prior parties

<COL>9-301(A)(3)<COL>Unperfected security interest subordinate to certain transferees

<COL>9-304(A)<COL>Perfection by filing

<COL>9-305<COL>When possession by secured party perfects security interest

<COL>9-306(E)<COL>Rule when goods whose sale result in chattel paper return to seller's possession

<COL>9-308<COL>When purchasers of chattel paper have priority over security interest

<COL>9-318(A)<COL>Rights of assignee subject to defenses

<COL>9-318(C)<COL>When account debtor may pay assignor

<COL>9-502<COL>Collection rights of secured party

<COL>9-504(B)<COL>Rights on default where underlying transaction was sale

<COL><COL>

<COL>SECTION<COL> DOCUMENTS AND INSTRUMENTS

<COL>9-105(A)(5)<COL>Definition of document (and see § 1-201)

<COL>9-105(A)(7)<COL>Definition of instrument

<COL>9-206(A)<COL>Rule where buyer of goods signs both negotiable instrument and security agreement

<COL>9-207(A)<COL>Duty of secured party in possession of instrument to preserve rights against prior parties

<COL>9-301(A)(3)<COL>Unperfected security interest subordinate to certain transferees

<COL>9-302(A)(2)<COL>What interests need not be filed

<COL>and (6)<COL>

<COL>9-304(A)<COL>How security interest can be perfected

<COL>9-304(B),(C)<COL>Perfection of security interest in goods in possession of issuer of negotiable document or of other bailee

<COL>9-304(D),(E)<COL>Perfection of security interest in instruments or negotiable documents without filing or transfer of possession

<COL>9-305<COL>When possession by secured party perfects security interest

<COL>9-308<COL>When purchasers of instruments have priority over security interest

<COL>9-309<COL>When purchasers of negotiable instruments or negotiable documents have priority over security interest

<COL>9-501(A)<COL>Rights on default where collateral is documents

<COL>9-502<COL>Collection rights of secured party

<COL><COL>

<COL>SECTION<COL> GENERAL INTANGIBLES

<COL>9-103(B)<COL>When Article applies; conflict of laws rules

<COL>9-105<COL>Obligor is "account debtor"

<COL>9-106<COL>Definition

<COL>9-301(A)(4)<COL>Unperfected security interest subordinate to certain transferees

<COL>9-318(A)<COL>Rights of assignee subject to defenses

<COL>9-318(C)<COL>When account debtor may pay assignor

<COL>9-502<COL>Collection rights of secured party

<COL><COL>

<COL>SECTION<COL> GOODS

<COL>9-103<COL>When Article applies with regard to goods of a type normally used in more than one jurisdiction; goods covered by certificate of title; conflict of law rules

<COL>9-105(A)(8)<COL>Definition

<COL>9-109<COL>Classification of goods as consumer goods, equipment, farm products, and inventory

<COL>9-203<COL>Formal requisites of security agreement covering certain types of goods (crops or timber)

<COL>9-204<COL>Validity of after-acquired property clause covering certain types of goods (crops, consumer goods)

<COL>9-205<COL>Permissible for debtor to accept returned goods

<COL>9-206(B)<COL>When security agreement can limit or modify warranties on sale

<COL>9-301(A)(3)<COL>Unperfected security interest in goods in possession of issuer of negotiable document or of other bailee

<COL>9-304(E)<COL>Perfection of security interest in goods in possession of issuer of negotiable document or of other bailee

<COL>9-305<COL>When possession by secured party perfects security interest

<COL>9-306(E)<COL>Rule when goods whose sale gave rise to account or chattel paper return to seller's possession

<COL>9-307<COL>When buyers of goods from debtor take free of security interest

<COL>9-313<COL>Goods which are or become fixtures

<COL>9-314<COL>Goods affixed to other goods

<COL>9-315<COL>Goods commingled in a product

<COL>9-401(A)<COL>Place of filing for fixtures

<COL>9-402<COL>Form of financing statement covering fixtures

<COL>9-504(A)<COL>Sale of goods by secured party after default subject to Article 2 (Sales)

<COL><COL>

<COL>SECTION<COL> CONSUMER GOODS

<COL>9-109(A)<COL>Definition

<COL>9-203(B)<COL>Transaction

<COL>9-204(B)<COL>Validity of after-acquired property clause against an assignee subject to statute or decision which establishes rule for buyers of consumer goods

<COL>9-206(A)<COL>Buyer's agreement not to assert defenses

<COL>9-302(A)(4)<COL>When filing not required

<COL>9-307(B)<COL>When buyers from debtor take free of security interest

<COL>9-401(A)(1)<COL>Place of filing

<COL>9-505(A)<COL>Secured party's duty to dispose of repossessed consumer goods

<COL>9-507(A)<COL>Secured party's liability for improper disposition of consumer goods after default

<COL><COL>

<COL>SECTION<COL> EQUIPMENT

<COL>9-103(B)<COL>When Article applies with regard to certain types of equipment normally used in more than one jurisdiction; conflict of laws rules

<COL>9-109(B)<COL>Definition

<COL>9-302(A)(3)<COL>When filing not required to perfect security interest in certain farm equipment

<COL>9-307(B)<COL>When buyers of certain farm equipment from debtor take free of security interest

<COL>9-401(A)<COL>Place of filing for equipment used in farming operation

<COL>9-503<COL>Secured party's right after default to remove or to render equipment unusable

<COL><COL>

<COL>SECTION<COL> FARM PRODUCTS

<COL>9-109(C)<COL>Definition

<COL>9-203(A)(2)<COL>Formal requisites of security agreement covering crops

<COL>9-307<COL>When a buyer of farm products takes free of security interest

<COL>9-312(B)<COL>Priority of secured party who gives new value to enable debtor to produce crops

<COL>9-401(A)<COL>Place of filing

<COL>9-402(B)<COL>Form of financing statement covering crops

<COL>and (C)<COL>

<COL><COL>

<COL>SECTION<COL> INVENTORY

<COL>9-103(C)<COL>When Article applies with regard to certain types of inventory normally used in more than one jurisdiction; conflict of laws rules

<COL>9-109(D)<COL>Definition

<COL>9-114<COL>Consigned goods

<COL>9-306(E)<COL>Rule where goods whose sale gave rise to account or chattel paper return to seller's possession

<COL>9-307(A)<COL>When buyers from debtor take free of security interest

<COL>9-312(C)<COL>When purchase money security interest takes priority over conflicting security interest

<COL>9-304(E)<COL>

<COL>9-408<COL>Financing statements covering consigned or leased goods

Cross References

Sections 9-103 and 9-104.

Point 1: Section 2-326.

Point 2: Section 1-105.

Definitional Cross References

"Account". Section 9-106.

"Chattel paper". Section 9-105.

"Contract". Section 1-201.

"Document". Section 9-105.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

Most transfers of personal property and fixtures can be classified as one of the following:

1. Unconditional sales, where the parties intend that the buyer keep the property regardless of whether or not he performs any obligation to the seller. For example, if a store sells a loan of seed to a farmer on credit, without intending to reclaim the seed if the farmer fails to pay the purchase price, that is an unconditional sale.

2. True leases, where the parties intend that the owner/lessor will always regain his property at the agreed time and until that time the property can be used by the borrower/lessee. For example, if an equipment rental company rents a tractor to a farmer for a week, that is a true lease transaction; or

3. Secured transactions, where the parties intend that the property be used as collateral to secure an obligation of the debtor/obligor to the creditor/obligee. For example, if an equipment dealer sells a tractor to a farmer on credit and the farmer agrees that his rights to the tractor become exclusive only when he pays the entire purchase price, that conditional sale is a secured transaction subject to this article 9. Similarly, if a farmer borrows money from a bank in order to buy 10 horses and agrees to use those horses as collateral for the loan, that is also a secured transaction subject to this article.

There are many different types of secured transactions. In most cases, besides true leases, a secured transaction will exist when a debt or other obligation exists between two persons and those parties agree that the property owned or held by the debtor/obligor can be used by the creditor/obligee to satisfy the debt or obligation if the debtor/obligor fails to perform as agreed.

Sales of chattel paper and accounts are treated like secured transactions. See § 9-106 for the definition of accounts and § 9-105 for the definition of chattel paper.

Other laws besides Article 9 may create liens upon the property of a person to secure his obligation to another person. Although such liens are similar in function to Article 9 security interests, this article does not apply to those liens, except that § 9-310 states when those liens have priority over Article 9 security interests in the same property.

When person A is obligated to person B, person B can generally use that obligation of person A as collateral to secure a separate debt or other obligation of person B to person C. In such cases person A generally can be required to perform that obligation in favor of person C. That obligation of person A either may be secured by property of person A or may be unsecured. If an obligation is transferred from one person to another, the security for that obligation is also transferred. Article 9 will apply to obligations and to security for obligations except to the extent they are excluded by § 9-104.

§ 9-103. Perfection of security interest in multiple state transactions

A. Documents, instruments and ordinary goods.

1. This Subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in Subsection (B), mobile goods described in Subsection (C), and minerals described in Subsection (E).

2. Except as otherwise provided in this Subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

3. If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until 30 days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the 30-day period.

4. When collateral is brought into and kept on Navajo Indian Country, while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this article to perfect the security interest:

a. If the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into Navajo Indian Country, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;

b. If the action is taken before the expiration of the period specified in paragraph (4)(a), the security interest continues perfected thereafter;

c. For the purpose of priority over a buyer of consumer goods (§ 9-307(B)), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (4)(a) and (b).

B. Certificate of title.

1. This Subsection applies to goods covered by a certificate of title issued under Navajo law or under a statute of another jurisdiction under the law of which indication of a security interest on the

certificate is required as a condition of perfection.

2. Except as otherwise provided in this Subsection (B), perfection and the effect of perfection or non-perfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.

3. Except with respect to the rights of a buyer described in the next paragraph (4), a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into Navajo Indian Country and thereafter covered by a certificate of title issued under Navajo law is subject to the rules stated in Subsection (A)(4).

4. If goods are brought into Navajo Indian Country while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued under Navajo law and the certificate does not show that the goods are subject to the security interest or that they maybe subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

5. Unless and until the Navajo Nation Council adopts laws creating a system for the issuance of certificates of title for such goods, perfection of security interests in vehicles and other goods registered under the certificate of title laws of a state of the United States or other jurisdiction shall be governed by such laws.

C. Accounts, general intangibles and mobile goods.

1. This Subsection (C) applies to accounts (other than an account described in Subsection (E) on minerals) and general intangibles (other than uncertificated securities) and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in Subsection (B).

2. The law (including the conflict of laws rule) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.

3. If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for

perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has his major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions, and the Commonwealth of Puerto Rico, including Navajo Indian Country.

4. A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Code of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

5. A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

D. Chattel paper.

The rules stated for goods in Subsection (A) apply to a possessory security interest in chattel paper. The rules stated for accounts in Subsection (C) apply to a non-possessory security interest in chattel paper, but the security interest may not be perfected by notification to the account-debtor.

E. Minerals

Perfection and the effect of perfection or non-perfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located.

F. Uncertificated securities.

The law (including the conflict of laws rules), of the jurisdiction of organization of the issuer governs the perfection and the effect of perfection or non-perfection of a security interest in uncertificated securities.

G. Deposit Accounts.

This article governs the perfection of security interests in deposit accounts of any person or entity which are maintained at any office located in Navajo Indian Country of any depositary institution or other business authorized to accept deposits in Navajo Indian Country.

History

CJA-1-86, January 26, 1986.

Official Comment

Changes. Except as stated in § 9-103(G), this section is intended to have the same meaning and effect as § 9-103 of the Uniform Commercial Code adopted by the states. Other variations are only for the purposes of clarification or emphasis.

An exception exists under § 9-103(B) for motor vehicle and other goods which are registered under certificates of title laws of other jurisdictions in order to conform to existing practice. As to other persons or entities to whom Navajo law might apply, the Navajo Nation is treated like the States of the United States for the purposes of the § 9-103 choice of law rules.

Commentary. 1. The general rules on choice of law between the original parties in § 1-105 apply to this article. However, when conflicting claims to collateral arise, the question depends on perfection of security interests, and thus on the effect of perfection or non-perfection. These problems are dealt with in this section 9-103. The general rule (§ 9-103(A)(2)) is that these questions are governed by the law of the jurisdiction where the collateral is located when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. The event will frequently be the filing. If the last event is not filing and perfection is through filing, the filing required is in the jurisdiction where the collateral is located when the last event occurs; prior filing in another jurisdiction is not effective and is not saved by the four-month rule discussed below, which applies only when the security interest was already perfected in the jurisdiction from which the collateral was removed. If the security interest was perfected in one jurisdiction and then removed to another jurisdiction, maintenance of perfection in the latter jurisdiction or failure to do so is the "last event" to which the basic rule refers.

There are, however, exceptions to this basic rule as stated below:

2. If the parties to a transaction creating a purchase money security interest in goods understand when the security interest attaches that the collateral will be kept in another jurisdiction, the law of that jurisdiction governs perfection and the effect of perfection or non-perfection until thirty (30) days after the debtor receives possession of the goods (§ 9-103(A)(3)). A filing in that jurisdiction perfects the security interest even before the goods are removed. The 30-day period is not a period of grace during which filing is unnecessary or has retroactive effect, but merely states the period during which the other jurisdiction is the place of filing. The effect of late filing is governed by other provisions, such as §§ 9-301 and 9-312.

3. If the goods reach that jurisdiction within the thirty (30) days, the effectiveness of the filing in that jurisdiction continues without

interruption. If the collateral is not kept in that jurisdiction before the end of the 30-day period, Subsection (A)(3) ceases to be applicable and thereafter the law of the jurisdiction where the collateral is located controls perfection. A failure of the collateral to reach the intended destination jurisdiction before the expiration of the 30-day period because of a conflicting claim or otherwise may cause disappointment of expectations that the law of the destination jurisdiction will govern continuously, and caution may dictate filing both in that jurisdiction and in the jurisdiction where the security interest attaches.

This section 9-103 uses the concepts that goods are "kept" in or "brought" into a jurisdiction, and related terms. These concepts imply a stopping place of a permanent nature in the jurisdiction, and not merely transit or storage intended to be transitory.

4. A. Where the collateral is an automobile or other goods covered by a certificate of title issued by any state and the security interest is perfected by notation on the certificate of title, perfection is controlled by the certificate of title rather than by the law of the state wherein the security interest attached (§ 9-103(B)).

B. It has long been hoped that "exclusive certificate of title laws" would provide a sure means of controlling property interests in goods like automobiles which because of their nature cannot readily be controlled by local or statewide filing alone. In theory the certificate of title should control the property interests in the vehicle wherever the vehicle maybe. However, two circumstances operate to prevent the perfect operation of the certificate of title device:

First, some jurisdictions have never adopted certificate of title laws. This results in problems in the issuance of a certificate of title when the vehicle moves from a non-certificate to a certificate state, because the certificate-issuing officer is in no position to conduct a complete search to ascertain the condition of the title in a jurisdiction of origin which requires no filing or in which filing could be in any one or more of several localities. It also seems that when a vehicle moves from a certificate to a non-certificate jurisdiction, the officers issuing a new registration for the vehicle are not always meticulous to notify secured parties shown on the certificate to give them a chance to perfect their security interests in the non-certificate jurisdiction when new registration is issued. Moreover, some vehicles like mobile homes are not always issued certificates even in a jurisdiction which may have certificate laws applicable thereto, because the certificate laws may apply only if the mobile homes use the highways. Registration plates of a mobile home having a certificate could be removed and there would be nothing visible to show that a certificate had ever been issued for it.

Second, various fraudulent devices based on allegations of loss of the certificate of title enable a dishonest person to obtain both an original and a duplicate of title; to have a security interest shown on only one certificate; and then to effect a transfer into a new jurisdiction on the basis of the clean certificate, no matter how diligent the officers in the second jurisdiction may be.

Given these practical problems, the choice of applicable rules of law after interstate removals of vehicles subject to certificate of title laws is most difficult. This article provides the rules set forth below.

C. The security interest perfected by notation on a certificate of title will be recognized without limit as to time; but, of course, perfection by this method ceases if the certificate of title is surrendered (§ 9-103(B)(2)). Since the secured party ordinarily holds the certificate, surrender thereof could not occur without his action in the matter in some respect. If the vehicle is reregistered in another jurisdiction while the secured party still holds the certificate, a danger of deception to third parties arises. The section provides that the certificate ceases to control after four months following removal if reregistration has occurred, but during the four months the secured party has the same protection for cases of interstate removal as is set forth in § 9-103(A)(4) and Comment 7, subject to additional limitation if the reregistration also involves a new "clean" certificate of title in the removal jurisdiction and a non-professional buyer buys while that new certificate is outstanding. See § 9-103(B)(4) and Comment 4(E).

D. If a vehicle: (a) is not covered by a certificate of title; (b) is removed to a jurisdiction issuing certificates; and (c) a certificate is issued for that vehicle in the new jurisdiction, then the holder of security interest has the same four-month protection subject to the provision discussed in the next Subsection (E) of this comment.

E. Where "this jurisdiction" issues a certificate of title on collateral that has come from another jurisdiction subject to a security interest perfected in any manner, problems will arise if this jurisdiction, from whatever cause, fails to show on its certificate the security interest perfected in the other jurisdiction. The Navajo Nation will have every reason nevertheless, to make its certificate of title reliable to the type of person who most needs to rely upon it. Section 9-103(B)(4) therefore provides that the security interest perfected in the other jurisdiction is subordinate to the rights of a limited class of persons buying the goods while there is a dean certificate of title issued by any authorized official, without knowledge of the security interest perfected in the other jurisdiction. The limited class are buyers who are non-professionals, i.e., not dealers and not secured parties (who are ordinarily professionals). This protective rule does not apply if the Navajo Nation Council (or its authorized official or authority) adopts a device used under some certificate of title laws, namely, stating on the certificate of title that the vehicle may be subject to security interests not shown on the certificate, where the collateral came from a non-certificate jurisdiction. In any event, Navajo law defers to the perfection laws of other jurisdictions issuing certificates of title under § 9-103(B)(5) unless and until the Navajo Nation Council (or another authorized official or authority) creates a comparable mechanism for issuing such certificates of title. However, when and if such a Navajo law is created, the security interest perfected in another jurisdiction would become unperfected unless reperfected under Navajo law within the usual four-month period (§ 9-103(B)(4)).

5. The general rules of the section based on location collateral could not be applied to certain types of intangible collateral which have no location in any realistic sense, or to certain moveable chattels which have no permanent location.

A. For accounts and general intangibles there is no indispensable or symbolic document which represents the underlying claim, whose endorsement or delivery is the one effectual means of transfer. Since the principal question is where certain financing statements shall be filed, two things become clear: *First*: since the purpose of filing is to allow subsequent creditors of the debtor-assignor to determine the true status of his affairs, the place chosen must be one which such creditors would normally associate with the assignor; thus the place of business of the assignee and the places of business or residences of the various account debtors must be rejected in ordinary situation. *Second:* the place chosen must be one which can be determined with the least possible risk of error. The place chosen by § 9-103(C) is the debtor's location, which is ordinarily the location of its chief executive office. This concept is discussed below.

B. Another class of collateral for which a special rule is stated in § 9-103(C) is mobile goods of types which are normally moved for use from one jurisdiction to another. Such goods are generally classified as equipment; sometimes they may be classified as inventory, for example, goods leased by a professional lessor. Subsection 9-103(C) provides that a security interest in such equipment or inventory is subject to this article when the debtor's location, i.e., ordinarily its chief executive office, is in Navajo Indian Country.

While automobiles are obviously mobile goods, they will in most cases be covered by § 9-103(B) of this section and therefore excluded from § 9-103(C) by paragraph (1) thereof. If an automobile is not covered by a certificate of title and is classified as equipment or as inventory under lease, it win be subject to § 9-103(C). Automobiles and other mobile goods which are classified as consumer goods are not subject to § 9-103(C).

The rule of § 9-103(C) applies to goods of a type "normally used" in more than one jurisdiction; there is no requirement that particular goods be in fact used out of state. Thus, if an enterprise whose chief executive office is in Navajo Indian Country keeps in State Y goods of the type covered by § 9-103(C), the rule of Subsection (C) requires filing under Navajo law even though the goods never leave State Y.

C. "Chief executive office" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief executive office" is not defined in this section or elsewhere in this article. Doubt may arise as to which is the "chief executive office" of a multi-state enterprise, but it would be rare that there could be more than two possibilities. A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place. The Subsection states a rule which will be simple to apply in most cases, and which makes it possible to dispense with much burdensome and useless filing.

D. If the location of the debtor is moved after a security in interest has been perfected in another jurisdiction, the secured party has four months within which to refile, unless the perfection in the original jurisdiction would have expired earlier (§ 9-103(C)(5)).

E. Under § 9-103(C) each jurisdiction other than that of the debtor's location in effect disclaims jurisdiction over certain accounts and general intangibles which, by common law rules, might be held to be within its jurisdiction; in the same way there is a disclaimer of jurisdiction over mobile chattels, even though they may be physically located within the jurisdiction much of the time. If the jurisdiction whose law controls under this rule is a United States jurisdiction, the law of that jurisdiction will be recognized in the disclaiming jurisdiction as perfecting the security interest. The jurisdiction of the debtor's location may not, however, have such legislation. Consider, for example, the case where mobile equipment is used in Arizona, but the debtor's chief place of business is in a Mexican jurisdiction which will not permit or recognize filing as to property physically located therein. Section 9-103(C)(3) solves this difficulty by permitting perfection through filing in the jurisdiction in the United States in which the debtor has its major executive office in the United States. Where the debtor is not located in the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the secured party may alternatively perfect by notification to account debtors.

F. A sentence in § 9-103(C)(4) provides a special rule for security interests in airplanes owned by a foreign air carrier. Without that sentence Subsection (C) might refer such a case to the law of a foreign nation whose law is difficult or impossible to ascertain. The sentence clears up such doubts by treating as the location of the carrier the office designated for service of process in the United States under the Federal Aviation Code of 1958. To the extent that it is applicable, the Convention on the International Recognition of Rights in Aircraft (Geneva Convention) supersedes state legislation on this subject, as set forth in § 9-302(C), but some nations are not parties to that Convention.

6. Section 9-103(D) deals with chattel paper, a semi-intangible security interest which may be perfected either by possession or by filing (§§ 9-304(A), and 9-305). As to possessory security, § 9-103(D) provides that chattel paper shall be subject to the same rule as goods in § 9-103(A). As to non-possessory security, § 9-103(D) provides that it shall be subject to the same rule as the intangibles under § 9-103(C), except that notification to the account debtor is ruled out as an optional means of perfection under § 9-103(C)(3), since a different alternative, possession, is available for chattel paper.

7. In addition to the foregoing rules defining which jurisdiction governs perfection of a security interest in the first instance, "this jurisdiction" (i.e., a destination jurisdiction after removal) adds its own rules requiring removal of collateral other than that described in § 9-103(B), (C), and (E). "This jurisdiction" will for four months recognize perfection under the law of the jurisdiction from which the collateral came, unless the remaining period of effectiveness of the perfection in that jurisdiction was less than four (4) months (§ 9-103(A)(4)). After the four-month period or the remaining period of effectiveness; whichever is shorter, the secured party must comply with perfection requirements under Navajo law. Section 9103(A)(4) proceeds on the theory that not only the secured party whose collateral has been removed, but also creditors of and purchasers from the debtor "in this jurisdiction" should be considered.

The four-month period is long enough for a secured party to discover in most cases that the collateral has been removed and refile in this jurisdiction;

thereafter, if he has not done so, his interest, although originally perfected in the jurisdiction from which the collateral was removed, is subject to defeat here by purchasers of the collateral. Compare the situation arising under § 9-403(B) when a filing lapses. It should be noted that a "purchaser" includes a secured party. Section 1-201(FF) and (GG)). The rights of a purchaser with a security interest against an unperfected security interest are governed by § 9-312.

In case of delay beyond the four-month period, there is no "relation back". This is also true where the security interest is perfected for the first time in this jurisdiction.

If the removal of property occurs within a short period (like two weeks) before the lapse of the filing in the original state, the secured party has only that period, not the full four months, to reperfect in this "jurisdiction". However, ordinarily the secured party would have filed a continuation statement in the original Jurisdiction, and he may do so to avoid lapse and allow himself the full four months if he is searching for the collateral and needs more time.

Section 9-103(A)(4) does not apply to the case of goods removed from one filing district to another within this jurisdiction (see § 9-401(Q)), but only to property brought into this jurisdiction from another jurisdiction.

8. Section 9-103(E) deals with problems relating to the financing of minerals (including oil and gas) as these products come from the ground. In some cases rights in oil and gas in the ground have been split into a large variety of interests. As the oil or gas issues from the ground, it may be encumbered by the group of persons having interests therein. Alternatively, the product may be sold at minehead or wellhead and the resulting accounts assigned. The question arises as to the place of filing. The usual rule of § 9-103(C) would make the place to search for encumbrances on the accounts the locations of the respective assignors might be a number of individuals located throughout the country. To avoid the difficult problems of search thus created, § 9-103(E) provides that the place for filing with respect to security interests in the mineral as they issue from the ground at minehead or wellhead or in the accounts arising out of the sale of the minerals at minehead or wellhead shall be in the jurisdiction where the minehead or wellhead is located. See § 9-401.

The term "at wellhead" is intended to encompass arrangements based on sale of the product as soon as it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" or the far side of a gathering tank or at some other point. The term "at minehead" is a comparable concept.

Nothing in §§ 9-103 or 9-401 should be construed as purporting to permit security interests in any trust property such as land, minerals, crops or timber (See § 2-107, Comment 2) unless properly approved by the United States Government, 25 U.S.C. § 81 (1984).

Cross References

Sections 1-105, 9-302 and 9-401.

Definitional Cross References

"Accounts". Section 9-106.

"Attaches". Section 9-203.

"Chattel Paper". Section 9-105.

"Collateral". Section 9-105.

"Consumer Goods". Section 9-109.

"Debtor". Section 9-105.

"Document". Section 9-105.

"Equipment". Section 9-109.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-109.

"Purchase money security interest". Section 9-107.

"Purchaser". Section 1-201(GG).

"Security interest". Section 1-201(KK).

Special Plain Language Comment

Since the law of different jurisdictions might be applicable to transaction between parties located in different jurisdictions or to property located in different jurisdictions, it is necessary for the parties and other interested persons to know where to perfect security interests in different types of collateral. Section 9-103 states the "choice of law" rules for determining which jurisdiction's law is to be followed in order to "perfect" a security interest in each type of collateral and to evaluate the effects of perfecting or failing to perfect in that manner.

Section 9-103 describes the rules for determining which jurisdiction's law to consult in order to determine the method, effect and place of perfection of security interests and the consequences of nonperfection.

§ 9-104. Transactions excluded from Article

This article does not apply:

A. To a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to, and third parties affected by, transactions in particular types of property; or

B. To a landlord's lien; or

C. To a lien given by statute or other rule of law for services or materials except as provided in § 9–310 on priority of such liens; or

D. To a transfer of a claim for wages, salary or other compensation of an employee; or

E. To a transfer by a government or governmental subdivision, official or agency except to the extent that such entity has made an effective waiver of its sovereign immunity in accordance with 7 N.N.C. § 621 *et seq.;* or

F. To a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness; or

G. To a transfer of an interest in or claim in or under any policy of insurance as security for any loan made by the insurance company pursuant to the provision of the policy; or

H. To a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

I. To any right of set-off; or

J. Except to the extent that provision is made for fixtures in § 9-313, to the creation or transfer of an interest in or hen on real estate, including a lease or rents thereunder or to any property held in trust (see § 2–107, Comment 2); or

K. To a transfer in whole or in part of any claim arising out of tort; or

L. To a transfer of an interest in any deposit account (§ 9–105(A)), except as provided with respect to proceeds (§ 9–306) and priorities in proceeds (§ 9–312), and except for deposit accounts maintained in offices in Navajo Indian Country of depositary institutions and other businesses authorized to accept deposits in Navajo Indian Country.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. The purpose of § 9–104 is to exclude certain security transactions from this article. Except as stated in § 9–104(E),(G) and (L), this section is intended to have the same meaning and effect as § 9–104 of the Uniform Commercial Code adopted by the states. Section 9–104(E) is altered to comply with 7 N.N.C. § 621 *et seq*. and to allow governmental units to elect to be bound by this article. Section 9–104(G) is expanded from the Official Text (following the lead of California and certain other States) in order to permit insured parties to use their policies as security. The official Text of § 9–

104(L) is modified because (like the California version of the Code) Navajo Indian Country deposit accounts are permitted to be collateral under this article.

Commentary. 1. Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this article. The Ship Mortgage Code, 1920, is an example of such a federal act. The present provisions of the Federal Aviation Code of 1958 (49 U.S.C. Section 1403 *et seq*.) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator and such registration is recognized as equivalent to filing under this article (§ 9-302(C)). However, to the extent that the Federal Aviation Code does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this article.

Although the Federal Copyright Act of 1976 contains provisions permitting the recording of any transfer of copyright (17 U.S.C. Section § 201, 204, 205). The prior copyright law was interpreted as not containing sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this article. *Compare Republic Pictures Corp. v. Security-First National Bank of Los Angeles,* 197 F.2d 767 (9th Cir. 1952). The status of secured interests in copyrights under the new statute is not clear. Compare also with respect to patents, 35 U.S.C. Section 47, and trademarks. The filing provisions under these Codes, like the filing provisions of the Federal Aviation Code, are recognized as the equivalent to filing under this article. See § 9-302(C) and (D).

Even such a statute as the Ship Mortgage Code is far from a comprehensive regulation of all aspects of ship mortgage financing. That Code contains provisions on formal requisites, on recordation and on foreclosure but not much more. If problems arise under a ship mortgage which are not covered by the Code, the federal admiralty court must decide whether to improvise an answer under "federal law" or to follow the law of some jurisdiction with which the mortgage transaction has appropriate contacts. The exclusionary language in § 9-104(A) is that this article does not apply to such security interest "to the extent" that the federal statute governs the rights of the parties. Thus, if the federal statute contained no relevant provision, this article could be looked to for an answer.

2. Except for fixtures (§ 9-313), the Article applies only to security interests in personal property. The exclusion of landlord's liens by Subsection (B) and of leases and other interests in or liens on real estate by Subsection (J) merely reiterates the limitations on coverage already made explicit in § 9-102(C). (See Comment 4 to that section.)

3. Section 9-104(C) excludes statutory liens from this article. Section 9-310 states a rule for determining priorities between such liens and the consensual security interests covered by this article.

4. Assignments of wage claims and the like present important social problems whose solution should be a matter of separate local regulation. Section 9-104(D) therefore excludes them from this article.

5. Certain governmental borrowings include collateral in the form of assignments of water, electricity or sewer charges, rents on dormitories or industrial buildings, tools etc. Since these assignments may be governed by special provisions of law, these governmental transfers are excluded from this article, except to the extent that the governmental authority, official or agency has complied with 7 N.N.C. § 621 *et seq*. and thereby elects to become subject to this article.

6. In general, sales as well as security transfers of accounts and chattel paper are within this article (see § 9-102). Section 9-104(F) excludes from the Article certain transfers of such intangibles which, by their nature, have little or nothing to do with commercial financing transactions.

7. Rights under life insurance and other policies are available as collateral except to the extent that the insurance payments secure a loan from the insurer under the policy. Deposit accounts are also available as security if the deposit account is maintained on Navajo Indian Country.

8. The remaining exclusions go to other types of claims which do not customarily serve as commercial collateral: judgments under § 9-104(H), set-offs under Subsection (I) and tort claims under Subsection (K).

Cross References

Point 1: Section 9-302(C)

Point 2: Sections 9-102(C) and 9-313.

Point 3: Sections 9-102(B) and 9-310.

Point 6: Section 9-102.

Definitional Cross References

"Account". Section 9-106.

"Chattel paper". Section 9-105.

"Contract". Section 1-201.

"Deposit account". Section 9-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

Special Plain Language Comment

Except for limited types of property excluded by § 9-104 from the Article, this article permits persons and entities to use any type of personal property as collateral. Real estate is always excluded from this article. Fixtures are included in this article except to the extent that they are trust property subject to regulation by the United States Government. (See § 2-107, Comment 2.)

§ 9-105. Definitions and index of definitions

A. In this article unless the context otherwise requires:

1. "Account debtor" means the person who is obligated on an account, deposit account, chattel paper or general intangible;

2. "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

3. "Collateral" means the property subject to a security interest, and includes accounts and chattel paper which have been sold;

4. "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both the owner and the obligor where the context so requires.

5. "Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization or a similar account maintained with any other type of business which is or becomes authorized to accept such deposits by the law applicable thereto. An account evidenced by a negotiable certificate of deposit is an "instrument" but a non-negotiable certificate of deposit is a deposit account, if such account is maintained in Navajo Indian Country, or a general intangible, if such account is maintained in any other jurisdiction;

6. "Document" means document of title as defined in the general definitions of Article 1 (§ 1-201), and a warehouse receipt issued by a warehouse or other bailee in order to evidence the receipt of goods to be held for the bailor or his assignee;

7. "Encumbrance" includes real estate leases, mortgages and other liens on real estate and all other rights and interests in real estate that are not ownership interests.

8. "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (§ 9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also includes standing timber which is to be cut and

removed under a conveyance or contract for sale, the unborn young of animals, and growing crops;

9. "Instrument" means a negotiable instrument (defined in § 3-104), or a certificated security (as defined in this section), or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment;

10. "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;

11. An advance is made "pursuant to commitment" if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relive him from his obligation;

12. "Security agreement" means an agreement which creates or provides for a security interest;

13. "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders or owners of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party;

14. "Transmitting utility" means any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service.

B. In this article, unless the context otherwise requires:

1. A "certificate security" is a share, participation or other interest in property of or an enterprise of the issuer or an obligation of the issuer which is:

a. Represented by an instrument issued in bearer or registered form;

b. Of a type commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

c. Either one of a class or series or by its term divisible into a class or series of shares, participations, interests, or obligations.

2. An "uncertificated security" is a share, participation, or other interest in property or an enterprise of the issuer or an obligation of the issuer which is:

a. Not represented by an instrument and the transfer of which is registered upon books maintained for that purpose by or on behalf of the issuer;

b. Of a type commonly dealt in on securities exchanges or markets; and

c. Either one of a class or series or by its terms divisible into a class or series of shares, participations, interests, or obligations.

3. A "security" is either a certificated or an uncertificated security. If a security is certificated, the terms "security" and "certificated security" may mean either the intangible interest, the instrument representing that interest, or both, as the context requires. A writing that is a certificated security is governed by this article and not by Article 3, even though it also meets the requirements of that Article. This article does not apply to money. If a certificated security has been retained by or surrendered to the issuer or its transfer agent for reasons other than registration of transfer, other temporary purpose, payment, exchange, or acquisition by the issuer, that security shall be treated as an uncertificated security for purposes of this article.

C. Other definitions applying to this article and the sections in which they appear are:

"Account". Section 9-106.

"Attach". Section 9-203.

"Construction mortgage". Section 9-313(A).

"Consumer goods". Section 9-109(A).

"Equipment". Section 9-109(B).

"Farm products". Section 9-109(C).

"Fixture". Section 9-313(A).

"Fixture filing". Section 9-313(A).

"General intangibles". Section 9-106.

"Inventory". Section 9-109(D).

"Lien creditor". Section 9-301(C).

"Proceeds". Section 9-306(A).

"Purchase money security interest". Section 9-107.

"United States". Section 9-103.

D. The following definitions in other Articles apply to this article:

"Check". Section 3-104.

"Contract for sale". Section 2-106.

"Holder in due course". Section 3-302.

"Note". Section 3-104.

"Sale". Section 2-106.

E. In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. Except as provided in §§ 9-105(A)(1), (5), (6), (9) and Subsection (B), this section is intended to have the same meaning and effect as § 9-105 of the Uniform Commercial Code adopted by the states. Section 9-105(A)(1) is expanded from the Official Text to include deposit accounts. Because of the rapid deregulation of financial services businesses, § 9-105(A)(5) is expanded to include deposit accounts which are similar to bank accounts regardless of the identity of the deposit holder as long as the deposit holder is legally entitled to accept such deposits under applicable law. Although negotiable certificates of deposits are "instruments", non-negotiable certificates of deposit are "deposit accounts", if maintained in Navajo Indian Country, or "general intangibles" if located outside Navajo Indian Country. Sections 9-105(A)(6) and (9) are modified because the Navajo Nation has not adopted Article 7 relating to warehouse receipts or Article 8 relating to investment securities. Subsection (B) incorporates certain definitions found in Article 8 relating to investment securities which the Navajo Nation has not otherwise adopted.

Commentary. 1. General. It is necessary to have a set of terms to describe the parties to a secured transaction, the agreement itself, and the property involved therein. This article generally uses terms which are defined in the Uniform Commercial Code adopted by the states.

In place of such terms as "chattel mortgage", "conditional sale", "assignment of accounts receivable", "trust receipt", etc., this article substitutes the general term ("security agreement" defined in § 9-105(A)(12)) in place of "mortgagor", "mortgaged", "conditional vendee", "conditional vendor", etc., this article substitutes "debtor", defined in § 9-105(A)(4), and "secured party", defined in § 9-105(A)(13). The property subject to the security agreement is "collateral", defined in § 9-105(A)(3). The interest in the collateral which is conveyed by the debtor to the secured party is a "security interest", defined in § 1-201(KK).

2. Parties. The parties to the security agreement are the "debtor" and the "secured party".

"Debtor": In all but a few cases the person who owes the debt and the person whose property secures the debt will be the same. Occasionally, one person furnishes security for another's debt, and sometimes property is transferred subject to a secured debt of the transferor which the transferee does not assume. In such cases, under the second sentence of the definition, the term "debtor" may, depending upon the context, include either or both such persons. Section 9-112 sets out special rules which are applicable where collateral is owned by a person who does not owe the debt or obligation that is secured.

"Secured Party": The term includes any person in whose favor there is a security interest (defined in § 1-201). The term is used equally to refer to a person who as a seller retains a lien on or title to goods sold, to a person whose interest arises initially from a loan transaction, and to an assignee of either. Note that a seller is a "secured party" in relation to his customer; but the seller becomes a "debtor" if he assigns the chattel paper as collateral to secure his own debt to a third party. This is also true of a lender who assigns the debt as collateral. With the exceptions stated in § 9-104(F) the Article applies to any sale of accounts or chattel paper: the term "secured party" includes an assignee of such intangibles whether by sale or for security, to distinguish him from the payee of the account, for example, who becomes a "debtor" by pledging the account as security for a loan.

(On the applicability of the terms "debtor" and "secured party" to consignments and leases, see § 9-408 and the Comments thereto.)

"Account debtor": Where the collateral is an account, deposit account, chattel paper or general intangible the original obligor is called the "account debtor". See § 9-105(A)(1).

3. Property subject to the security agreement. "Collateral", defined in Subsection (A)(3) is a general term for the tangible and intangible property subject to a security interest. For some purposes the Code makes distinctions between different types of collateral and therefore further classification of collateral is necessary. Collateral which consists of tangible property is "goods", defined in § 9-105(A)(8); and "goods" are again subdivided in § 9-109. For purposes of this article all intangible collateral fits one of five categories, two of which "accounts", and "general intangibles" are defined in the following § 9-106; the other three, "documents", "instruments" and "chattel paper", are defined in § 9-105(A)(6), (A)(9) and (A)(2).

"Goods": the definition in § 9-105(A)(8) is similar to that contained in § 2-105 except that the Sales Article definition refers to "time of identification to the contract for sale", while this definition refers to "the time the security interest attaches". (See § 9-203).

For the treatment of fixtures, § 9-313 should be consulted. It will be noted that the treatment of fixtures under § 9-313 does not at all points conform to their treatment under § 2-107 (goods to be severed from realty). Section 2-107 relates to sale of such goods; § 9-313 to security interests in them. The discrepancies between the two sections arise from the differences in the types of interest covered. A comparable discrepancy exists as to minerals. In the case of timber, both sections treat it as goods if it is to be severed under a contract of sale, but not otherwise.

If in any jurisdiction any minerals before severance are deemed to be personal property, they fall outside the Article's definition of "goods" and would therefore fall into the catch-all definition, "general intangibles", in § 9-106. In that case, the special provisions of § 9-103(E) would not apply and those of § 9-103(C) would apply. The resulting problems should be considered under local law.

For the purpose of this article, goods are classified as "consumer goods", "equipment", "farm products", and "inventory", as those terms are defined in § 9-109. When the general term "goods" is used in this article, it includes, as may be appropriate in the context, those subclasses of goods defined in § 9-109.

"Instrument": the term as defined in § 9-105(A)(9) includes not only negotiable instruments and certificated securities but also any other intangibles evidenced by writings which are in ordinary course of business transferred by delivery. As in the case of chattel paper "delivery" is only the minimum stated and may be accompanied by other steps. If a writing is itself a security agreement or lease with respect to specific goods it is chattel paper and not an instrument, although it otherwise meets the term of the definition of instrument. (See Comment below on "chattel paper".) However, the fact that an instrument is secured by collateral, whether the collateral be other instruments, documents, goods, accounts or general intangibles, does not change the character of the principal obligation as an instrument or convert the combination of instrument and collateral into a separate Code classification of personal property. The single qualification to this principle is that an instrument which is secured by chattel paper is itself part of the chattel paper, while also retaining its identify as an instrument.

"Document": (See the Comments under §§ 1-201(O)).

"Chattel paper": To secure his own financing a secured party may wish to borrow against or sell the security agreement itself along with his interest in the collateral which he has received from his debtor. Since the refinancing of paper secured by specific goods presents some problems of its own, the term "chattel paper" is used to describe this kind of collateral. The Comments under § 9-308 further describe this concept. Thus, chattel paper includes a purchaser's obligation to pay a purchase price and the security agreement granting the seller a security interest in the goods sold to the purchaser, whether the obligation and security agreement are contained in one or more different documents. Similarly, when a lessor wishes to assign a security interest in a lease of goods, the lease collateral is chattel paper. Charters of vessels are excluded from the definition of chattel paper because they fit under the definition of accounts. (See Comment to § 9-106). The term "charter" as used herein and in § 9-106 includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage, and all other arrangements for use of vessels.

4. The following transactions illustrate the use of the term "chattel paper" and some of the other terms defined in this section. A dealer sells a tractor

to a farmer on conditional sales contract or purchase money security interest. The conditional sales contract is a "security agreement", the farmer is the "debtor", the dealer is the "secured party" and the tractor is the type of "collateral" defined in § 9-109 as "equipment". But now the dealer transfers the contract to his bank, either by outright sale or to secure a loan. Since the conditional sales contract is a security agreement relating to specific equipment, the conditional sales contract is now the type of collateral called "chattel paper". In this transaction between the dealer and his bank, the bank is the "secured party", the dealer is the "debtor", and the farmer is the "account debtor".

Under the definition of "security interest" in § 1-201(KK) a lease does not create a security interest unless intended as security. Whether or not the lease itself is a security agreement, it is chattel paper when transferred if it relates to specific goods. Thus, if the dealer enters into a straight lease of the tractor to the farmer (not intended as security), and then arranges to borrow money on the security of the lease, the lease is chattel paper.

Security agreements of the type formerly known as chattel mortgages and conditional sales contracts are frequently executed in connection with a negotiable note or a series of such notes. Under the definitions in § 9-105(A)(2) and (A)(9) the rules applicable to chattel paper, rather than those relating to instruments, are applicable to the group of writings (contract plus note) taken together.

5. Miscellaneous definitions. "Deposit account" is a type of collateral excluded from this article under § 9-104(L), except when it constitutes proceeds of other collateral under § 9-306 or is maintained in Navajo Indian Country.

The terms "encumbrance" and "mortgage" are defined for use in § 9-313 regarding fixtures.

The term "transmitting utility" is defined to designate a special class of debtors for whom separate filing rules are provided in Part 4, thus obviating all local filing and particularly the several local filings that would be necessary under the usual rules of § 9-401 for the fixture collateral of a far-flung public utility debtor. (See Comments under §§ 9-401 and 9-403).

The term "pursuant to commitment" is defined for use in the rules relating to priority of future advances in §§ 9-301(D), 9-307(C), and 9-312(G).

6. Subsection (B) defines "security", the basic term of this section. Paragraphs (1) and (2) respectively define "certificated security" and "uncertificated security") and paragraph (3) states that the term "security" comprises both. These definitions are functional rather than formal. At the core is the notion that a security is a share or participation in an enterprise or an obligation that is of a type commonly traded in organized markets for such interests or is commonly recognized as a medium for investment. The ambit of the definition will change as "securities" trading practices evolve to include or exclude new property interests. It is believed that the definition will cover anything which securities markets, including not only the organized exchanges but as well the "over-the-counter" markets, are likely to regard as suitable for trading. For example, transferable warrants evidencing rights to

subscribe for shares in a corporation will normally be "certificated securities" within the definition, since they (1) are issued in bearer or registered form, (2) are of a type commonly dealt in on securities markets, (3) constitute a class or series of instruments, and (4) evidence an obligation of the issuer, namely the obligation to honor the warrant upon its due exercise and issue shares accordingly.

Notice that the definition of uncertificated security does not include the phrase "or commonly recognized in any area in which it is issued or dealt in as a medium for investment". Since there is no requirement of representation by an instrument, a great many interests that might be regarded as media for investment would be classified as securities under the umbrella of the omitted phrase. For example, interests such as bank checking and savings accounts are intended to be excluded from the definition because they are not commonly traded; but since those accounts are commonly recognized as media for investment, the omitted language might bring them within the scope of the definition.

Interests such as the stock of closely-held corporations, although they are not actually traded upon securities exchanges, are intended to be included within the definitions of both certificated and uncertificated securities by the inclusion of interests "of a type" commonly traded in those markets. (See Subsections (B)(1)(b) and (B)(2)(b)).

The second sentence of Subsection (B)(3) is intended to eliminate confusion arising from the fact that certificated securities are alternatively viewed as the actual pieces of paper and the interests they represent. The final sentence of Subsection (B)(3) is modified to recognize that an issuer that nominally issues certificated securities but does not normally send the certificates to the owners is functionally identical to the issuer of uncertificated securities and should be guided by the same rules.

7. Comments to the definitions indexed in § 9-105(C) and (D) follow the sections in which the definitions are contained.

Cross References

Point 2: Sections 9-104(F) and 9-112.

Point 3: Sections 2-105, 2-107, 9-106, 9-109, 9-303 and 9-313.

Definitional Cross References

"Account". Section 9-106.

"Agreement". Section 1-201.

"Document of title". Section 1-201.

"General intangibles". Section 9-106.

"Holder". Section 1-201.

"Money". Section 1-201.

"Negotiable instrument". Section 3-104.

"Person". Section 1-201.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

"Writing". Section 1-201.

Construction and effect of UCC Art 9, dealing with secured transactions, sales of accounts, contract rights, and chattel paper, 30 A.L.R.3d 9 (1970).

Special Plain Language Comment

This section 9-105 contains the basic definitions which are used in Article 9, as supplemented by the definitions in §§ 9-106, 9-107 and 9-109 and by the general definitions in § 1-201. Each provision in this article must be read carefully in the context of such definitions. Rather than explain such definitions in simpler terms in this comment, the Comments to the substantive portions of this article will be expanded to provide illustrations which demonstrate the use of defined terms.

§ 9-106. Definitions: "account"; "general intangibles"

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including rights to bring lawsuits and other things in action) other than goods, accounts, deposit accounts, chattel paper, documents, instruments and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-106 of the Uniform Commercial Code adopted by the states, except that non-negotiable certificates of deposit are included as general intangibles pursuant to § 9-105(E), if they are maintained off the Navajo Reservation, and deposit accounts are treated as a separate type of collateral.

Commentary. The terms in this section round out the classification of intangibles: see the definitions of "document", "chattel paper" and "instrument" in § 9-105. Those three terms cover the various categories of commercial paper which are either negotiable or to a greater or less extent dealt with as if negotiable. The term "account" covers most choses in action which maybe the subject of commercial financing transactions but which are not evidenced by an indispensable writing. The term "general intangibles" brings under this article miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security. Examples are goodwill, literary rights and rights to performance. Other examples are copyrights, trademarks and patents, except to the extent that they may be excluded by § 9-104(A). This article solves the problems of filing of security interests in these types of intangibles (§§ 9-103(C) and 9-401). Note that this catch-all definition does not apply to money or to types of intangibles which are specifically excluded from the coverage of the Article (§ 9-104). Note also that under § 9-302 filing under a federal statute may satisfy the filing requirements of this article.

A right to the payment of money is frequently buttressed by ancillary covenants to insure the preservation of collateral, such as covenants in a purchase agreement, note or mortgage requiring insurance on the collateral or forbidding removal of the collateral, or covenants to preserve credit-worthiness of the promisor, such as covenants restricting dividends, etc. While these miscellaneous ancillary rights might conceivably be thought to fall within the definition of "general intangibles", it is not the intention of the Code to treat them separately and require the perfection of assignment thereof by filing in the manner required for perfection of an assignment of general intangibles. Whatever perfection is required for the perfection of an assignment of the right to the payment of money will also carry these ancillary rights.

Similarly, when the right to the payment of money is not yet earned by performance, there are frequently ancillary rights designed to assure that an assignee may complete the performance and crystallize the right to payment of money. Such rights are frequently present in a "maintenance" lease, where the lessor has continuing duties to perform, or in a ship charter. These ancillary rights, if considered in the abstract, might be thought to be "general intangibles", since they do not themselves involve the payment of money. However, it is not the intent of the Code to split up the rights to the payment of money and its ancillary supports, and thereby multiply the problem of perfection of assignments. Therefore, all rights of the lessor in a lease are to be perfected as "chattel paper", and all rights of the owner in a ship charter are to be perfected as "accounts".

"Account" is defined as a right to payment for goods sold or leased or services rendered; the ordinary commercial account receivable. In some special cases a right to receive money not yet earned by performance crystallizes not into an account but into a general intangible, for it is a right to payment of money that is not "for goods sold or leased or for services rendered". Examples of such rights are the right to receive payment of a loan not evidenced by an instrument or chattel paper; a right to receive partial refund of purchase prices paid by reason of retroactive volume discounts; rights to receive payment under licenses of patents and copyrights, exhibition contracts, etc.

This article rejects any lingering common law notion that only rights already earned can be assigned. In the triangular arrangement following assignment, there is reason to allow the original parties-assignor and account debtor-more flexibility in modifying the underlying contract before performance than after performance (see § 9–318). It will, however, be found that in most situations the same rules apply to accounts both before and after performance.

Cross References

Sections 9–103(B), 9–104, 9–302(C), 9–318 and 9–401.

Definitional Cross References

"Chattel paper". Section 9–105.

"Contract". Section 1–201.

"Document". Section 9–105.

"Goods". Section 9–105.

"Instrument". Section 9–105.

Special Plain Language Comment

"Choses" or "things in action" mentioned with respect to general intangibles are basically rights to bring a legal action to enforce an obligation or a claim, although § 9–104 excludes claims other than those for breach of contract and certain related legal theories. General intangibles is thus a "catch-all" category including everything (besides money) which is permitted collateral under this article (see §§ 9–102 and 9–104) and which is not defined in § 9–106 as accounts or in § 9–105 as goods, deposit accounts, chattel paper, documents or instruments.

Comments to the substantive provisions in this article will illustrate meanings of accounts and general intangibles.

§ 9–107. Definitions: "purchase money security interest"

A security interest is a "purchase money security interest" to the extent that it is:

A. Taken or retained by the seller of the collateral to secure all or part of its price; or

B. Taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9–107 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under existing rules of law and under this article purchase money obligations often have priority over other obligations. Thus, a purchase money obligation has priority over an interest acquired under an after-acquired property clause (§ 9-312(C) and (D)). Where filing is required, a grace period of 10 days is allowed against creditors and transferees in bulk (§ 9-301(B)). In some instances filing may not be necessary (§ 9-302(A)(4)).

Under this section a seller has a purchase money security interest if he retains a security interest in the goods. A financing agency has a purchase money security interest when it advances money to the seller, taking back an assignment of chattel paper, and also when the financer advances money to the buyer to enable him to buy the property, and the buyer uses the money for that purpose.

2. When a purchase money interest is claimed by a secured party who is not a seller, he must of course have given present consideration. This section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation"; which quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a preexisting claim or antecedent debt.

3. If a secured party wishes he may acquire both a purchase money security interest to secure the purchase money obligation and a regular security interest to secure other obligations. Although some court decisions in other jurisdictions would seem to require separate documentation for each type of security interest, this section permits the same security agreement to create (and the same financing statement to perfect) both types of security interests.

Cross References

Point 1: Sections 9-301, 9-302, and 9-312.

Point 2: Section 9-108.

Definitional Cross References

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Person". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

"Value". Section 1-201.

Special Plain Language Comment

A seller can acquire a purchase money security interest to secure the unpaid portion of the price of collateral sold to the buyer. A lender can also acquire a purchase money security interest by loaning the debtor the funds which he uses to purchase the collateral. However, the lender has to be able to prove that its loan funds were used to pay the purchase price, for example, by using a cashiers or certified check evidencing the loan funds to pay the purchase price to the seller.

Purchase money security interests can have various advantages over regular security interests, including priority under §§ 9-312(C) and (D).

§ 9-108. When after-acquired collateral not security for antecedent debt

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property, his security interest in the after-acquired collateral shall. be deemed to be taken for new value (and not as security for an antecedent debt) if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-108 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Many financing transactions contemplate that the collateral will include both the debtor's existing assets and also assets thereafter acquired by him in the operation of his business. This article generally validates such after-acquired property interests (see § 9-204 and Comment), although they may be subordinated to later purchase money security interests under § 9-312(C) and (D).

Two tests must be met under this section for an interest in after-acquired property to be one not taken for an antecedent debt. First: the secured party must, at the inception of the transaction, have given new value in some form. Second: the after-acquired property must come in either in the ordinary course of the debtor's business or as an acquisition which is made under a contract of purchase entered into within a reasonable time after the giving of new value and pursuant to the security agreement. The reason for the first test needs no comment. The second is in line with limitations which judicial construction has placed on the operation of after-acquired property clauses. Their coverage has been in many cases restricted to subsequent ordinary course acquisitions: this article does not go so far (see § 9-204 and Comment), but it does deny present value status to out of ordinary course of business acquisitions that are not made pursuant to the original loan agreement.

2. The term "value" is defined in § 1-201(RR) and discussed in the accompanying Comment. In this section and in other sections of this article the term "new value" is used but is left without statutory definition. The several illustrations of "new value" given in the text of this section (making an advance, incurring an obligation, releasing a perfected security interest) as

well as the "purchase money security interest" definition in § 9-107 indicate the nature of the concept. In other situations it is left to the courts to distinguish between "new" and "old" value, between present considerations and antecedent debt. As a practical matter, the concept of "new value" will be governed in most cases by the definition of "new value" in 11 U.S.C. § 547(a)(2), which relates to the preference tests under the Bankruptcy Code.

Cross References

Point 1: Sections 9-204 and 9-312.

Point 2: Section 9-107.

Definitional Cross References

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

Special Plain Language Comment

This article permits the debtor to grant a security interest in collateral which he may acquire in the future. (See § 9-204. This section describes the tests for deciding when that security is acquired for new value or when it is acquired for an old (or "antecedent") debt.)

§ 9-109. Classification of goods: "consumer goods"; "equipment"; "farm products"; "inventory"

Goods are:

A. "Consumer goods" if they are regularly used or bought for use for personal, family or household purposes;

B. "Equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

C. "Farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wooldip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory; or

D. "Inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service (or if he has so furnished them), or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-109 of the Uniform Commercial Code adopted by the states, except that goods which are regularly used by consumers for their personal, family or household purposes are defined as consumer goods even if they are more often also used for business purposes and that Navajo law apart from this Code may further clarify and regulate the matters relating to consumer goods.

Commentary. 1. This section classifies goods as consumer goods, equipment, farm products and inventory. The classification is important in many situations: it is relevant, for example, in determining the rights of persons who buy from a debtor goods subject to a security interest (§ 9-307), in certain question of priority (§ 9-312), in determining the place of filing (§ 9-40 1) and in working out rights after default (Part 5). Comment 5 to § 9-102 contains an index of the special rules under this Code applicable to different classes of collateral.

2. The classes of goods are mutually exclusive; the same property cannot at the same time and as to the same person be both equipment and inventory, for example. In borderline cases—a physician's car or a farmer's jeep which might be either consumer goods or equipment—the principal use to which the property is put should be considered as determinative, although under Navajo law, goods which have regular use for personal, family or household purposes will be consumer goods even if they are also regularly used for business purposes by an individual consumer. Goods can fall into different classes at different times; a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder. When goods are owned by a corporation, partnership or other business entity, it is presumed that such goods are not consumer goods.

3. The principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale. Implicit in the definition is the criterion that the prospective sale is in the ordinary course of business. Machinery used in manufacturing, for example, is equipment and not inventory even though it is the continuing policy of the enterprise to sell machinery when it becomes obsolete. Goods to be furnished under a contract of services are inventory even though the arrangement under which they are furnished is not technically a sale. When an enterprise is engaged in the business of leasing a

stock of products to users (for example, the fleet of cars owned by a car rental agency), that stock is also included within the definition of "inventory". It should be noted that one class of goods which is not held for disposition to a purchaser or user is included in inventory: "Materials used or consumed in a business". Examples of this class of inventory are fuel to be used in operations, scrap metal produced in the course of manufacture, and containers to be used to package the goods. In general, it maybe said that goods used in a business are equipment when they are fixed assets or have, as identifiable units, a relatively long period of use; but are inventory, even though not held for sale, if they are used up or consumed in a short period of time in the production of some end product.

4. Goods are "farm products" only if they are in the possession of a debtor engaged in farming operations. Animals in a herd of livestock are covered whether they are acquired by purchase or result from natural increase. Products of crops or livestock remain farm products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. The terms "crops", "livestock" and "farming operations" are not defined: however, it is obvious from the text that "farming operations" includes raising livestock as well as crops. Similarly, since eggs are products of livestock, livestock includes fowl.

When crops or livestock or their products come into the possession of a person not engaged in farming operations they cease to be "farm products". If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory.

Products of crops or livestock, even though they remain in the possession of a person engaged in fanning operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not determined by this article. At one end of the scale some processes are so closely connected with farming—such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar—that they would not rank as manufacturing. On the other hand, an extensive canning operation would be manufacturing. The line is one for the courts to draw. After farm products have been subjected to a manufacturing operation, they become inventory if held for sale.

5. The principal definition of equipment is a negative one: goods used in a business (including farming or a profession) which are not inventory and not farm products. Trucks, rolling stock, tools, machinery are typical types of equipment. Furthermore, any goods which are not covered by one of the other definitions in this section are to be treated as equipment.

Cross References

Point 1: Sections 9–102, 9–307, 9–312, 9–401 and Part 5.

Point 3: Section 9–307.

Point 4: Section 9–307.

Definitional Cross References

"Contract". Section 1–201.

"Debtor". Section 9–105.

"Goods". Section 9–105.

"Organization". Section 1–201.

"Person". Section 1–201.

"Sale". Sections 2–106 and 9–105.

Special Plain Language Comment

This article provides for different rights and obligations to apply to different types of goods. This section describes the tests for classifying goods as "consumer goods", "equipment", "farm products" or "inventory". Those four categories are mutually exclusive, and the same item can only be placed in one category at a time. However, the classification of goods can depend upon their use, and the same item can have a different classification in the hands of different people. For example, a pick-up truck can be "consumer goods" of an individual who uses it for personal transportation, "equipment" of a business that uses it for deliveries, and "inventory" of a truck dealer.

§ 9–110. Sufficiency of description

For the purposes of this article any description of personal property or real estate is sufficient, whether or not it is specific, if it reasonably identifies what is described.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9–110 of the Uniform Commercial Code adopted by the states.

Commentary. The requirement of description of collateral (see § 9–203 and Comment thereto) is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it—that it make possible the identification of the thing described. Under this rule it is not essential that descriptions be of the most exact and detailed nature, the so-called "serial number" test. The same test of reasonable identification applies where a description of real estate is required in a financing statement. (See § 9–402). The functional test for the adequacy of a description is whether a third person could determine what the collateral is without an unreasonable amount of difficulty.

Cross References

Sections 9–203 and 9–402.

Special Plain Language Comment

The collateral must be described in financing statements and security agreements. This section describes the rule for deciding whether a collateral description is adequate. If a financing statement description of collateral is inadequate, then the financing statement is ineffective. If a security agreement description is inadequate, the security agreement may be ineffective, although the Courts can use oral or other evidence in order to resolve ambiguities concerning what collateral the parties intended the agreement to cover and to reform the agreement to be consistent with the intention of the parties.

§ 9-111. [Omitted]

History

CJA-1-86, January 29, 1986.

§ 9-112. Where collateral is not owned by debtor

Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral: (i) is entitled to received from the secured party any surplus under § 9-502(B) or under § 9-504(A); (ii) is not liable for the debt or for any deficiency after resale; and (iii) has the same right as the debtor:

A. To receive statements under § 9-208;

B. To receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under § 9-505;

C. To redeem the collateral under § 9-506;

D. To obtain injunctive or other relief under § 9-507(A); and

E. To recover losses caused to him under § 9-208(B).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-112 of the Uniform Commercial Code adopted by the states.

Commentary. Under the definition of § 9-105, in any provisions of this article dealing with the collateral the term "debtor" means the owner of the collateral even though he is not the person who owes payment or performance of the obligation secured. For example, if the owner of a corporation grants a security interest in equipment which he owns in order to secure a loan to the corporation, both the owner and the corporation are "debtors", even though the owner has not promised to repay the loan. This section covers several situations in which the implications of this broad definition of "debtor" are specifically set out.

The duties which this section imposes on a secured party toward such an owner of collateral are conditioned on the secured party's knowledge of the true state of the facts. Short of such knowledge he may continue to deal exclusively with the person who owes the obligation. This section does not suggest that the secured party is under any duty of inquiry. It does not purport to cut across or alter the law of conversion or of ultra vires. Whether a person who does not own property has authority to encumber it for his own debts, and whether a person is free to encumber his property as collateral for the debts of another, are each matters to be decided under other rules of law and are not covered by this section. This section also does not affect any rights which the owner of collateral may have under laws relating to suretyship or guaranties.

This section does not purport to be an exhaustive treatment of the subject. It isolates certain problems which maybe expected to arise and states rules as to them. Others will no doubt arise: their solution is left to the courts.

Cross References

Sections 9–105, 9–208 and Part 5.

Definitional Cross References

"Collateral". Section 9–105.

"Debtor". Section 9–105.

"Notice". Section 1–201.

"Person". Section 1–201.

"Receive notice". Section 1–201.

"Right". Section 1–201.

"Secured party". Section 9–105.

Special Plain Language Comment

This section recognizes that people sometimes grant security interests in their property in order to secure obligations of another person. Although this article refers to both that owner of the collateral and person having the obligation as "debtors", those two types of "debtors" have different rights and obligations. This section describes some of the protections available to the owner of collateral who is not obligated on the obligation secured by that collateral.

§ 9–113. Security interests arising under Article on sales

A security interest arising solely under the Article on Sales (Article 2) is subject to the provisions of this article, except that to the extent that (and so long as) the debtor does not have or does not lawfully obtain possession of the goods:

A. No security agreement is necessary to make the security interest enforceable; and

B. No filing is required to perfect the security interest; and

C. The rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-113 of the Uniform Commercial Code adopted by the states.

Commentary. 1. Under the provisions of Article 2 on Sales, a seller of goods may reserve a security interest (see, e.g., §§ 2-401 and 2-505); and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under §§ 2-703, 2-705 and 2-706, which are similar to the rights of a secured party. Similarly, under such sections as §§ 2-506, 2-707 and 2-711, a financing agency, an agent, a buyer or another person may have a security interest or other right in goods similar to that of a seller. The use of the term "security interest" in the Sales Article is meant to bring the interests so designated within this article. This section makes it clear, however, that such security interests are exempted from certain provisions of this article.

2. The security interests to which this section applies commonly arise by operation of law in the course of a sales transaction. Since the circumstances under which they arise are defined in the Sales Article, there is no need for the "security agreement" defined in § 9-105(A)(12) and required by § 9-203(A), and Subsection (A) dispenses with such requirements. The requirement of filing may be inapplicable under §§ 9-302(A)(1) and (2), 9-304 and 9-305, where the goods are in the possession of the secured party or of a bailee other than the debtor. To avoid difficulty in the residual cases, as for example where a bailee does not receive notification of the secured party's interest until after the security interest arises, Subsection (B) dispenses with any filing requirement. Finally, Subsection (C) makes inapplicable the default provisions of Part 5 of this article, since the Sales Article contains detailed provisions governing stoppage of delivery and resale after breach. (See §§ 2-705, 2-706, 2-707(B) and 2-711(C)).

3. These limitations on the applicability of this article to security interests arising under the Sales Article are appropriate only so long as the debtor does not have or lawfully obtain possession of the goods. A secured party who wishes to retain a security interest after the debtor lawfully obtains possession must comply fully with all the provisions of this article and ordinarily must file a financing statement to perfect his interest. This is the effect of the "except" clause in the preamble to this section. Note that in the case of a buyer who has a security interest in rejected goods under § 2-

711(C), the buyer is the "secured party" and the seller is the "debtor".

4. This section applies only to a "security interest". The definition of "security interest" in § 1-201(KK) expressly excludes the special property interest of a buyer of goods on identification of those goods to a contract under § 2-401(A). The seller's interest after identification and before delivery may be more than a security interest by virtue of explicit agreement under § 2-401(A) or 2-501(A), by virtue of the provisions of § 2-401(B) or (C) or (D), or by virtue of substitution pursuant to § 2-501(B). In such cases, Article 9 is inapplicable by the terms of § 9-102(A)(1).

5. Where there is a "security interest", this section applies only if the security interest arises "solely" under the Sales Article. Thus, § 1-201 (KK) permits a buyer to acquire by agreement a security interest in goods not in his possession or control. Such a security interest does not impair the buyer's rights under the Sales Article, but any rights based on the security agreement are fully subject to this article without regard to the limitations of this section. Similarly, a seller who reserves a security interest by agreement does not lose his rights under the Sales Article, but rights other than those conferred by the Sales Article depend on full compliance with this article.

Cross References

Point 1: Sections 2-401, 2-505, 2-506, 2-705, 2-706, 2-707 and 2-711(Q).

Point 2: Sections 2-705, 2-706, 2-707(B), 2-711(C), 9-203(A), 9-302(A)(1) and (2), 9-304, 9-305 and Part 5.

Point 3: Section 2-711(C).

Point 4: Sections 2-401, 2-501 and 9-102(A)(1).

Definitional Cross References

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section reconciles this article 9 with Article 2 which also grants rights which are in some or all respects like security interests. If the seller or his agents still have possession of goods being sold to a buyer, the seller can have numerous rights under Article 2 which are not affected by the requirements of this article 9.

§ 9-114. Consignment

A. A person who delivers goods under a consignment which is not a security interest and who would be required to file under this article by § 2-326(C) (3): (i) has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee; and (ii) also has priority with respect to identifiable cash proceeds received on or before delivery of the goods to a buyer, if:

1. The consignor complies with the filing provision of the Article on Sales with respect to consignments (§ 2-326(C)(3)) before the consignee receives possession of the goods; and

2. The consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and

3. The holder of the security interest receives the notification within five (5) years before the consignee receives possession of the goods; and

4. The notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type.

B. In the case of a consignment which is not a security interest and in which the requirements of the preceding Subsection have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor, except for artists (see § 2-326).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-114 of the Uniform Commercial Code adopted by the states except that artists who consign goods have priority over the consignor's creditors.

Commentary. 1. This section requires that where goods are furnished to a merchant under the arrangement known as consignment, rather than in a security transaction, the consignor must, in order to protect his position as against an inventory secured party of the consignee, give to that party the same notice and at the same time that he would give to that party if that party had filed first with respect to inventory and if the consignor were furnishing the goods under an inventory security agreement instead of under a consignment.

For the distinction between true consignment and security arrangements, see § 1-201(MM). For the assimilation of consignments under certain circumstances to goods on sale or return and the requirement of filing in the case of consignments, see § 2-326.

The requirements of notice in this section conform closely to the concepts and the language of § 9-312(C), which should be consulted together with the relevant Comments thereto.

Except in the limited cases of identifiable cash proceeds received on or before delivery of the goods to a buyer, no attempt has been made to provide rules as to perfection of a claim to proceeds of consignments (compare § 9-306) or the priority thereof (compare § 9-312). It is believed that under many true consignments the consignor acquires a claim for an agreed amount against the consignee at the moment of sale, and does not look to the proceeds of sale. In contrast to the assumption of this article that rights to proceeds of security interests under § 9-306 represent the presumed intent of the parties (compare § 9-203(C)), the Article goes on the assumption that if consignors intend to claim the proceeds of sale, they will do so by expressly contracting for them and will perfect their security interests therein.

Cross References

Sections 2-326 and 9-312(C).

Definitional Cross References

"Consignment". Section 1-201(MM).

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Notification". Section 1-201(Z).

"Proceeds". Section 9-306.

"Security interest". Section 1-201(MM).

Special Plain Language Comment

This section refers to certain arrangements made under Article 2 which are described as "consignments", and reconciles the competing interests of the interested parties in the consigned property. For example, if the owner of a painting delivered the painting to a gallery for sale by the gallery to third parties, the owner can be described as a "consignor" and the gallery can be described as the "consignee". This section describes the rights of the consignor (e.g., the owner of the painting) against the consignee (e.g., the gallery) and its secured creditors.

Part 2. Validity of Security Agreement and Rights of Parties Thereto

§ 9-201. General validity of security agreement

Except as otherwise provided by applicable law, a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, consumer protection, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-201 of the Uniform Commercial Code as adopted by the states, except that this section recognizes that federal and other laws outside this Code can affect the terms of a security agreement.

Commentary. This section states the general validity of a security agreement. In general, the security agreement is effective between the parties. It is likewise effective against third parties. Exceptions to this general rule arise where there is a specific provision in any Article of this Code or other applicable law; for example, where Article I invalidates a disclaimer of the obligations of good faith, etc. (§ 1-102(Q)), or this article subordinates the security interest because it has not been perfected (§ 9-301) or for other reasons (see § 9-312 on priorities) or defeats the security interest where certain types of claimants are involved (for example, § 9-307 on buyers of goods). As pointed out in the Comment to § 9-102, there is no intention that the enactment of this article should repeal retail installment selling acts, small loan acts or other consumer protection laws. Nor of course are any applicable usury laws repealed. These are mentioned in the text of § 9-201 as examples of applicable laws, outside this Code entirely, which might invalidate terms of a security agreement.

Cross References

Sections 1-102(C), 9-301, 9-307 and 9-312.

Definitional Cross References

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Security agreement". Section 9-105.

Special Plain Language Comment

This section recognizes the legal effect of security agreements, which can be affected by other applicable laws.

§ 9-202. Title to collateral immaterial

Each provision of this article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-202 of the Uniform Commercial Code as adopted by the states.

Commentary. The rights and duties of the parties to a security transaction and of third parties arc stated in this article without reference to the location of "title" to the collateral. Thus, the incidents of a security interest which secures the purchase price of goods are the same under this article whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed it or a lien to the secured party. This article in no way determines which line of interpretation (title theory v. lien theory or retained title v. conveyed title) should be followed in cases where the applicability of some other rule of law depends upon who has title. Thus, if a revenue law imposes a tax on the "legal" owner of goods, or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this article does not attempt to define whether the secured party is a "legal" owner or whether the transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determine the location of "title" for such purposes.

Petitions for reclamation brought by a secured party in his debtor's insolvency proceedings have often been granted or denied on a title theory: where the secured party has title, reclamation will be granted; where he has "merely a lien", reclamation maybe denied. (For the treatment of such petitions under this article, see Point 1 of Comment to § 9-507).

Cross References

Sections 2-401 and 2-507.

Definitional Cross References

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

Special Plain Language Comment

This section recognizes that a relationship of "debtor" and "secured party" can exist even though the secured party remains the technical owner of the property subject to the right of the debtor-buyer to acquire title to the property when he pays the full purchase price.

§ 9-203. Attachment and enforceability of security interest; proceeds; formal requisites

A. Subject to the provisions of other applicable laws on the security interest of a collecting bank such rights are governed by § 4-208 of the Uniform Commercial Code, on security interests in securities (since the Navajo Nation has not adopted Article 4 and Article 8 of the Uniform Commercial Code rights which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204) and subject to § 9-113 on a security interest arising under Article 2 on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

1. The collateral is in the possession of the secured party pursuant to an agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;

2. Value has been given; and

3. The debtor has rights in the collateral.

B. A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in Subsection (A) have taken place unless explicit agreement postpones the time of attaching.

C. Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by § 9-306.

D. A transaction, although subject to this division, is subject to other statutes enacted by the Navajo Nation Council. A transaction, although subject to this division, is also subject to certain other statutes of the States. Such statutes are not pre-empted by this Code (although such statutes may be pre-empted by further legislation of the Navajo Nation Council). Unless otherwise agreed in writing the law of the state in which a natural person resides, or in the case of all other entities, the state in which the entity has its principal place of business shall be the governing statutes. Such statutes are those set forth in the following sections of the state statutes: Ariz. Rev. Stat. Ann. § 47-9203(D) in Arizona, N.M. Stat. Ann. § 55-9-203(B) in New Mexico and Utah Code Ann. § 70A-9-203(D) in Utah.

E. In case of conflict between the provisions of this article and any such statutes, the provisions of such statutes control. Failure to comply with any applicable statute has only the effect which is specified therein.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-203 of the Uniform Commercial Code as adopted by the states, except that Subsection (D) recognizes that statutes of the Navajo Nation Council and certain states may have an effect on this article.

Commentary. 1. Subsection (A) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing unless the collateral is in the possession of the secured party (including an agent on his behalf-see Comment 2 to § 9-305). When all of these elements exists, the security agreement becomes enforceable between the parties and is said to "attach". Perfection of a security interest (see § 9-303) will in many cases depend on the additional step of filing a financing statement (see § 9-302) or possession of the collateral (§§ 9-304(A) and 9-305). Section 9-301 states who will take priority over a security interest which has attached but which has not been perfected. Subsection (B) states a rule of construction under which the security interest, unless postponed by explicit agreement, attaches automatically when the stated events have occurred.

2. As to the type of description of collateral in a written security agreement which will satisfy the requirements of this section, see § 9-110 and the Comment thereto. In the case of crops growing or to be grown or timber to be cut the best identification is by describing the land, and Subsection (A)(1) requires such a description.

3. One purpose of the formal requisites stated in Subsection (A)(1) is evidentiary. The requirement of a written record minimizes the possibility of future dispute as to the terms of a security agreement and as to what property stands as collateral for the obligation secured. Where the collateral is in the possession of the secured party, the evidentiary need for a written record is much less than where the collateral is in the debtor's possession; customarily, of course, as a matter of business practice the written record will be kept, but, in this article the writing is not a formal requisite. Subsection (A)(1), therefore, dispenses with the written agreement—and thus with signature and description—if the collateral is in the secured party's possession.

4. The definition of "security agreement" (§ 9-105) is "an agreement which creates or provides for a security interest". Under that definition the requirement of this section that the debtor sign a security agreement is not intended to reject, and does not reject, the deeply rooted doctrine that a bill of sale, although absolute in form, may be shown to have been in fact given as security. Under this article a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security and may then, on payment of the debt, assert his fundamental right to return of the collateral and execution of an acknowledgment of satisfaction.

5. The formal requisite of a writing stated in this section is not only a

condition to the enforceability of a security interest against third parties, it is also in the nature of a Statute of Frauds. Unless the secured party or his agent is in possession of the collateral, his security interest, absent a writing which satisfies Subsection (A)(1), is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like. If the secured party has advanced money, he is, of course, a creditor and, like any creditor, is entitled after judgment to appropriate process to enforce his claim against his debtor's assets. That secured party win not, however, have against his debtor the rights given a secured party by Part 5 of this article on default. More harm than good would result from allowing creditors to establish a secured status by parol evidence after they have neglected the simple formality of obtaining a signed writing.

6. The provisions of regulatory statutes covering the field of consumer finance prevail over the provisions of this article in case of conflict. Failure to comply with any applicable regulatory statute has whatever effect may be specified in that statute, but no more.

Cross References

Section 9-113.

Point 1: Section 9-110.

Point 5: Part 5.

Definitional Cross References

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Party". Section 1-201.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

Special Plain Language Comment

This section describes the fundamental requirements for a security interest to attach to any collateral. Although a written agreement is necessary to create a security interest in collateral not possessed by the secured party or his agent, the security interest requires "value" in order to attach to collateral. The security interest only attaches to the extent of the debtor's interest in the collateral. If the debtor has no interest in particular collateral when he signs a security agreement, no security interest attaches to that collateral until the debtor acquires rights in the collateral to which the security interest can attach. The timing of the attachment of the security interest can affect the rights of the parties under other provisions of this article.

§ 9-204. After-acquired property; future advances

A. Except as provided in Subsection (B), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.

B. No security interest attaches under an after-acquired property clause to consumer goods other than accessions (§ 9-314) when given as additional security unless the debtor acquires rights in them within 10 days after the secured party gives value.

C. Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (§ 9-105(A)).

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-204 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. Subsection (A) makes clear that a security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement. That is to say: the security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party-such as the taking of a supplemental agreement covering the new collateral-is required. This does not, however, mean that the interest is proof against subordination or defeat: Section 9-109 should be consulted on when a security interest in after-acquired collateral is not security for antecedent debt, and § 9-312(C) and (D) on when such a security interest may be subordinated to a conflicting purchase money security interest in the same collateral.

2. This article accepts the principle of a "continuing general lien" or a "floating security interest". This article validates a security interest in the debtor's existing and future assets, even though (see § 9-205) the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. (See further, however, § 9-306 on Proceeds and Comment thereto.)

Notice that the question of assignment of future accounts is treated like any other case of after-acquired property-no periodic list of accounts is required by this Code. Where less than all accounts are assigned, such a list may, of course, be necessary to permit identification of the particular accounts assigned.

3. Subsection (A) also serves to validate the so-called "cross-security" clause

under which collateral acquired at any time may secure advances whenever made or obligations whenever arising.

4. Subsection (B) limits the operation of the after-acquired property clause against consumers. No such interest can be claimed as additional security in consumer goods (defined in § 9-109), except accessions (see § 9-314), acquired more than 10 days after the giving of value.

5. Under Subsection (C) collateral may secure future as well as present, advances or obligations when the security agreement so provides. In line with the policy of this article toward after-acquired property interests that Subsection validates the future advance interest, provided only that the obligation be covered by the security agreement.

The effect of after-acquired property and future advance clauses in the security agreement should not be confused with the use of financing statements in notice filing. The references to after-acquired property clauses and future advance clauses in § 9-204 are limited to security agreements. This section follows § 9-203, the section requiring a written security agreement, and its purpose is to make dear that confirmatory agreements are not necessary where the basic agreement has the clauses mentioned. This section has no reference to the operation of financing statements. The filing of a financing statement is effective to perfect security interests as to which other required elements for perfection exist, whether the security agreement involved is one existing at the date of filing with an after-acquired property clause or a future advance clause, or whether the applicable security agreement is executed later. Indeed, § 9-402(A) expressly contemplates that a financing statement may be filed when there is no security agreement. There is no need to refer to after-acquired property or future advances in the financing statement.

As in the case of interests in after-acquired collateral, a security interest based on future advances or obligations may be subordinated to conflicting interests in the same collateral. See §§ 9-301(D), 9-307(C), 9-312(C), (D) and (G).

Cross References

Point 1: Sections 9-108 and 9-312.

Point 2: Sections 9-205 and 9-306.

Point 4: Sections 9-109 and 9-314.

Point 5: Sections 9-301(D), 9-307(C), 9-312(C), (D) and (G).

Definitional Cross References

"Account". Section 9-106.

"Agreement". Section 1-201.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Purchase". Section 1-201.

"Pursuant to commitment". Section 9-105.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

Special Plain Language Comment

Except for consumer goods, a security agreement may grant a security interest in specified collateral, whether then existing or thereafter acquired by the debtor, to secure any or all of the obligations of the debtor to the secured party, whether then existing or thereafter arising.

§ 9-205. Use or disposition of collateral without accounting permissible

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of an or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-205 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. This article expressly validates the floating charge or lien on a shifting stock. (See §§ 9-201, 9-204, and Comment to § 9-204.) This section provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for proceeds or substitute new collateral.

2. While this section does not require a secured party to "police" his

collateral, the filing requirements (§ 9-302) give other creditors the opportunity to ascertain from public sources whether property of their debtor or prospective debtor is subject to secured claims, and the provisions about proceeds (§ 9-306(D)) enable creditors to claim collections which were made by the debtor more than 10 days before insolvency proceedings and commingled or deposited in a bank account before institution of the insolvency proceedings.

3. Nothing in § 9-205 prevents such "policing" or dominion as the secured party and the debtor may agree upon. Business and not legal reasons win determine the extent to which strict accountability, segregation of collections, daily reports and the like will be employed.

4. The last sentence is added to make clear that this section does not mean that the holder of an unfiled security interest, whose perfection depends on possession of the collateral by the secured party or by the bailee (such as a field warehouseman), can allow the debtor access to and control over the goods without thereby losing his perfected interest. The rules on the degree and extent of possession which are necessary to perfect a pledge interest or to constitute a valid field warehouse are not relaxed by this or any other Section of this article.

Cross References

Point 1: Sections 9-201 and 9-204.

Point 2: Sections 9-302 and 9-306(D).

Point 4: Sections 9-304 and 9-305.

Definitional Cross References

"Account". Section 9-106.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section clarifies the fact that the secured parties legal rights are generally not impaired by his failure to control the debtor's use or disposition of the collateral.

§ 9-206. Agreement not to assert defenses against assignee; modification of sales warranties where security agreement exists

A. Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a, negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

B. When a seller retains a purchase money security interest in goods, the Article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-206 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. Clauses are frequently inserted in installment purchase contracts under which the conditional vendee agrees not to assert defenses against an assignee of the contract. Under Subsection (A) such clauses in a security agreement are validated outside the consumer field, but only as to defenses which could be cut-off if a negotiable instrument were used. This limitation is important, since if the clauses were allowed to have full effect as typically drafted, they would operate to cut-off real as well as personal defenses. The execution of a negotiable note in connection with a security agreement is given like effect as the execution of an agreement containing a waiver of defense clause. The same rules are made applicable to leases as to security agreements, whether or not the lease is intended as security.

2. This article takes no position on the controversial question whether a buyer of consumer goods may effectively waive defenses by contractual clause or by execution of a negotiable note. This article neither adopts nor rejects the approach taken in such statutes and decisions, except that the validation of waivers in Subsection (A) is expressly made "subject to any statute or decision" which may restrict the waiver's effectiveness in the case of a buyer of consumer goods.

3. Subsection (B) makes clear that purchase money security transactions are sales, and warranty rules for sales are applicable. It also prevents a buyer from inadvertently abandoning his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement. Where the sales arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim, limit or modify warranties to the extent permitted by Article 2.

Cross References

Point 1: Section 3-305.

Point 2: Section 9-203(B).

Point 3: Section 2-102 and 2-316.

Definitional Cross References

"Agreement". Section 1-201.

"Consumer goods". Section 9-109.

"Good faith". Section 1-201.

"Goods". Section 9-105.

"Holder". Section 1-201.

"Holder in due course". Sections 3-302 and 9-105.

"Negotiable instrument". Section 3-104.

"Notice". Section 1-201.

"Purchase money security interest". Section 9-107.

"Sale". Sections 2-106 and 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

Special Plain Language Comment

This section discusses the extent to which a seller or lessor can include waivers in his contract which enable his successor by assignment to enforce the contract even though the buyer or lessee would otherwise have a defense to such enforcement by the seller or lessor personally.

§ 9-207. Rights and duties when collateral is in secured party's possession

A. A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed in writing.

B. Unless otherwise agreed in writing, when collateral is in the secured party's possession:

1. Reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;

2. The risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

3. The secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

4. The secured party must keep the collateral identifiable, but fungible collateral may be commingled; and

5. The secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.

C. A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding Subsections, but does not lose his security interest.

D. A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-207 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. Subsection (A) states the duty to preserve collateral imposed on a pledge. In many cases a secured party having collateral in his possession may satisfy this duty by notifying the debtor of any act which must be taken and allowing the debtor to perform such act himself. If the secured party himself takes action, his reasonable expenses may be added to the secured obligation.

Under § 1-102(C) the duty to exercise reasonable care may not be disclaimed by agreement, although under that section the parties remain free to determine by agreement, in any manner not manifestly unreasonable, what shall constitute reasonable care in a particular case.

2. Subsection (B) states rules which apply, unless there is written agreement otherwise, in typical situations during the period while the secured party is in possession of the collateral.

3. The right of a secured party holding instruments or documents to have them

endorsed or transferred to him or his order is dealt with in the relevant sections of Article 3 (Commercial Paper).

4. This section applies when the secured party has possession of the collateral before default, as a pledgee, and also when he has taken possession of the collateral after default. (See §§ 9-501(A) and (B) and 9-503.) Subsection (D) permits operation of the collateral in the circumstances stated, and Subsection (B)(1) authorizes payment of or provision for expenses of such operation. Agreements providing for such operation are common in trust indentures securing corporate bonds and are particularly important when the collateral is a going business. Such an agreement cannot, of course, disclaim the duty of care established by Subsection (A), nor can it waive or modify the rights of the debtor contrary to § 9-501(C).

Cross References

Point 1: Section 1-102(C).

Point 3: Section 3-201.

Point 4: Section 9-501(B) and Part 5.

Definitional Cross References

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Instrument". Section 9-105.

"Money" Section 1-201.

"Party". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section describes certain rights and obligation of a secured party when he has possession of the collateral. To a limited extent these rights and obligations may be altered by agreement.

§ 9-208. Request for statement of account or list of collateral

A. A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral, a debtor may similarly request the secured party to approve or correct a list of the collateral.

B. The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor, the secured party may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply, he is liable for any loss caused to the debtor thereby, and; if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both, the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If the secured party no longer has an interest in the obligation or collateral at the time the request is received, he must disclose the name and address of any successor in interest known to him, and he is liable for any loss caused to the debtor as a result of any failure to so disclose. A successor in interest is not subject to this section until a request is received by him.

C. A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars ($10.00) for each additional statement furnished.

D. If the secured party is an organization maintaining branches or branch offices, the requests provided for herein shall be sent to the branch or office at which the secured transaction was entered into or at which the debtor is permitted or required to pay his obligation. Unless the secured party shall otherwise so specify in his statement, the secured party's statement shall be deemed to apply only to obligations entered into or payable at such branch or office and to any collateral taken at such branch or office. If such branch or office is closed before such a statement is issued, the secured party's obligations are not limited to any branch or office.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-208 of the Uniform Commercial Code as adopted by the states, except that Subsection (D) has been added in order to clarify the obligations of a secured party with multiple branches or offices in a manner similar to the version of the Code adopted in California and certain other states.

Commentary. 1. The purpose of this section is to provide a procedure whereby a debtor may obtain from the secured party a statement of the amount due on the obligation and in some cases a statement of the collateral.

2. The financing statement required to be filed under this article (see § 9-402) may disclose only that a secured party may have a security interest in specified types of collateral owned by the debtor. Unless a copy of the security agreement itself is filed as the financing statement, third parties are told neither the amount of the obligation secured nor which particular assets are covered. Since subsequent creditors and purchasers may legitimately need more detailed information, it is necessary to provide a procedure under

which the secured party will be required to make disclosure. On the other hand, the secured party should not be under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them. This section gives the right to demand disclosure only to the debtor, who will typically request a statement in connection with negotiations with subsequent creditors and purchasers, or for the purpose of establishing his credit standing and proving which of his assets are free of the security interest. The secured party is further protected against onerous requests by the provisions that he need furnish a statement of collateral only when his own records identify the collateral and that, if he claims all of a particular type of collateral owned by the debtor, he is not required to approve an itemized list.

Cross References

Point 2: Section 9-402.

Definitional Cross References

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Good faith". Section 1-201.

"Know". Section 1-201.

"Person". Section 1-201.

"Receive". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Written". Section 1-201.

Special Plain Language Comment

The section creates a mechanism which the debtor may use to check on the status of his transaction with the secured party or to obtain proof of that status for other creditors or persons.

Part 3. Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority

§ 9-301. Persons who take priority over unperfected security interests; rights of "lien creditor"

A. Except as otherwise provided in Subsection (B), an unperfected security interest is subordinate to the rights of:

1. Persons entitled to priority under § 9-312;

2. A person who becomes a lien creditor before the security interest is perfected;

3. In the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interests and before it is perfected;

4. In the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that gives value without knowledge of the security interest and before it is perfected.

B. If the secured party files with respect to a purchase money security interest before or within 10 days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or other buyer out of the ordinary course of business or of a lien creditor which arise between the time the security interest attaches and the time of filing.

C. A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

D. A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he or she becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-301 of the Uniform Commercial Code as adopted by the states, except to the extent buyers of farm products are given greater protection under § 9-307 of this Code, which protection is recognized in this section 9-301.

Commentary. 1. This section lists the classes of persons who take priority over an unperfected security interest. As in § 547 of the Federal Bankruptcy Code, the term "perfected" is used to describe a security interest in personal property which cannot be defeated in insolvency proceedings or in general by creditors. A security interest is "perfected" when the secured party has taken whatever steps are necessary to give him such a perfected interest. These steps are explained in the five following sections (9-302 through 9-306).

2. Section 9-312 states general rules for the determination of priorities among conflicting security interests and in addition refers to other sections which state special rules of priority in a variety of situations. The interests given priority under § 9-312 and the other sections therein cited take such priority in general even over a perfected security interest. Therefore, perfected and other priority interests also take priority over an unperfected security interest, and Subsection (A)(1) of this section so states.

3. Subsection (A)(2) provides that an unperfected security interest is subordinate to the rights of lien creditors. The section subordinates the unperfected security interest, but does not subordinate the secured debt to the competing lien.

4. Subsections (A)(3) and (A)(4) deal with purchasers (other than secured parties) of collateral who would take subject to a perfected security interest but who are by these Subsections given priority over an unperfected security interest. In the cases of goods and of intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (instruments, documents and chattel paper) the purchaser who takes priority must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection (Subsection (A)(3)). Thus, even if the purchaser gave value without knowledge and before perfection, he would take subject to the security interest if perfection occurred before physical delivery of the collateral to him. The Subsection (A)(3) rule is obviously not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer. Therefore, with respect to such intangibles (accounts and general intangibles), Subsection (A) (4) gives priority to any transferee who has given value without knowledge and before perfection of the security interest.

The term "buyer in ordinary course of business" referred to in Subsection (A)(3) is defined in § 1-201(1).

Other secured parties are excluded from Subsections (A)(3) and (A)(4) because their priorities are covered in § 9-312 (see point 2 of this comment).

5. Except to the extent provided in Subsection (B), this article does not permit a secured party to file or take possession after another interest has received priority under Subsection (A) and thereby protect himself against the intervening interest. Subsection (B) gives a grace period for perfection by filing as to purchase money security interests only (as defined in § 9-107). The grace period runs for ten (10) days after the debtor receives possession of the collateral, but operates to cut off only the interests of intervening lien creditors, bulk purchasers or other buyers out of the ordinary course of business.

6. Subsection (D) deals with the question whether advances under an existing security interest in collateral, made after rights of lien creditors have attached to that collateral, will take precedence over rights of lien creditors. (See related problems in §§ 9-307(C) and 9-312(G)). In this section, because of the impact of the rule chosen on the question whether the

security interest for future advances is "protected" under § 6323(3)(2) and (4) of the Internal Revenue Code as amended by the Federal Tax Lien Code of 1966, the priority of the security interest for future advances over a judgment lien is made absolute for 45 days, regardless of knowledge of the secured party concerning the judgment lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien obtain by legal proceedings. The importance of the rule chosen for actual conflicts between secured parties making subsequent advances and judgment lien creditors may not be great; but the rule chosen for the first 45 days is important in effectuating the intent of the Federal Tax Lien Code of 1966.

Cross References

Section 9-312.

Point 1: Sections 9-302 through 9-306.

Point 6: Sections 9-204, 9-307(C) and 9-312(G).

Definitional Cross References

"Account". Section 9-106.

"Buyer in ordinary course of business". Section 1-201.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 9-105.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchase money security interest". Section 9-107.

"Pursuant to commitment". Section 9-105.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9–105.

"Security interest". Section 1–201.

"Value". Section 1–201.

Special Plain Language Comment

This section describes the priorities between unperfected security interests (i.e., those where the secured party has not filed required financing statement or complied with requirements for taking possession of collateral or for giving notice to third parties in possession) and competing liens and interests in the collateral.

§ 9–302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply

A. A financing statement must be filed to perfect all security interests except the following:

1. A security interest in collateral in possession of the secured party under § 9–305;

2. A security interest temporarily perfected in instruments or documents without delivery under § 9–304 or in proceeds for a 10-day period under § 9–306;

3. A security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;

4. A purchase money security interest in consumer goods; but filing is required for a motor vehicle required to be registered by applicable law; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in § 9–313;

5. An assignment of accounts which does not alone (or in conjunction with other assignments to the same assignee) transfer a significant part of the outstanding accounts of the assignor;

6. A security interest of a collecting bank or arising under the Article on Sales (see § 9–113) or covered in Subsection (C) of this section;

7. An assignment for the benefit of A the creditors of the transferor, and subsequent transfers by the assignee thereunder;

8. A security interest in a deposit account, which interest is perfected instead: (i) automatically upon the execution of the security agreement when the deposit account is maintained with the secured party; and (ii) when notice thereof is given in writing to the organization with whom the deposit account is maintained (if different than the secured party); and

9. A security interest in or claim under any policy of insurance,

including unearned premiums, which interest is perfected instead when notice thereof is given in writing to the insurer.

B. If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

C. The filing of a financing statement otherwise required by this article is not necessary or effective to perfect a security interest in property subject to:

1. A statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this article for filing of the security interest; or

2. Any Navajo law which provides for the registration of title or liens on motor vehicles or other personal property, but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this article (Part 4) apply to a security interest in that collateral created by him as debtor; or

3. A certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection (§ 9-103(B)).

D. Compliance with a statute or treaty described in Subsection (C) is equivalent to the filing of a financing statement under this article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in § 9-103 on multiple state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the statute or treaty; in other respects the security interest is subject to this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-302 of the Uniform Commercial Code as adopted by the states, except that this section makes certain adjustments because this Code does not presently include Article 4 or 8 of the Uniform Commercial Code and because this Code follows the approach taken in California to the perfection of security interests in deposit accounts and insurance policies.

Commentary. 1. Subsection (A) states the general rule that to perfect a security interest under this article a financing statement must be filed. Subsections (A) (1)(A) (9) exempt from the filing requirement the transactions described. Subsection (C) further sets out certain transactions to which the filing provisions of this article do not apply, but it does not defer to another statute on the filing of inventory security interests. The cases recognized are those where suitable alternative systems for giving public notice of a security interest are available. Subsection (D) states the consequences of such other form of notice.

Section 9-303 states the time when a security interest is perfected by filing or otherwise. Part 4 of the Article deals with the mechanics of filing: place of filing, form of financing statement and so on.

2. There is no requirement of filing when the secured party has possession of the collateral in a pledge transaction (Subsection (A)(1)). Section 9-305 should be consulted on what collateral may be pledged and on the requirements of possession.

3. Under this article, filing is not effective to perfect a security interest in instruments. (See § 9-304(A)).

4. Where goods subject to a security interest are left in the debtor's possession, the only permanent exception from the general filing requirement is that stated in Subsection (A)(4): purchase money security interests in consumer goods. For temporary exceptions, see §§ 9-304(E)(1) and 9-306.

Although the security interests described in Subsection (A)(4) are perfected without filing, § 9-307(B) provides that unless a financing statement is filed certain buyers may take free of the security interest even though perfected. See that section and the Comment thereto.

On filing for security interests in motor vehicles under certificate of title laws, see Subsection (C) of this section.

5. A financing statement must be filed to perfect a security interest in accounts except for the transactions described in Subsection (A)(5) and (7). It should be noted that this article applies to sales of accounts and chattel paper as well as to transfers thereof for security (§ 9-102(A)(2)); the filing requirement of this section applies both to sales and to transfers thereof for security. This article adopts that filing requirement, on the theory that there is no valid reason why public notice is less appropriate for assignments of accounts than for any other type of nonpossessory interest. Section 9-305, furthermore, excludes accounts from the types of collateral which may be the subject of a possessory security interest: filing is thus the only means of perfection contemplated by this article. See § 9-306 on accounts as proceeds.

The purpose of the Subsection (A)(5) exemption is to save from ex post facto invalidation casual or isolated assignments. Any person who regularly takes assignments of any debtor's accounts should file. In this connection § 9-104(F) which excludes certain transfers of accounts from the Article should be consulted.

Assignments of interests in trusts and estates are not required to be filed because they are often not thought of as collateral comparable to the types dealt with by this article. Assignments for the benefit of creditors are not required to be filed because they are not financing transactions and the debtor will not ordinarily be engaging in further credit transactions.

6. With respect to the Subsection (A)(6) exemptions, see the sections cited therein and Comments thereto.

7. The following example will explain the operation of Subsection (B): Buyer buys goods from Seller who retains a security interest in them which he perfects. Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on his part, continues perfected against Buyer's transferees and creditors. If, however, the assignment from Seller to X was itself intended for security (or was a sale of accounts or chattel paper), X must take whatever steps may be required for perfection in order to be protected against *Seller's* transferees and creditors.

8. Subsection (C) exempts from the filing provisions of this article transactions as to which an adequate system of filing, Navajo, state or federal, has been set up outside this article and Subsection (D) makes clear that when such a system exists perfection of a relevant security interest can be had only through compliance with that system (i.e., filing under this article is not a permissible alternative). Examples of the type of federal statute referred to in Subsection (C)(1) are the provisions of 17 U.S.C. §§ 28, 30 (copyrights), 49 U.S.C. § 1403 (aircraft), 49 U.S.C. § 20(3) (railroads). The Assignment of Claims Code of 1940, as amended, provides for notice to contracting and disbursing officers and to sureties on bonds but does not establish a national filing system and therefore is not within the scope of Subsection (C)(1). An assignee of a claim against the United States, who must of course comply with the Assignment of Claims Code, must also file under this article in order to perfect his security interest against creditors and transferees of his assignor.

Some states have enacted central filing statutes with respect to security transactions in kinds of property which are of special importance in the local economy. Subsection (C) adopts such statutes as the appropriate filing system for such property.

In addition to such central filing statutes many states have enacted certificates of title laws covering motor vehicles and the like. Subsection (C) exempts transactions covered by such laws from the filing requirements of this article. For a discussion of the operation of state motor vehicle certificate of title laws in interstate contexts, see Comment 4 to § 9-103.

9. Perfection of a security interest under a state or federal statute of the type referred to in Subsection (C) has all the consequences of perfection under the provisions of this article, Subsection (D).

Cross References

Point 1: Section 9-303 and Part 4.

Point 2: Section 9-305.

Point 3: Section 9-304(A).

Point 4: Section 9-307(B).

Point 5: Section 9-102(A)(2), 9-104(F) and 9-305.

Point 6: Section 9-113.

Definitional Cross References

"Account". Section 9-106.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Delivery". Section 1-201.

"Document". Section 9-105.

"Equipment". Section 9-109.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Instrument". Section 9-105.

"Inventory". Section 9-109.

"Proceeds". Section 9-306.

"Purchase". Section 1-201.

"Purchase money security interest". Section 9-107.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section describes when it is not necessary to file a financing statement in order to perfect a security interest in particular types of collateral. In certain cases, alternative methods of perfection are stated.

§ 9-303. When security interest is perfected; continuity of perfection

A. A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in §§ 9-302, 9-304, 9-305, and 9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

B. If a security interest is originally perfected in any way permitted under this article and is subsequently perfected in some other way under this article, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-303 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. The term "attach" is used in this article to describe the point at which property becomes collateral subject to a security interest. The requisites for attachment are stated in § 9-203. When it attaches a security interest may be either perfected or unperfected. "Perfected" means that the secured party has taken all the steps required by this article as specified in the several sections listed in Subsection (A). A perfected security interest may still be or become subordinate to other interests (see § 9-312), but in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor. Subsection (A) states the truism that the time of perfection is when the security interest has attached and any necessary steps for perfection (such as taking possession or filing) have been taken. If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches.

2. The following example will illustrate the operation of Subsection (B): A bank which has issued a letter of credit honors drafts drawn under the credit and receives possession of the negotiable bill of lading covering the goods shipped. Under §§ 9-304(B) and 9-305 the bank now has a perfected security interest in the document and the goods. The bank releases the bill of lading to the debtor for the purpose of procuring the goods from the carrier and selling them. Under § 9-304(E) the bank continues to have a perfected security interest in the document and goods for 21 days. The bank files a financing statement before the expiration of the 21-day period. Its security interest now continues perfected for as long as the filing is good. The goods are sold by the debtor. The bank continues to have a security interest in the proceeds of the sale to the extent stated in § 9-306.

If the successive stages of the bank's security interest succeed each other without an intervening gap, the security interest is "continuously perfected" and the date of perfection is when the interest first became perfected (i.e., in the example given, when the bank received possession of the bill of lading against honor of the drafts). If, however, there is a gap between stages-for example, if the bank does not file until after the expiration of the 21-day period specified in § 9-304(E), the collateral still being in the debtor's possession-then, the chain being broken, the perfection is no longer continuous. The date of perfection would now be the date of filing (after expiration of the 21-day period); the bank's interest might now become subject to attack under § 547 of the Federal Bankruptcy Code and would be subject to any interests arising during the gap period which under § 9–301 take priority over an unperfected security interest.

The rule of Subsection (B) would also apply to the case of collateral brought into this jurisdiction subject to a security interest which become perfected in another state or jurisdiction. See § 9–103(A)(4).

Cross References

Sections 9–302, 9–304, 9–305 and 9–306.

Point 1: Sections 9–204 and 9–312.

Point 2: Sections 9–103(A)(4) and 9–301.

Definitional Cross References

"Attach". Section 9–203.

"Security interest". Section 1–201.

Special Plain Language Comment

This section deals with the consequences of changes in circumstances which may cause a "perfected" security interest to become "unperfected" without further action by one or both of the parties.

§ 9–304. Perfection of security interest in instruments, documents and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession

A. A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in Subsections (D) and (E) of this section and § 9–306(B) and (C) on proceeds.

B. During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

C. A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

D. A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

E. A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor:

1. Makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests In the goods is subject to § 9-312(C); or

2. Delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

F. After the 21-day period in Subsections (D) and (E) perfection depends upon compliance with applicable provisions of this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-304 of the Uniform Commercial Code as adopted by the states, except as to certain adjustments which were necessary because this Code does not contain an Article 8 of the Uniform Commercial Code regarding certificated securities.

Commentary. 1. For most types of property, filing and taking possession are alternative methods of perfection. For some types of intangibles (i.e., accounts and general intangibles) filing is the only available method (see § 9-305 and Point 1 of Comment thereto). With respect to instruments Subsection (A) provides that, except for the cases of "temporary perfection" covered in Subsections (D) and (E), taking possession is the only available method of perfection. That rule is based on the thought that where the collateral consists of instruments, it is universal practice for the secured party to take possession of them in pledge; any surrender of possession to the debtor is for a short time; therefore it would be unwise to provide the alternative of perfection for a long period by filing which, since it in no way corresponds with commercial practice, would serve no useful purpose. For similar reasons, filing is not permitted as to money.

Subsection (A) further provides that filing is available as a method of perfection for security interests in chattel paper and negotiable documents, which also come within § 9-305 on perfection by possession. Chattel paper is sometimes delivered to the assignee, sometimes left in the hands of the assignor for collection; Subsection (A) allows the assignee to perfect his interest by filing in the latter case. Negotiable documents may be, and usually are, delivered to the secured party, and Subsection (A) allows an alternative method of perfection. Perfection of an interest in goods through a non-negotiable document is covered in Subsection (C).

2. Subsection (B) takes the position that, so long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document, and the proper way of dealing with such goods is through the document. Perfection therefore is to be made with respect to the document and, when made, automatically, carries over to the goods. Any interest perfected directly in the goods while the document is outstanding (for example, a chattel mortgage type of security interest on goods in a warehouse) is subordinated to an outstanding negotiable document.

3. Subsection (C) takes a different approach to the problem of goods covered by a non-negotiable document or otherwise in the possession of a bailee who has not issued a negotiable document. Here title to the goods is not looked on as being locked up in the document, and the secured party may perfect his interest directly in the goods by filing as to them. The Subsection states two other methods of perfection: issuance of the document in the secured party's name (as consignee of a straight bill of lading or the person to whom delivery would be made under a non-negotiable warehouse receipt), and receipt of notification of the secured party's interest by the bailee which, under § 9-305, is looked on as equivalent to taking possession by the secured party.

4. Subsections (D) and (E) give perfected status to security interests in instruments and documents for a short period although there has been no filing and the collateral is in the debtor's possession. There are a variety of legitimate reasons—some of them are described in Subsections (E)(1) and (E)(2)—why such collateral has to be temporarily released to a debtor, and no useful purpose would be served by cluttering the files with records of such exceedingly short term transactions. Under Subsection (D) the 21-day perfection runs from the date of attachment. There is no limitation on the purpose for which the debtor is in possession, but the secured party must have given new value under a written security agreement. Under Subsection (E) the 21-day perfection runs from the date a secured party who already has a perfected security interest turns over the collateral to the debtor (an example is a bank which has acquired a bill of lading by honoring drafts drawn under a letter of credit and subsequently turns over the bill of lading to its customer). There is no new value requirement, but the turnover must be for one or more of the purposes stated in Subsections (E)(1) and (E)(2). Note that while Subsection (D) is restricted to instruments and negotiable documents, Subsection (E) extends to goods covered by non-negotiable documents as well. Thus, the letter of credit bank referred to in the example could make a Subsection (E) turn-over without regard to the form of the bill of lading, provided that, in the case of a non-negotiable document, it had previously perfected its interest under one of the methods stated in Subsection (C). But note that the discussion of Subsection (E) in this comment deals only with perfection. Priority of a security interest in inventory after surrender of the document depends on compliance with the requirements of § 9-312(C) on notice to prior inventory financer.

Finally, it should be noted that the 21 days applies only to the documents and to the goods obtained by surrender thereof. If the goods are sold, the security interest will continue in proceeds for only 10 days under § 9-306, unless a further perfection occurs as to the security interest in proceeds.

Cross References

Sections 9–302, 9–305 and 9–312(C).

Definitional Cross References

"Chattel paper". Section 9–105.

"Debtor". Section 9–105.

"Document". Section 9–105.

"Goods". Section 9–105.

"Instrument". Section 9–105.

"Receives" notification. Section 9–201.

"Sale". Sections 2–106 and 9–105.

"Secured party". Section 9–105.

"Security agreement". Section 9–105.

"Security interest". Section 1–201

"Value". Section 1–201.

"Written". Section 1–201.

Special Plain Language Comment

This section describes the means for handling and perfecting collateral in the form of "instruments", "chattel paper", "documents", and goods covered by "documents". Among other things, the section describes how the secured party handles goods which are in the possession of warehousemen or other "bailees" who issue either a "negotiable" or "non-negotiable" document which represents rights with respect to the goods in his possession.

§ 9–305. When possession by secured party perfects security interest without filing

A security interest in letters of credit and advices of credit, goods, instruments, money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without back and continues only so long as possession is retained, unless otherwise specified in this article. The security interest maybe otherwise perfected as provided in this article before or after the period of possession by the secured party.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-305 of the Uniform Commercial Code as adopted by the states, except for the adjustment for certificated securities which are treated like other instruments because this Code does not presently include Article 8 of the Uniform Commercial Code.

Commentary. 1. As under the common law of pledge, no filing is required by this article to perfect a security interest where the secured party has possession of the collateral. (Compare § 9-302(A)(1)). This section permits a security interest to be perfected by transfer of possession only when the collateral is goods, instruments, documents or chattel paper: that is to say, accounts and general intangibles are excluded. A security interest in accounts and general intangibles—property not ordinarily represented by any writing whose delivery operates to transfer the claim—may under this article be perfected only by filing, and this rule would not be affected by the fact that a security agreement or other writing described the assignment of such collateral as a "pledge". Section 9-302(A)(5) exempts from filing certain assignments of accounts which are out of the ordinary course of financing: such exempted assignments are perfected when they attach under § 9-303(A); they do not fall within this section.

2. Possession may be by the secured party himself or by an agent on his behalf. It is, of course, clear, however, that the debtor or person controlled by him cannot qualify as such an agent for the secured party. See also the last sentence of § 9-205. Where the collateral (except for goods covered by a negotiable document) is held by a bailee, the time of perfection of the security interest, under the second sentence of the section, is when the bailee receives notification of the secured party's interest. It is not necessary for the bailee to attorn to the secured party or acknowledge that the bailee now holds on behalf of the secured party.

3. The third sentence of this section rejects the "equitable pledge" theory of relation back, under which the taking possession was deemed to relate back to the date of the original security agreement. Where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected, before that time under the rules.stated in § 9-204. The only exception to this rule is the short 21-day period of perfection provided in § 9-304(D) and (E) during which a debtor may have possession of specified collateral in which there is a perfected security interest.

Cross References

Sections 9-204, 9-302, 9-303, and 9-304.

Definitional Cross References

"Chattel paper". Section 9-105.

"Collateral" § 9-105.

"Documents". Section 9-105.

"Goods". Section 9-105.

"Instruments". Section 9-105.

"Receives" notification. Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section describes the circumstances under which possession by the secured party or his agents is sufficient to "perfect" a security interest in collateral.

§ 9-306. "Proceeds"; secured party's rights on disposition of collateral

A. "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds". All other proceeds are "non-cash proceeds".

B. Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof, unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

C. The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected, but it ceases to be a perfected security interest and becomes unperfected 10 days after receipt of the proceeds by the debtor unless:

1. A filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or

2. A filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or

3. The security interest in the proceeds is perfected before the expiration of the 10 day period. Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this article for original collateral of the same type.

D. In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

1. In identifiable non-cash proceeds and in separate deposit accounts containing only proceeds;

2. In identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

3. In identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and

4. In all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (4) is:

a. Subject to any right to set-off, and

b. Limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings less the sum of (i) the payments to the secured party on account of cash proceeds received by the debtor during such period; and (ii) the cash proceeds received by the debtor during such period to which the secured party is entitled under Subsection (D)(1)-(3).

E. If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

1. If the goods were collateral at the time of sale for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

2. An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (1) to the extent that the transferee of the chattel paper was entitled to priority under § 9-308.

3. An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (1).

4. A security interest of an unpaid transferee asserted under paragraph (2) or (3) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-306 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. This section states a secured party's right to the proceeds received by a debtor on disposition of collateral and states when his interest in such proceeds is perfected. It makes clear that insurance proceeds from casualty loss of collateral are proceeds within the meaning of this section. As to the proceeds of consigned goods, see § 9-114 and the Comment thereto.

2. A. This section provides rules for insolvency proceedings. Subsections (D)(1)-(3) substitute specific rules of identification for general principles of tracing. Subsection (D)(4) limits the security interest in proceeds not within these rules to an amount of the debtor's cash and deposit accounts not greater than cash proceeds received within 10 days of insolvency proceedings less the cash proceeds during this period already paid over and less the amounts for which the security interest is recognized under Subsection (D)(1)-(3).

B. Subsections (B) and (C) make clear that the three-month period for calculating a voidable preference in bankruptcy begins with the date of the secured party's obtaining the security interest in the original collateral and not with the date of his obtaining control of the proceeds. The interest in the proceeds "continues" as a perfected interest if the original interest was perfected; but the interest ceases to be perfected after the expiration of 10 days unless a filed financing statement covered the original collateral and the proceeds are collateral of a type as to which a security interest could be perfected by a filing in the same office or unless the secured party perfects his interest in the proceeds themselves-i.e., by filing a financing statement covering them or by taking possession. See § 9-312(F) and Comment thereto for priority of rights in proceeds perfected by a filing as to original collateral.

C. Where cash proceeds are deposited into the debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds when such payments and transfers occur in the ordinary course of business. The law of fraudulent conveyances would no doubt in appropriate cases support recovery of proceeds by a secured party from a transferee out of ordinary course or otherwise in collusion with the debtor to defraud the secured party.

3. In most cases when a debtor makes an unauthorized disposition of collateral, the security interest under this article, continues in the original collateral in the hands of the purchaser or other transferee. That is to say, since the transferee takes subject to the security interest, the secured party may

repossess the collateral from him or in an appropriate case maintain an action for conversion. Subsection (B) codifies this rule. The secured party may claim both proceeds and collateral, but may of course have only one satisfaction.

In many cases a purchaser or other transferee of collateral will take free of a security interest, and in such cases the secured party's only right will be to proceeds. The transferee will take free whenever the disposition was authorized, which authorization may be contained in the security agreement or otherwise given. The right to proceeds, either under the rules of this section or under specific mention thereof in a security agreement or financing statement, does not in itself constitute an authorization of sale.

Section 9-301 states when certain transferees take free of unperfected security interests. Section 9-307 on goods, § 9-308 on chattel paper and instruments and § 9-309 on negotiable instruments, negotiable documents and securities state when purchasers of such collateral take free of a security interest even though the disposition was not authorized.

4. Subsection (E) states rules to determine priorities when collateral which has been sold is returned to the debtor: for example, goods returned to a department store by a dissatisfied customer. The most typical problems involve sale and return of inventory, but the Subsection can also apply to equipment. Subsection (E)(1) of this section reinforces the rule of § 9-205: as between secured party and debtor (and debtor's trustee in bankruptcy) the original security interest continues on the returned goods. Whether or not the security interest in the returned goods is perfected depends upon factors stated in the text.

Subsections (E)(2), (3) and (4) deal with a different aspect of the returned goods situation. Assume that a dealer has sold an automobile and transferred the chattel paper or the account arising on the sale to Bank X (which had not previously financed the car as inventory). Thereafter the buyer of the automobile rightfully rescinds the sale, say for breach of warranty, and the car is returned to the dealer. Subsection (E)(2) gives the bank as transferee of the chattel paper or the account a security interest in the car against the dealer. For protection against dealer's creditors or purchasers from him (other than buyers in the ordinary course of business, see § 9-307), Bank X as the transferee, under Subsection (E)(4), must perfect its interest by taking possession of the car or by filing as to it. Perfection of his original interest in the chattel paper or the account does not automatically carry over to the returned car, as it does under Subsection (E)(1) where the secured party originally financed the dealer's inventory.

In the situation covered by Subsections (E)(2) and (E)(3) a secured party who financed the inventory and a secured party to whom the chattel paper or the account was transferred may both claim the returned goods-the inventory financer under Subsection (E)(1), the transferee under Subsections (E)(2) and (E)(3). With respect to chattel paper, § 9-308 regulates the priorities. With respect to an account, Subsection (E)(3) subordinates the security interest of the transferee of the account to that of the inventory financer. However, if the inventory security interest was unperfected, the transferee's interest could become entitled to priority under the rules stated in § 9-312(E).

In cases of repossession by the dealer and also in cases where the chattel was returned to the dealer by the voluntary act of the account debtor, the dealer's position may be that of a mere custodian; he may be an agent for resale, but without any other obligation to the holder of the chattel paper; he may be obligated to repurchase the goods, the chattel paper or the account from the secured party or to hold it as collateral for a loan secured by a transfer of the chattel paper or the account.

If the dealer thereafter sells the goods to a buyer in ordinary course of business in any of the foregoing cases, the buyer is fully protected under § 2-403(B) as well as under § 9-307(A), whichever is technically applicable.

Cross References

Sections 9-307, 9-308 and 9-309.

Point 3: Sections 1-205 and 9-301.

Point 4: Sections 2-403(B), 9-205 and 9-312.

Definitional Cross References

"Account". Section 9-106.

"Bank". Section 1-201.

"Chattel paper". Section 9-105.

"Check". Sections 3-104 and 9-105.

"Collateral". Section 9-105.

"Creditors". Section 1-201.

"Debtor". Section 9-105.

"Deposit account". Section 9-105.

"Goods". Section 9-105.

"Insolvency proceedings". Section 1-201.

"Money". Section 1-201.

"Purchaser". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section states rules which govern in various circumstances the treatment of "proceeds" which arise upon the sale or other disposition of collateral. This section also describes the treatment of goods which are returned to or recovered by a seller.

§ 9–307. Protection of buyers of goods

A. A buyer of goods in ordinary course of business (§ 1–201(J)) takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

B. In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes.

C. A buyer of goods other than a buyer in ordinary course of business (Subsection (A) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45-day period.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9–307 of the Uniform Commercial Code as adopted by the states, except that like California and other states, this section does not deny protection to buyers in the ordinary course of business of farm products as provided in the Official Text or to consumer purchasers of consumer goods without knowledge of the security interest.

Commentary. 1. This section states when buyers of goods take free of a security interest even though perfected. A buyer who takes free of a perfected security interest of course takes free of an unperfected one. Section 9–301 should be consulted to determine what purchasers, in addition to the buyers covered in this section, take free of an unperfected security interest.

Article 2 (Sales) states general rules on purchase of goods from a seller with defective or voidable title (§ 2–403).

2. The definition of "buyer in ordinary course of business" in § 1–201(1) restricts the application of Subsection (A) to buyers (except pawnbrokers) "from a person in the business of selling goods of that kind". Thus, the Subsection applies, in the terminology of this article, primarily to inventory and farm products. The buyer in ordinary course of business is defined as one who buys "in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party". This section provides that such a buyer takes free of a security interest, even

though perfected, and although he knows that the security interest exists. Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods, but takes subject to the security interest if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party.

The limitations which this section imposes on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this section. Section 9-306 states the right of a secured party to the proceeds of a sale, authorized or unauthorized.

3. Subsection (B) deals with buyers of "consumer goods" (defined in § 9-109). Under § 9-301(A)(4) no filing is required to perfect a purchase money interest in consumer goods subject to this Subsection except motor vehicles required to be registered; filing is required to perfect security interests in such goods other than purchase money interests and, registration is required for motor vehicles, even in the case of purchase money interests. (The special case of fixtures has added complications that are apart from the point of this discussion.)

Under Subsection (B) a buyer of consumer goods takes free of a security interest even though perfected: (a) if he buys without knowledge of the security interest; (b) for value; and (c) for his own personal, family, or household purposes. As to purchase money security interests which are perfected without filing under § 9-302(A)(4): A secured party may file a financing statement (although filing is not required for perfection). However, whether or not the secured party files, a buyer who meets the qualifications stated in the preceding sentence takes free of the security interest. So long as the security interest remains unperfected, not only the buyers described in Subsection (B), but the purchasers described in § 9-301 will take free of the interest. In any event, after compliance by a secured party with the applicable certificate of title law, all subsequent buyers, under the rule of Subsection (B), are subject to the security interest. Thus, consumer purchasers are deemed to have knowledge of security interests reflected on the registration title documents for motor vehicles.

4. Although a buyer is of course subject to the Code's system of notice from filing or possession, Subsection (C) makes clear that he will not be subject to future advances under a security interest after the secured party has knowledge that the buyer has purchased the collateral and in any event after 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45 days and without knowledge of the purchase. Of course, a buyer in ordinary course who takes free of the security interest under Subsection (A) is not subject to any future advances. (Compare §§ 9-301(D) and 9-312(G)).

Cross References

Point 1: Sections 2-403 and 9-301.

Point 2: Section 9-306.

Point 3: Sections 9–301 and 9–302.

Point 4: Sections 9–301(D) and 9–312(G).

Definitional Cross References

"Buyer in ordinary course of business". Section 1–201.

"Consumer goods". Section 9–109.

"Goods". Section 9–105.

"Knows" and "Knowledge". Section 1–201.

"Person". Section 1–201.

"Purchase". Section 1–201.

"Pursuant to commitment". Section 9–105.

"Secured party". Section 9–105.

"Security interest". Section 1–201.

"Value". Section 1–201.

Special Plain Language Comment

This section describes when buyers of goods are protected from continuing security interests created by their sellers and when the secured parties of the sellers retain the right to foreclose upon the goods in order to satisfy the obligations of the seller.

§ 9–308. Purchase of chattel paper and instruments

A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument:

A. Which is perfected under § 9–304 (permissive filing and temporary perfection) or under § 9–306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or

B. Which is claimed merely as proceeds of inventory or other goods subject to a security interest (§ 9–306) even though he knows that the specific paper or instrument is subject to the security interest.

History

CJA–1–86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-308 of the Uniform Commercial Code as adopted by the states, except that the protection for purchasers of chattel paper or instruments extends to persons claiming security interests in such collateral as proceeds from the sale of all goods, not merely inventory.

Commentary. 1. Chattel paper is defined (§ 9-105) as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods". Such paper has become an important class of collateral in financing arrangements, which may-as in the automobile and some other fields-follow an earlier financing arrangement covering inventory or which may begin with the chattel paper itself

Arrangements where the chattel paper is delivered to the secured party who then makes collections, as well as arrangements where the debtor, whether or not he is left in possession of the paper, makes the collections, are both widely used, and are known respectively as notification (or "direct collection") and non-notification (or "indirect collection") arrangements. In the automobile field, for example, when a car is sold to a consumer buyer under an installment purchase agreement and the resulting chattel paper is assigned, the assignee usually takes possession, the obligor is notified of the assignment and is directed to make payments to the assignee. In the furniture field, for an example on the other hand, the chattel paper may be left in the dealer's hands or delivered to the assignee; in either case the obligor may not be notified, and payments are made to the dealer-assignor who receives them under a duty to remit to his assignee. The widespread use of both methods of dealing with chattel paper is recognized by the provisions of this article, which permit perfection of a chattel paper security interest either by filing or by taking possession.

2. Although perfection by filing is permitted as to chattel paper, certain purchasers of chattel paper allowed to remain in the debtor's possession take free of the security interest despite the filing. Subsection (B) of the section deals with the case where the security interest in the chattel paper is claimed merely as proceeds—e.g., on behalf of an inventory financer who has not by some new transaction with the debtor acquired a specific interest in the chattel paper. In that case a purchaser, even though he knows of the inventory financer's proceeds interest, takes priority provided he gives new value and takes possession of the paper in the ordinary course of his business. The same basic rule applies in favor of a purchaser of other instruments who claims priority against a proceeds interest therein of which he has knowledge. Thus, a purchaser of a negotiable instrument might prevail under Subsection (B) even though his knowledge of the conflicting proceeds claim precluded his having holder in due course status under § 9-309.

3. Subsection (A) deals with the case where the non-possessory security interest in the chattel paper is more than a mere claim to proceeds-i.e., exists in favor of a secured party who has given value against the paper, whether or not he financed the inventory whose sale gave rise to it. In this case the purchaser, to take priority, must not only give new value and take possession in the ordinary course of his business, but he must also take without knowledge of the existing security interest. Thus a secured party who has a specific interest in the chattel paper and not merely a claim to proceeds

and who wishes to leave the paper in the debtor's possession can, because of the knowledge requirement, protect himself against purchasers by stamping or noting on the chattel paper the fact that it has been assigned to him.

4. It should be noted that under § 9–304(A) a security interest in an instrument, negotiable or non-negotiable, cannot be perfected by filing (except where the instrument constitutes part of chattel paper). Thus, the only types of perfected non-possessory security interest that can arise in an instrument are the temporary 21-day perfection provided for in § 9–304(D) and (E) or the 10-day perfection in proceeds of § 9–306. Where such a perfected interest exists in a non-negotiable instrument, purchasers will take free if they qualify under Subsection (A) of the section.

Cross References

Point 1: Sections 9–304(A) and 9–305.

Point 2: Section 9–306.

Point 4: Sections 9–304 and 9–306.

Definitional Cross References

"Chattel paper". Section 9–105.

"Instrument". Section 9–105.

"Inventory". Section 9–109.

"Knowledge". Section 1–201.

"Proceeds". Section 9–306.

"Purchaser". Section 1–201.

"Security interest". Section 1–201.

"Value". Section 1–201.

Special Plain Language Comment

This section describes the competing priorities between (1) buyers of chattel paper and instruments, and (2) persons with security interests in such collateral, either directly or as "proceeds" of goods sold by the debtor.

§ 9–309. Protection of purchasers of instruments, documents and securities

Nothing in this article limits the rights of a holder in due course of a negotiable instrument (§ 3–302) or a holder to whom a negotiable document of title has been duly negotiated or a bona fide purchaser of a security, and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this article does not constitute notice of the security interest to such holders or purchasers.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-309 of the Uniform Commercial Code as adopted by the states, although this Code does not presently include Articles 7 (regarding documents) and 8 (regarding securities) of the Uniform Commercial Code.

Commentary. 1. Under this article the rights of purchasers of negotiable paper, including negotiable documents of title and investment securities, are determined by the rules of holding in due course and the like which are applicable to the type of paper concerned. See Article 3 of this Code. The rights of parties which would be governed under Articles 7 and 8 of the Uniform Commercial Code are governed under Navajo law pursuant to 7 N.N.C. § 204.

2. Under § 9-304(A) filing is ineffective to perfect a security interest in instruments (including securities) except those instruments which are part of chattel paper, and, of course, is ineffective to constitute notice to subsequent purchasers. Although filing is permissible as a method of perfection for a security interest in documents, this section provides that the filing does not constitute notice to purchasers.

Cross References

Article 3 and §§ 9-304(A) and 9-308.

Definitional Cross References

"Document of title". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Sections 3-302 and 9-105.

"Negotiable instrument". Sections 3-104 and 9-105.

"Notice". Section 1-201.

"Purchaser". Section 1-201.

"Security". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section describes the protection which certain holders of negotiable documents and instruments and which certain purchasers have as against competing security interests.

§ 9-310. Priority of certain liens arising by operation of law

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-310 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. The purpose of this section is to provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected.

2. There was generally no specific statutory rule as to priority between security devices and liens for services or materials. This section makes the lien for services or materials prior in all cases where they are furnished in the ordinary course of the lienor's business and the goods involved are in the lienor's possession. Some of the statutes creating such liens may expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions. If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest.

Cross References

Sections 9-102(B), 9-104(C) and 9-312(A).

Definitional Cross References

"Goods". Section 9-105.

"Person". Section 1-201.

"Security interest". Section 1-201.

Special Plain Language Comment

This section recognizes that, when a person has a lien for services rendered or materials provided to improve, repair or protect collateral, such a lien will generally have priority over competing security interests created under this article. Mechanic liens are an example of such liens. The creation and terms of such liens are determined by other statutes or decisions by the Navajo courts.

§ 9-311. Alienability of debtor's rights; judicial process

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default, although a provision in a security agreement making such transfer constitute a default is valid.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-311 of the Uniform Commercial Code as adopted by the states, although like in California and other states the last clause has been added in order to clarify that such transfers may constitute defaults under the security agreement. Thus, the debtor retains the right to transfer effectively any or all of his interest in the collateral to a third party, although such a transfer may give the secured party remedies against the collateral depending upon the terms of the security agreement.

Commentary. 1. The purpose of this section is to make clear that in all security transactions under this article, the debtor has an interest (whether legal title or an equity) which he can dispose of and which his creditors can reach.

2. This section provides that in all security interests the debtor's interest in the collateral remains subject to claims of other creditors who take appropriate action. Other Navajo laws determine the form of "appropriate process" for other creditors to use to reach a debtor's property.

3. Where the security interest is in inventory, difficult problems arise with reference to attachment and levy. Assume that a debt of one hundred thousand dollars ($100,000) is secured by inventory worth twice that amount. If by attachment or levy certain units of the inventory are seized, the determination of the debtor's equity in the units seized is not a simple matter. The section leaves the solution of this problem to the courts. Procedures such as marshalling may be appropriate.

Cross References

Sections 9-301(D), 9-307(C) and 9-312(G).

Definitional Cross References

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Rights". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section allows the owner of collateral to transfer any or all of his interest in collateral to another secured creditor or purchaser even though a prior security interest exists in the collateral. Other creditors of the owner can also use the court procedures to require the owner's property to be sold in order to satisfy the owner's debts. However, the security agreement signed by the owner of the property may provide that such transfers of the collateral to third parties are defaults entitling the secured creditor to exercise various remedies under this article with respect to the collateral. See §§ 9-502, 9-503 and 9-504.

§ 9-312. Priorities among conflicting security interests in the same collateral

A. The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: Section 9-103 on security interests related to other jurisdictions; and § 9-114 on consignments. The security interests of collecting banks in an item being collected, accompanying documents and proceeds to secure credit given by such bank on such item shall have priority over conflicting perfected security interests in the item and any accompanying documents or proceeds.

B. A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

C. A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if:

1. The purchase money security interest is perfected at the time the debtor receives possession of the inventory, and

2. The purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party; or (ii) before the beginning of the 21-day period where the purchase money security interest is temporarily perfected without filing or possession (§ 9-304(E)); and

3. The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory, and

4. The notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

D. A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within 10 days thereafter.

E. In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in Subsections (C) and (D) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

1. Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection; and

2. So long as conflicting security interests are unperfected, the first to attach has priority.

F. For the purposes of Subsection (E) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

G. If future advances are made while a security interest is perfected by filing, the taking of possession, or other perfection, the security interest has the same priority for the purpose of Subsection (E) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as 9-312 of the Uniform Commercial Code as adopted by the states, except for certain adjustments made because the Code does not presently include Article 4 of the Official Text. The rights which the parties would have under Article 4 of the Uniform Commercial Code are governed under Navajo law pursuant to 7 N.N.C. § 204.

Commentary. 1. In a variety of situations two or more people may claim an interest in the same property. The several sections specified in Subsection (A) contain rules for determining priorities between security interests and such other claims in the situations covered in those sections. For cases not covered in those Sections, this section states general rules or priority between conflicting security interests.

2. Subsection (B) gives priority to a new value security interest in crops based on a current crop production loan over an earlier security interest in the crop which secured obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops become growing crops. This priority is not affected by the fact that the person making the crop loan knew of the earlier security interest. In the case of crops which are grown on trees or vines, the crop begins to grow for the purposes of this section when customary cultivation practices begin for a crop season (e.g. pruning or spraying) or when the buds or fruit first appears, whichever occurs first.

3. Subsections (C) and (D) give priority to a purchase money security interest (defined in § 9-107) under certain conditions over non-purchase money interests, which in this context will usually be interests asserted under after-acquired property clauses. See § 9-204 on the extent to which after-acquired property interests are validated and § 9-108 on when a security interest in after-acquired property is deemed taken for new value. While this article broadly validates the after-acquired property interest, it also recognizes as sound the preference for the purchase money interest. That policy is carried out in Subsections (C) and (D).

Subsection (D) states a general rule applicable to all types of collateral except inventory: the purchase money interest takes priority if it is perfected when the debtor receives possession of the collateral or within 10 days thereafter. As to the 10-day grace period, compare § 9-301(B). The perfection requirement means that the purchase money secured party either has filed a financing statement before that time or has a temporarily perfected statement before that time or has a temporarily perfected interest in goods covered by documents under § 9-304(D) and (E) (which is continued in a perfected status by filing before the expiration of the 21-day period specified in that section). There is no requirement that the purchase money secured party be without notice or knowledge of the other interest, and the purchase money secured creditor takes priority although he knows of it or it has been filed.

Under Subsection (C), the-same rule of priority, but without the 10-day grace period for filing, applies to a purchase money security interest in inventory, with the additional requirement that the purchase money secured party give notification, as stated in Subsection (C), to any other secured party who filed earlier for the same item or type of inventory. The reason for the additional requirement of notification is that typically the arrangement between an inventory secured party and his debtor will require the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though he has already given a security interest in the inventory to another secured party. The notification requirement protects the inventory financer in such a situation: if he has received notification, he will presumably not make an advance; if he has not received notification (or if the other interest does not qualify as a purchase money interest), any advance he may make will have priority. Since an arrangement for periodic advances against incoming property is unusual outside the inventory field, no notification requirement is included in Subsection (D).

Where the purchase money inventory financing began by possession of a negotiable document of title by the secured party, he must in order to retain priority give the notice required by Subsection (C) at or before the usual time, i.e., when the debtor gets possession of the inventory, even though his security interest remains perfected for 21 days under § 9-304(E).

When under these rules the purchase money secured party has priority over another secured party, the question arises whether this priority extends to the proceeds of the original collateral. Under Subsection (D) which deals with non-inventory collateral and where there was no ordinary expectation that the goods would be sold, the section gives an affirmative answer. In the case of inventory collateral under Subsection (C), where it was expected that the goods would be sold and where financing frequently is based on the resulting accounts, chattel paper, or other proceeds, the Subsection gives an answer limited to the preservation of the purchase money priority only in so far as the proceeds are cash received on or before the delivery of the inventory to a buyer, that is, without the creation of an intervening account to which conflicting rights might attach. The conflicting rights to proceeds consisting of accounts are governed by Subsection (E). See Comment 8.

The foregoing rules applicable to purchase money security interests in inventory apply also to the rights in consigned merchandise. See § 9-114.

4. Subsection (E) states a rule for determining priority between conflicting security interests in cases not covered in the sections referred to in Subsection (A) or in Subsections (B), (C) and (D) of this section. Note that Subsection (E) applies to cases of purchase money security interests which do not qualify for the special priorities set forth in Subsections (C) and (D).

There is a single priority rule based on precedence in the time as of which the competing parties either filed their security interests or perfected their security interests. The form of the claim to priority, i.e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection so long as there is no intervening period without filing or perfection. Filing may occur as to particular collateral before the collateral comes in existence. Under the standards of § 9-203 perfection cannot occur as to particular collateral until the collateral itself (and not prior collateral) comes into existence and the debtor has rights therein; but under Subsection (F) of this section the secured party's priority may date from his time of perfection as to the prior collateral, if perfection or filing has been continuously maintained. Subsection (F) provides that a date of filing or perfection as to original collateral is also a date of filing or perfection as to proceeds. This rule should also be read with § 9-306, which makes it unnecessary to claim proceeds expressly in a financing statement and provides in effect that a filing as to original collateral is also a filing as to proceeds (with exceptions therein stated). Thus, if a financing statement is filed covering inventory, then (subject to the exception involving multistate problems) this filing is also a filing as to the resulting accounts and constitutes the date of filing as to the accounts.

The party who may have had a prior security interest in inventory (or may have had the only such security interest) does not automatically for that reason have priority as to the accounts. His claim in accounts may or may not have priority over competing filed claims to accounts. The priority is based on precedence as to the accounts under the rules stated in the preceding paragraph.

5. The operation of this section is illustrated by the examples set forth under this and the succeeding Points.

Example 1. "A" files against "X" (debtor) on February 1. "B" files against "X" on March 1. "B" makes a non-purchase money advance against certain collateral on April 1. "A" makes an advance against the same collateral on May 1. "A" has priority even though "B's" advance was made earlier and was perfected when made. It makes no difference whether or not "A" knew of "B's" interest when he made his advance.

The problem stated in the example is peculiar to a notice filing system under which filing may be made before the security interest attaches (see § 9-402). The justification for the rule lies in the necessity of protecting the filing system-that is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condition of protection, to check for filing later than his. Note, however, that his protection is not absolute: if, in the example, "B's" advance creates a purchase money security interest, he has priority under Subsection (D), or, in the case of inventory, under Subsection (C) provided he has properly notified "A". (See further Example 3 below.)

Example 2. "A" and "B" make non-purchase money advances against the same collateral. The collateral is in the debtor's possession and neither interest is perfected when the second advance is made. Whichever secured party first perfects his interest (whether by taking possession of the collateral, by filing or otherwise) takes priority, and it makes no difference whether or not he knows of the other interest at the time he perfects his own.

This result may be regarded as a race of diligence among creditors. Subsection (E)(2) adds the thought that so long as neither of the interests is perfected, the one which first attached (i.e., under the advance first made) has priority. The last mentioned rule maybe thought to be of merely theoretical interest, since it is hard to imagine a situation where the case would come into litigation without either "A" or "B" having perfected his interest. If neither interest had been perfected at the time of the filing of a petition in bankruptcy, of course neither would be good against the trustee in bankruptcy. See Bankruptcy Code § 547.

Example 3. "A" has a temporarily perfected (21-day) security interest, unfiled, in a negotiable document in the debtor's possession under § 9-304(D) or (E). On the fifth day "B" files and thus perfects a security interest in the same document. On the tenth day "A" files. "A" had priority, whether or not he knows of "B's" interest when he files, because "A" perfected first and has maintained continuous perfection or filing.

6. The application of the priority rules to after-acquired property must be considered separately for each item of collateral. Priority does not depend only on time of perfection, but may also be based on priority in filing before perfection.

Example 4. On February 1 "A" makes advances to "X" (the debtor) under a security agreement which covers "all the machinery in X's plant" and contains an after-acquired property clause. "A" promptly files his financing statement. On March 1 "X" acquires a new machine, "B" makes an advance against it and files his financing statement. On April 1 "A", under the original security agreement, makes an advance against the machine acquired March 1. If "B's" advance creates a purchase money security interest, he has priority under Subsection (D) (provided he filed before "X" received possession of the machine or within 10 days thereafter). If "B's" advance, although he gave new value, did not create a purchase money interest, "A" has priority as to both of his advances by virtue of his priority in filing, although the parties perfected simultaneously on March 1 as to the new machine.

The application of the priority rules to proceeds presents special features discussed in Comment 8.

7. The application of the priority rules to future advances is complicated. In general, since any secured party must operate in reference to the Code's system of notice, he takes subject to future advances under a priority security interest while it is perfected through filing, possession, or otherwise, whether the advances are committed or non-committed, and to any advances subsequently made "pursuant to commitment" (§ 9-105) during that period. In the rare case when a future advance is made without commitment while the security interest is perfected temporarily without either filing, possession, or otherwise, the future advance has priority from the date it is made. These rules are more liberal toward the priority of future advances than the corresponding rules applicable to an intervening buyer (§ 9-307(C)) because of the different characteristics of the intervening party. Compare the corresponding rule applicable to an intervening judgment creditor. (§ 9-301(D).)

Example 5. On February 1 "A" makes an advance against machinery in the debtor's possession and files his financing statement. On March 1 "B" makes an advance against the same machinery and files his financing statement. On April 1 "A" makes a further advance under the original security agreement, against the same machinery (which is covered by the original financing statement and thus perfected when made). "A" has priority over "B" both as to the February 1 and as to the April 1 advance, and it makes no difference whether or not "A" knows of "B's" intervening advance when he makes his second advance.

"A" wins, as to the April 1 advance, because he first filed even though "B's" interest attached, and indeed was perfected, before the April 1 advance. The same rifle would apply if either "A" or "B" had perfected through possession. Section 9-204(C) and the Comment thereto should be consulted for the validation of future advances.

The same result would be reached even though "A's" April 1 advance was not under the original security agreement, but was under a new security agreement under "A's" same financing statement or during the continuation of "A's" possession.

8. The application of the priority rules of Subsections (E) and (F) to proceeds is shown by the following examples:

Example 6: "A" files a financing statement covering a described type of inventory then owned or thereafter acquired. "B" subsequently takes a purchase money security interest in certain inventory described in "A's" financing statement and achieves priority over "A" under Subsection (C) as to this inventory. This inventory is then sold, producing proceeds.

If the proceeds of the inventory are instruments or chattel paper, the rights of "A" and "B" (on the one hand) and any adverse claimant to these proceeds (on the other hand) are governed by §§ 9-308 and 9-309. If the proceeds are cash, Subsection (C) indicates that "B's" priority as to the inventory carries over to the cash. Proceeds which are accounts constitute different collateral, and the priorities as to the original collateral do not control the priority as to the accounts. Under §§ 9-306 and 9-312(F), "A's" first filing as to the inventory constitutes a first filing as to the accounts, provided that the same filing office would be appropriate for filing as to accounts under the rules of § 9-306(C). Therefore, "A" has priority as to the accounts.

Many parties financing inventory are quite content to protect their first security interest in the inventory itself, realizing that when inventory is sold, someone else will be financing the accounts and the priority for inventory win not run forward to the accounts. Indeed, the cash supplied by the accounts financer will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase money basis makes contractual arrangements that the proceeds of accounts financing by another be devoted to paying off the first inventory security interest.

Example 7. In the foregoing case, if "B" had filed directly as to accounts, the date of that filing as to accounts would be compared with the date of "A's" first filing as to the inventory, and the first-to-file rule would prevail.

Subsection (F) provides that a filing as to original collateral determines the date of a filing as to the proceeds thereof. This rule implies, of course, that the filing as to the original collateral is effective as to proceeds under the rule of § 9-306(C).

Example 8. If "C" had filed as to accounts in Example 6 above before either "A" or "B" had filed as to inventory, "C's" first filing as to accounts would have priority over the filings of "A" and "B", which would also constitute filings as to accounts under the rule just mentioned. "A's" and "B's" position as to the inventory gives them no automatic claim to the proceeds of the inventory consisting of accounts against someone who has filed earlier as to accounts. If, on the other hand, either "A's" or "B's" filings as to the inventory constituted good filings as to accounts and these filings preceded "C's" direct filings as to accounts, "A" or "B" would outrank "C" as to the accounts.

If the filings as to inventory were not effective under Subsection (F) for filing as to accounts because a filing for accounts would have to be in a different filing office under § 9-103(C), these inventory filings would nevertheless be effective for 10 days as to accounts. See § 9-306. If the perfection of the security interest in accounts was continued within the 10 days by appropriate filings, then "A's" and "B's" interests in the accounts would date from the date of filing as to inventory.

Cross References

Sections 9-204(A) and 9-303.

Point 1: Sections 9-114, 9-301, 9-304, 9-306, 9-307, 9-308, 9-309, 9-310, 9-313, 9-314, 9-315 and 9-316.

Point 3: Sections 9-108, 9-204, 9-304(D) and (E).

Points 4 to 7: Sections 9-204, 9-301(D), 9-304(D) and (E), 9-306, 9-307(C) and 9-402(A).

Point 8: Sections 9-103(F) and 9-306(C).

Definitional Cross References

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Documents". Section 9-105.

"Give notice". Section 1-201.

"Goods". Section 9-105.

"Instruments". Section 9-105.

"Inventory". Section 9-109.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Proceeds". Section 9-306.

"Purchase money security interest". Section 9-107.

"Pursuant to commitment". Section 9-105.

"Receives" notification. Section 1-201.

"Secured party". Section 9-105.

"Security". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

Special Plain Language Comment

This section states the rules for priority among competing security interests in various types of collateral and in proceeds from the sale or other disposition of collateral.

§ 9-313. Priority of security interests in fixtures

A. In this section and in the provisions of Part 4 of this article referring to fixture filing, unless the context otherwise requires:

1. Goods are "fixtures" when they become so related to particular real estate because of their attachment or affixation to realty or other fixtures, that a deed to the real property would transfer the goods if they were not removed from the real property (assuming for such purposes that the realty could be lawfully deeded). Nothing in this article shall be deemed to make fixtures real property or, to the maximum extent permitted by federal law, to cause fixtures to become part of any real property held in trust for the Navajo Nation. No personal property which is not permanently affixed or attached to real property shall be deemed to be a fixture. No personal property which is affixed or attached to any real property (or to any building or other real property structure or improvement) and becomes a fixture or fixtures shall lose its character or status as personal property subject to this article as long as the fixture can be removed without causing damage to the real property which could only be repaired at a cost exceeding the value of the fixture or fixtures at such time (excluding from such computation any decrease in the value of the realty because of the removal of the fixtures).

2. A "fixture filing" is the filing in the required office (§ 9-401(A)(1)) of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of § 9-402(E).

3. A mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if the recorded writing so indicates.

B. A security interest under this article may be created in goods which are fixtures or may continue in goods which becomes fixtures, but no security interest exists under this article in ordinary building materials incorporated into an improvement on land.

C. This article does not prevent creation of an encumbrance upon, fixtures pursuant to real estate law.

D. A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where:

1. The security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter, and the debtor has an interest of record in the real estate, is in possession of the real estate (whether or not such possession is exclusive or continuous)

or, in the case of land owned by or held in trust for the Navajo Nation, the debtor has a right to use of the land; or

2. The security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate, is in possession of the real estate (whether or not such possession is exclusive or continuous) or, in the case of land owned by or held in trust for the Navajo Nation, the debtor has a right to use of the land; or

3. The fixtures are readily removable factory, office or business machines and other goods or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any methods permitted by this article; or

4. The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.

E. A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where:

1. The encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

2. The debtor has a right or remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

F. Notwithstanding Subsection (D)(1), but otherwise subject to Subsections (D), (E) and (I), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

G. Subject to Subsection (I), in cases not within the preceding Subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

H. When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate, but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

I. Except as may otherwise be stated in any lease or other agreement between the Navajo Nation (or any authorized governmental official, agency or authority) and any owner or secured party relating to the use or possession of any real property owned by or held in trust for the Navajo Nation, and to the extent permitted by federal law, (i) the Navajo Nation consents to the creation of security interests in fixtures owned by persons having the right to use or possess any such real property and (ii) the Navajo Nation's interest in any fixtures shall not have priority over any security interests in fixtures under this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-313 of the Uniform Commercial Code as adopted by the states, except that:

A. The term "fixtures" is defined in a functional manner because of the complex state of the applicable real property laws and because of the policies described in these Comments;

B. Goods are less readily classified as real property compared to the Official Text because that characterization might result in goods becoming part of trust property of the Navajo Nation (the extent to which improvements become trust property, if at all, is unclear); and

C. The requirement for the debtor's ownership of a record interest in the land on which the fixtures are located or possession of that land is relaxed to accommodate the customary and sometimes non-exclusive uses of Tribal lands by members of the Tribe without recorded interests.

The general policy of the Navajo Nation is to encourage commercial transactions and to enable Navajo debtors to maximize their credit worthiness by maximizing the business property which they can use as collateral. Consistent with that policy, goods do not become fixtures or lose their status as inventory, equipment, farm products or consumer goods unless they are affixed or attached to land or buildings or other real property improvements in a manner which has substantial permanence and which would cause the fixtures to be included in a conveyance by deed of the real property. Federal law provides that improvements on a leasehold held in trust for the Navajo Nation or an individual Indian becomes the property of the lessor unless the lease provides otherwise. 25 C.F.R. § 162.9 (1984). Improvements are not defined in the regulations, but the Code in Subsection (B) uses the term improvement. Improvement is generally considered to be a class of property distinct from fixtures. Improvements are much more integrally related to the land than fixtures. For some examples of fixtures see 16 N.N.C. § 1401(B). Temporary attachments or the creation of safety devices or braces to support the goods do not cause the goods to become fixtures, since a contrary rule might cause persons wishing to prevent goods from becoming fixtures to minimize safety precautions. As stated in Subsection (I), this article attempts to distinguish fixtures from trust property and improvements on the trust property of the Navajo Nation in order to facilitate financing for such property.

Commentary. 1. Section 9-313 deals with the problem that certain goods which are the subject of Article 9 financing become so affixed or otherwise so related to real estate they may become part of the real estate, and that personal property security interests would be subordinate to real estate interests except as protected by the priorities regulated by the section. These goods are called "fixtures". Some fixtures also retain their personal property nature in that an Article 9 financing with respect to them may exist and may continue to be recognized, if notice therefore is given to real estate interests in accordance with this section. However, this concept does not apply if the goods are integrally incorporated into the real estate in the forming of a permanent structure, i.e., an improvement. Improvements may also become the property of the lessor on land held in trust either for the Navajo Nation or individual Indians. 25 C.F.R. § 162.9 (1984).

The term "fixture filing" has been introduced and defined. It emphasizes that when a filing is intended to give the priority advantages herein discussed against real estate interests, the filing must (except as stated below) be for record in the real estate records and indexed therein, so that it will be found in a real estate search, except for lands owned by or held in trust for the Navajo Nation, which are filed as described in § 9-401(A)(1).

Since the determination in advance of judicial decision of the question whether goods have become fixtures is a difficult one, no inference may be drawn from a fixture filing that the secured party concedes that the goods are or will become fixtures. The fixture filing may be merely precautionary.

2. "Fixture" is defined to include any goods which become so related to particular real estate that an interest in them may arise under real estate law, and therefore, goods integrally incorporated into the real estate are fixtures. However, under Subsection (B) no security interest exists under Article 9 in ordinary building materials incorporated into an improvement on land. Goods may be technically "ordinary building materials", e.g., window glass, but if the are incorporated into a structure which as a whole has not become an integral part of the real estate, the rules applicable to the ordinary building materials follow the rules applicable to the structure itself. The outstanding examples presenting this kind of problem are the modern "mobile homes" and the modern prefabricated steel buildings usable as warehouses, garages, factories, etc. In the case of the mobile homes, most of them are erected on leased land or other land not owned by the debtor, and the right of the debtor under a mobile home purchase contract to remove the goods as lessee or user of the land will make clear that his secured party ordinarily has a similar right. See § 9-313(E)(2). Although such mobile homes and prefabricated buildings might not be considered improvements under 25 C.F.R, § 162.9, owners of such structures who place them on leased land should ensure that the lease grants them the authority to remove them.

In cases where mobile homes or prefabricated steel buildings are erected by a person having an ownership interest in the land, the question into which category the buildings fall is one determined by other applicable law. In general, the governing law will not be that applicable in determining whether goods have become real property between landlord and tenant, or between mortgagor and mortgagee, or between grantor and grantee, but rather that applicable in a three party situation, determining whether secured financing under Article 9 can survive as against parties who acquire rights through the affixation of the goods to the real estate.

The assertion that no security interest exists in ordinary building materials is only for the operation of the priority provisions of this section. It is without prejudice to any rights which the secured party may have against the debtor himself if he incorporated the goods into real estate or against any party guilty of wrongful incorporation thereof in violation of the secured party's rights.

3. Under these concepts the section recognizes three categories of goods: (1) those which retain their character entirely as goods and are not part of the real estate; (2) ordinary building materials which have become an integral part of the real estate and cannot retain their character as goods for purposes of finance; and (3) an intermediate class which may have become real estate for certain purposes, but as to which secured financing under Article 9 maybe preserved. This third and intermediate class is the primary subject of this section. The demarcation between these classifications is not exhaustively delineated by this section, the determination of whether a good is a fixture will depend on the same three-part test which is common in many jurisdictions: (1) annexation to the realty; (2) adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriate; and (3) intention to make the article a permanent accession to the real property. See *Energy Control Services, Inc. v. Arizona Department of Economic Security,* 135 Ariz. 20, 658 P.2d 820 (1982); *Garrison General Tire Service v. Montgomery,* 75 N.M. 321, 404 P.2d 143 (1965); *State Road Commission v. Papanikolas,* 19 Utah 2d 153, 427 P.2d 749 (Utah 1967).

4. In considering fixture priority problems, there will always first be a preliminary question whether real estate interests per se have an interest in the goods as part of real estate. If not, it is immaterial, so far as concerns real estate parties as such, whether a security interest in goods is perfected or unperfected. In no event does a real estate party acquire an interest in "pure" goods as defined in this article just because a security interest therein is unperfected. If, on the other hand, real estate law gives real estate parties an interest in the goods, a conflict arises between the laws relating to real and personal property, and this section states the priorities.

A. The principal exception to the general rule of priority stated in Comment (B) based on time of filing or recording is a priority given in Subsection (D)(1) to purchase money security interests in fixtures as against prior recorded real estate interests, provided that the purchase money security interest is filed as a fixture filing in the required place before the goods become fixtures or within 10 days thereafter. This priority corresponds to one given in § 9-312(D), and the 10 days of grace represents a reduction of the purchase money priority as against prior interests in the real estate under the present § 9-313, where the purchase money priority exists even though the security interest is *never* filed.

It should be emphasized that this purchase money priority with the 10 day grace period for filing is limited to rights against prior real estate interests. There is no such priority with the 10-day grace period as against subsequent real estate interests. The fixture security interest can defeat subsequent real estate interests only if it is filed first and prevails under the usual conveyancing rule recognized in Subsection (D)(2) or as otherwise provided in this section.

B. The general principle of priority announced in this section is set forth in Subsection (D)(2). It is basically that a fixture filing gives to the fixture security interest priority as against other real estate interests according to the usual priority rule of conveyancing, that is, the first to file or record prevails. An apparent limitation to this principle set forth in Subsection (D)(2) (namely that the secured party must have had priority over any interest of a predecessor in title of the conflicting encumbrancer or owner) is not really a limitation, but is an expression of the usual rule that a person must be entitled to transfer what he has. Thus, if the fixture security interest is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage even though the assignment is a later recorded instrument. Similarly, if the fixture security interest is subordinate to the rights of an owner, it is subordinate to a subsequent grantee of the owner and likewise subordinate to a subsequent mortgagee of the owner.

C. A qualification to the rule based on priority of filing or recording is Subsection (D)(4), where priority based on precedence in filing or recording is preserved, but there is no requirement that, as against a judgment lienor of the real estate, the prior filing of the fixture security interest must be in the real estate records. The fixture security interest if perfected first should prevail even though not filed or recorded in real estate records, because generally a judgment creditor is not a reliance creditor who would have searched records. Thus, even a prior filing in the records required for goods protects the priority of a fixture security interest against a subsequent judgment lien.

It is hoped that this rule will have the effect of preserving a fixture security interest so filed against invalidation by a trustee in bankruptcy. That would be the result under § 544(1) of the Bankruptcy Code if the time of perfection of the fixture security interest were measured by the judgment creditor test applicable to personal property. It would not be the result if the time of perfection were measured by the purchase test applicable to real estate. Since the fixture security interest arises against the goods in their capacity as personal property, the bankruptcy courts should apply the judgment creditor test. The effectiveness of the drafting to achieve its purchase cannot be known certainly until the courts adjudicate the question or until it is settled by amendment to the Bankruptcy Code.

The phrase "lien by legal or equitable proceedings" in § 9-313(D)(4) is intended to encompass all liens on real estate obtained by any creditor action under the Bankruptcy Code.

D. A special exception to the usual rule if priority based on precedence in time is the one of § 9-313(D)(3) in favor of holders of security interests in factory, office and business machines and other goods, and in certain replacement domestic appliances, as discussed below. To repeat, a fixture conflict is not reached if the goods are held as a matter of applicable law not to have become part of the real estate, which will frequently be the holding for goods of these types. If the opposite is held, the rule of Subsection

(D)(3) operates only if the fixture security interest is perfected before the goods become fixtures. Having been perfected, it would of course have priority over subsequent real estate interests under the rule of Subsection (D)(2). Since it would in almost all cases be a purchase money security interest, it would also have priority over other real estate interests under the purchase money priority of Subsection (D)(1), discussed in Subsection (A) above. The rule is stated separately because the permitted perfection is by any method permitted by the Article, and not exclusively by a fixture filing.

As an additional point, in the case of machinery, the separate statement of this rule makes clear that it is not overridden by the construction mortgage priority of § 9-313(F) discussed in Comment (E) below, as may have been true if reliance had been solely on the purchase money priority. Factory, office and business machines and other goods are not always financed as part of a construction mortgage, and the mortgagee should be alert to conflicting chattel financing of these machines and other goods.

As to appliances, the rule stated is limited to readily removable replacements, not original installations, of appliances which are consumer goods in the hands of the debtor (§ 9-109). To facilitate financing of original appliances in new dwellings as part of the real estate financing of the dwellings, no special priority is given to chattel financing or original appliances. The section leaves to other applicable law the question whether original installations are fixtures to which the protection accorded by this section to construction mortgages would be applicable. Likewise, it is recognized that (when not supplied by tenants) appliances in commercial apartment buildings may be intended as permanent improvements, and no special rule is stated for appliances in that case. The special priority rule here stated in favor of Article 9 financing is limited to situations where the installation of appliances may not be intended to be permanent, e.g., replacement appliances used by the debtor or his family (consumer goods). The principal effect of the rule is to make clear that a secured party financing occasional replacements of domestic appliances in noncommercial owner-occupied contexts need not concern himself with real estate descriptions or records; indeed, for a purchase-money replacement of consumer goods, perfection without any filing will be possible. (The priority of the construction mortgage has no application to replacement appliances.)

E. The purchase money priority presents a difficult problem in relation to construction mortgages. The latter will ordinarily have been recorded even before the commencement of delivery of materials to the job, and therefore would be prior in rank to the fixture security interests were it not for the problem of the purchase money priority. Subsection (F) expressly gives priority to the construction mortgage recorded before the filing of the fixture security interest, but this priority of a construction mortgage applies only during the construction period leading to the completion of the improvement. As to additions to the building made long after completion of the improvement, the construction priority will not apply simply because the additions are financed by the real estate mortgagee under an open end clause of his construction mortgage. In such case, the applicable principles will be those of §§ 9-313(D)(1) and (13)(2). A refinancing of a construction mortgage has the same priority as the mortgage itself.

The phase "an obligation incurred for the construction of an improvement" covers both optional advances and advances pursuant to commitment, and both types of advances have the same priority under the section.

5. The section does recognize that fixture filing may be necessary when the debtor is in possession of the real estate (e.g., a lessee) even without an interest of record. This possibility of a filing against a debtor who is not in the real estate chain of title makes it necessary to require the furnishing of the name of a record owner in such cases. See §§ 9-401(A)(1), 9-402(C), item 3; 9-402(E); and 9-403(G).

6. The status of fixtures installed by tenants (as well as such persons as licensees and holders of easements) is defined by Subsection (E)(2) to the effect that if the debtor (tenant or other interest mentioned) has the right to remove the fixture as against a real estate interest, the secured party has priority over that real estate interest.

7. Real estate lenders and title companies will have little difficulty in locating relevant fixture security interests applicable to particular parcels of real estate because of the provisions as to real estate description in fixture filings, the indexing thereof, and other related provisions in Part 4 of Article 9.

8. Real estate lending is typically long-term, and is usually done by institutional investors who can afford to take a long view of the matter rather than concentrating on the results of any particular case. It is apparent that the rule which permits and encourages purchase money fixture financing, which in contrast is typically short term, will result in the modernization and improvement of real estate, rather than in its deterioration, and will on balance benefit long-term real estate lenders. Because of the short-term character of the Article 9 financing, it will rarely produce any conflict in fact with the real estate lender. The contrary rule would chill the availability of short-term credit for modernization of real estate by installation of new fixtures and in the long run could not help real estate lenders.

9. Subsection (H) provides that a secured party entitled to priority may in all cases sever and remove his collateral, subject, however, to a duty to reimburse any real estate claimant (other than the debtor himself) for any physical injury caused by the removal. The right to reimburse is implemented by the last sentence of Subsection (H) which gives the real estate claimant a statutory right to security or indemnity failing which he may refuse permission to remove fixtures. The Subsection (H) rule thus protects the real estate claimant under the reimbursement provisions.

10. Section 9-313(I) addresses the unique status of much of the real property subject to the jurisdiction of the Navajo Nation and to a significant extent the jurisdiction of the federal government. See 25 U.S.C. §§ 81, 396, 397, 402, 415, & 635. This section does not, of course, alter federal law, but it does state the general rules which govern to the extent of the jurisdiction of the Navajo Nation over its real property and fixtures.

Cross References

Sections 2-107, 9-102(A), 9-104(J) and 9-312(A), and Parts 4 and 5.

Definitional Cross References

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Encumbrance". Section 9-105.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Mortgage". Section 9-105.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Writing". Section 1-201.

Special Plain Language Comment

This section states the treatment for competing interests in goods which are so affixed or attached to real estate that they could be claimed both by persons having an interest in the real estate and by persons having a security interest in the goods under this article. This section is especially important because of the trust character of much of the real estate subject to the jurisdiction of the Navajo Nation.

§ 9-314. Accessions

A. A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in Subsection (C), and subject to § 9-315(A).

B. A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in Subsection (C), but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.

C. The security interests described in Subsections (A) and (B) do not take priority over:

1. A subsequent purchaser for value of any interest in the whole; or

2. A creditor with a lien on the whole subsequently obtained by judicial proceedings; or

3. A creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for, without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale (other than the holder of a perfected security interest purchasing at his own foreclosing sale) is a subsequent purchaser within this section.

D. When under Subsection (A) or (B) and (C) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default (subject to the provisions of Part 5) remove his collateral from the whole, but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury (but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them). A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-314 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. The purpose of this section is to state when a secured party claiming an interest in goods installed in or affixed to other goods is entitled to priority over a party with a security interest in the whole.

2. This section does not apply to goods which, for example, are so commingled in a manufacturing process that their original identity is lost. That type of situation is covered in § 9-315. Section 9-315 should also be consulted for the effect of a financing statement which claims both component parts and the resulting product.

Cross References

Sections 9-203(A), 9-303, 9-312(A) and Part 5.

Point 2: Section 9-315.

Definitional Cross References

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Writing". Section 1-201.

Special Plain Language Comment

This section describes the treatment of goods which are added to other goods to create combined products and the competing interests of secured creditors with interests in the component goods and in the combined whole products. For example, if a citizens band radio is added to a car, the radio is an "accession" to the whole car.

§ 9-315. Priority when goods are commingled or processed

A. If a security interest in goods was performed and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if:

1. The goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or

2. A financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled. In a case to which Subsection (2) applies, no separate security interest in the part of the original goods which has been manufactured, processed or assembled into the product may be claimed under § 9-314.

B. When under Subsection (A) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-315 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. The purpose of this section is to state when a secured party whose collateral contributes to a product has priority over others who have conflicting claims in the same product.

2. Under this section the security interest continues in the resulting mass or product in the cases stated in Subsection (A).

3. This section applies not only to cases where flour, sugar and eggs are commingled into cake mix or cake, but also to cases where components are assembled into a machine. In the latter case a secured party is put to an election at the time of filing, by the last sentence of Subsection (A), whether to claim under this section or to claim a security interest in one component under § 9-314.

4. Subsection (B) is needed because under Subsection (A) it is possible to have more than one secured party claiming an interest in a product. The rule stated treats all such interests as being of equal priority entitled to share ratably in the product.

Cross References

Sections 9-203(A), 9-303, 9-312(A) and 9-314.

Definitional Cross References

"Goods". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section describes the treatment of security interests in goods which become part of a product or mass. For example, this section covers grain which is commingled with other grain of the same type in a silo or other storage facility and grain which is made into bread.

§ 9-316. Priority subject to subordination

Nothing in this article prevents subordination by agreement by any person entitled to priority.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-316 of the Uniform Commercial Code as adopted by the states.

Commentary. The several preceding sections deal elaborately with questions. of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate his claim. Only the person entitled to priority may make such an agreement: his rights cannot be adversely affected by an agreement to which he is not a party.

Cross References

Sections 1-102 and 9-312(A).

Definitional Cross References

"Agreement". Section 1-201.

"Person". Section 1-201.

§ 9-317. Secured party not obligated on contract of debtor

The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-317 of the Uniform Commercial Code as adopted by the states. This section shall apply to all approved contracts.

This section clarifies that the secured party is not liable for the conduct or contracts of the debtor. The secured party is not the principal or agent of the debtor, even if the secured transaction contemplates the debtor's sale of collateral and the payment of proceeds to the secured party. This is true for all types of secured transactions, including those involving trust receipts.

Cross References

Section 2-210(D).

Definitional Cross References

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

§ 9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment

A. Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in § 9-206, the rights of an assignee are subject to:

1. All the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

2. Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment which conspicuously states that the assignee intends by such notice to limit defenses and offsets by the account debtor on his obligations to the debtor.

B. So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee, unless the account debtor has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

C. The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

D. A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-318 of the Uniform Commercial Code as adopted by the states, except that it requires greater clarity in a secured party's notification to the account debtor.

Commentary. 1. An assignee (including a secured party) has traditionally been subject to defenses or set offs existing before an account debtor is notified of the assignment. When the account debtor's defenses on an assigned claim arise from the contract between him and the assignor, it makes no difference whether the breach giving rise to the defense occurs before or after the account debtor is notified of the assignment (Subsection (A)(1)). The account debtor may also have claims against the assignor which arise independently of that contract: an assignee is subject to all such claims which accrue before, and free of all those which accrue after, the account debtor is notified (Subsection (A)(2)). The account debtor may waive his right to assert claims or defenses against an assignee to the extent provided in § 9-206.

2. Subsection (B) makes good faith-modifications by assignor and account debtor without the assignee's consent effective against the assignee even after notification. When, for example, it becomes necessary for a government agency to cut back or modify existing contracts, comparable arrangements must be made promptly in hundreds and even thousands of subcontracts lying in many tiers below the prime contract. Typically, the right to payments under these subcontracts will have been assigned. The government as sovereign, might have the right to amend or terminate existing contracts apart from statute. This Subsection gives the prime contractor (the account debtor) the right to make the required arrangements directly with his subcontractors without undertaking the task or procuring assents from the many banks to whom rights under the contracts may have been assigned. Assignees are protected by the provision which gives them automatically corresponding rights under the modified or substituted contract. Notice that Subsection (B) applies only so far as the right to payment has not been earned by performance, and therefore its application ends entirely when the work is done or the goods are furnished.

3. Subsection (C) clarifies the right of an account debtor to make payment to his seller-assignor in an "indirect collection" situation (see Comment to § 9-308). So long as the assignee permits the assignor to collect claims or leaves him in possession of chattel paper which does not indicate that payment is to be made at some place other than the assignor's place of business, the account debtor may pay the assignor even though he may know of the assignment. In such a situation an assignee who wants to take over collections must notify the account debtor to make further payments to him.

4. Subsection (D) denies effectiveness to contractual terms prohibiting assignment of sums due and to become due under contracts of sale, construction contracts and the like. Under the rule as stated, an assignment would be effective, even if made to an assignee who took with full knowledge that the account debtor had sought to prohibit or restrict assignment of the claims.

5. The Federal Assignment of Claims Code of 1940 - to which of course this section is subject - requires that assignments of claims against the United States be filed as provided in that Code. Many large business enterprises, situated like the United States in that claims against them are held by hundreds or thousands of subcontractors or suppliers, often require in their contract or purchase order forms that assignments against them be filed in a prescribed way. Subsection (C) requires reasonable identification of the account assigned and recognizes the right of an account debtor to require

reasonable proof of the making of the assignment and to that extent validates such requirements in contracts or purchase order forms. If the notification does not contain such reasonable identification or if such reasonable proof is not furnished on request, the account debtor may disregard the assignment and make payment to the assignor. What is "reasonable" is not left to the arbitrary decision of the account debtor; if there is doubt as to the adequacy either of a notification or of proof submitted after request, the account debtor may not be safe in disregarding it, unless he has notified the assignee with commercial promptness as to the respects in which identification or proof is considered defective.

Cross References

Point 1: Section 9–206.

Point 3: Sections 9–205 and 9–308.

Point 4: Section 2–210(B) and (C).

Definitional Cross References

"Account". Section 9–106.

"Account debtor". Section 9–105.

"Agreement". Section 1–201.

"Contract". Section 1–201.

"Good faith". Section 1–201.

"Party". Section 1–201.

"Receives notification". Section 1–201.

"Rights". Section 1–201.

"Sale". Sections 2–106 and 9–105.

"Seasonably". Section 1–204.

"Term". Section 1–201.

Special Plain Language Comment

This section describes the rights and obligations between a person who owes money on a right to payment which has become collateral and the secured party with a security interest in that collateral. In particular, this section describes the extent to which a buyer of property from the seller-debtor may assert defenses which the buyer has against the seller-debtor to the payment of the purchase price against the secured party of the seller-debtor or against a purchaser of that right to receive payment.

Part 4. Filing

§ 9-401. Place of filing; erroneous filing; removal of collateral

A. The proper place to file in order to perfect a security interest is as follows:

1. When the collateral is timber to be cut, or is minerals or the like (including oil and gas) or accounts subject to § 9-103(E), or when the financing statement is filed as a fixture filing (§ 9-313) and the collateral is goods which are or are to become fixtures, then, in the Commerce Department within the Division of Economic Development or its designated successor;

2. In all other cases, in the Commerce Department within the Division of Economic Development or its designated successor.

B. A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

C. A filing which is made in the proper place under the law of this jurisdiction continues effective for four months after a change in the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is changed. It becomes ineffective thereafter unless a copy of the financing statement signed by the secured party is filed in the new required placed within said period. The security interest may also be perfected in the new place after the expiration of the four-month period; in such case perfection dates from the time of perfection in the new place. A change in the use of the collateral does not impair the effectiveness of the original filing.

D. The rules stated in § 9-103 determine whether filing is necessary in this jurisdiction.

E. Notwithstanding the preceding Subsections, and subject to § 9-302(C), the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the Commerce Department within the Division of Economic Development or its designated successor. This filing constitutes a fixture filing (§ 9-313) as to the collateral described therein which is or is to become fixtures.

F. For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business.

History

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-401 of the Uniform Commercial Code as adopted by the states, except that adjustments have been made in the filing requirements to reflect the differences in the manner in which land is held within Navajo Indian County and most states. The changes reflect the fact that the Navajo Nation wishes to exercise its civil jurisdiction over Navajo Indian Country to avoid the confusion caused by the otherwise conflicting jurisdictions.

Commentary. 1. When a secured party has in good faith attempted to comply with the filing requirements but has not done so correctly, Subsection (B) makes his filing effective in so far as it was proper, and also makes it good for all collateral covered by the financing statement against any person who actually knows the contents of the improperly filed statement.

2. Subsection 9-401(C) deals with change of residence or place of business or the location or use of the goods after a proper filing has been made. The Subsection is important only when local filing is required, and covers only changes between local filing units in this jurisdiction. For changes of location between jurisdiction see § 9-103(A)(4).

3. The usual filing rules do not apply well for a transmitting utility (defined in § 9-105). The Code provides that for transmitting utilities the filing need only be in the Commerce Department within the Division of Economic Development or its designated successor. The nature of the debtor will inform persons searching the record as to where to make a search.

Cross References

Sections 9-302, 9-304 and 9-307(B).

Point 2: Section 9-103(C).

Point 3: Sections 9-402(E) and 9-403(F).

Definitional Cross References

"Account". Section 9-106.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Equipment". Section 9-109.

"Farm products". Section 9-109.

"Financing statement". Section 9-402.

"Fixture filing". Section 9-313.

"Good faith". Section 1-201.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

"Transmitting utility". Section 9-105.

Special Plain Language Comment

This section describes the place where financing statements are to be filed for each type of collateral requiring filing to "perfect" (i.e., complete) the security interest. This section also describes rules relating to filing in an incorrect place or to filing when the debtor relocates.

§ 9-402. Formal requisites of financing statement; amendments; mortgage as financing statement

A. A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to § 9-103(E), or when the financing statement is filed as a fixture filing (§ 9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with Subsection (E). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this jurisdiction.

B. A financing statement which otherwise complies with Subsection (A) is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in:

1. Collateral already subject to a security interest in another jurisdiction when it is brought into this jurisdiction, or when the debtor's location is changed to this jurisdiction. Such a financing

statement must state that the collateral was brought into this jurisdiction or that the debtor's location was changed to this jurisdiction under such circumstances; or

2. Proceeds under § 9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral; or

3. Collateral as to which the filing has lapsed; or

4. Collateral acquired after a change of name, identity or corporate structure of the debtor (Subsection (G)).

C. A form substantially as follows is sufficient to comply with Subsection (A):

Name of debtor (or assignor)__________

Address__________

Name of secured party (or assignee)__________

Address__________

1. This financing statement covers the following types (or items) of property: (Describe)__________

2. (If collateral is crops) The above described crops are growing or are to be grown on: (Describe Real Estate)__________

3. (If applicable) The above goods are to become fixtures on* / (Describe Real Estate) _______, and this financing statement is to be filed for record in the real estate records. (If the debtor does not have an interest of record.) The name of a record owner is__________

4. (If products of collateral are claimed) Products of the collateral are also covered.

(Use whichever is applicable)__________

Signature of Debtor (or Assignor)__________

Signature of Secured Party (or Assignee)__________

D. A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this article, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

E. A financing statement covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to § 9-103(E), or a financing statement filed as a fixture filing (§ 9-313) where the debtor is not a transmitting utility, must (i) show that it covers this type of collateral, (ii) recite that it is to be filed in the real estate records, and (iii) contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under Navajo law. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner.

F. To the extent that this section requires the recording of a fixture filing in the real estate records where mortgages are recorded, a mortgage is effective as a financing statement filed as a fixture filing from the data of its recording if:

1. The goods are described in the mortgage by item or type; and

2. The goods are or are to become fixtures related to the real estate described in the mortgage; and

3. The mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and

4. The mortgage is duly recorded.

So far as this article relates to the matter, no fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.

G. A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners. Where the debtor so changes his name or, in the case of an organization, its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

H. A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-402 of the Uniform Commercial Code as adopted by the states. See § 9-401.

Commentary. 1. Subsection (A) sets out the simple formal requisites of a financing statement under this article. These requirements are: (1) signature of the debtor; (2) addresses of both parties; (3) a description of the collateral by type or item.

Where the collateral is crops growing or to be grown or when the financing statement is filed as a fixture filing (§ 9-313) or when the collateral is timber to be cut or minerals or the like (including oil and gas) financed at wellhead or minehead or accounts resulting from the sale thereof, the financing statement must also contain a description of the lands concerned. On description generally, see § 9-110 and Comment 4 to the present section. An important distinction must be drawn, however, between the function of the description of land in reference to crops and its function in the other cases mentioned. For crops it is merely part of the description of the crops concerned, and the security interest in crops is a Code security interest. In contrast, in the other cases mentioned the function of the description of land is to have the financing statement filed in the appropriate real estate records, as distinguished from the personal property records. Subsection (C) suggests a form which complies with the statutory requirements and makes clear that for the types of collateral mentioned other than crops, the financing statement containing a description of the land concerned is to go in the realty records. Note also Subsection (E) on the adequacy of the description of land where the filing is to be in the real estate records. See also § 9-403.

A copy of the security agreement may be filed in place of a separate financing statement, if it contains the required information and signature.

2. This section adopts the system of "notice filing". What is required to be filed is not the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refiling of each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution. Sometimes more than one copy of a financing statement or of a security agreement used as a financing statement is needed for filing. In such a case the section permits use of a carbon copy or photographic copy of the paper, including signatures.

However, even in the case of filings that do not necessarily involve a series of transactions the financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the description of collateral in the financing statement is broad enough to encompass them. Similarly, the financing statement is valid to cover after-acquired property and future advances under security agreements whether or not mentioned in the financing statement.

3. Subsection (B) allows the secured party to file a financing statement signed only by himself where the filing is required by any of the events listed, each of which occurs after the commencement of the financing, and therefore under circumstances where the cooperation of the debtor is not certain. See § 9-401(C). The secured party should not be penalized for failure to make a timely filing by reason of difficulty in procuring the signature of a possibly reluctant or hostile debtor. Financing statements filed under this Subsection must explain the circumstances under which they are filed with the signature of the secured party rather than that of the debtor.

In contrast to the signatures on original financing statements, an amendment to a financing statement must be signed by both parties, to preclude either from adversely affecting the interests of the other.

The reference in Subsection (D) to an amendment which "adds collateral" refers to additional types of collateral. A security interest on additional units of a type of collateral already described can be created under an after-acquired property clause or a new security agreement. See Comment to § 9-204. On priorities in such cases see § 9-312 and Comments thereto.

4. A description of real estate must be sufficient to identify it. See § 9-110. This formulation rejects the view that the real estate description must be by metes and bounds, or otherwise conforming to traditional real estate practice in conveyancing, but of course the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test for the description in a filing for fixtures, minerals, accounts subject to § 9-103(E) or timber to be cut is that a description of real estate must be sufficient so that the fixture financing statement will fit into the real estate search system and the financing statement be found by a real estate searcher; in other words, the test of adequacy of the description is whether it would be adequate in a mortgage of the real estate. However, the description of the real estate on which the crops are located need only satisfy the requirements of the local recorder for such crop filings where the crops are not grown on land owned by or held in trust for the Navajo Nation. In the case of crops grown on lands within Navajo Indian Country, the description of the land need only include its approximate location to the extent that no more precise location is reasonably available. Because it may not be practical to obtain with reasonable effort a precise description of some Navajo land and this Code does not wish to discourage commercial financing by imposing impractical or expensive requirements, the description of Navajo land which is difficult to describe in a formal sense shall not be invalid as long as the parties make a reasonable effort to distinguish the crop from other crops of the same debtor. In such cases, other creditors of the debtor will have the burden of distinguishing between separate crops of the same debtor, and the emphasis of such descriptions is not so much how to locate the land as it is how to distinguish between separate crops of the debtor in which different secured parties have a security interest or in which there is no security interest.

Where the debtor does not have an interest of record in the real estate, a fixture financing statement must show the name of a record owner. Thus, in such cases the fixture financing will fit into the real estate search system.

5. A real estate mortgage may provide that it constitutes a security agreement with, respect to fixtures (or other goods) in conformity with this article. Combined mortgages on real estate and goods are common and useful for certain purposes. This section goes further and makes provision that the recording of the real estate mortgage, (if it complies with the requirements of financing statement) shall constitute the filing of a financing statement as to the fixtures (but not, of course, as to the other goods). See § 9-403. Of course, if a combined mortgage covers goods which are not fixtures, a regular filing is necessary for such goods, and Subsection (F) is inapplicable to such goods. Likewise, filing as a "fixture filing" provided in § 9-401 does not apply to true goods.

6. Subsection (G) undertakes to deal with some of the problems as to who is the debtor. In the case of individuals, it contemplates filing only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system. See § 9-403(E).

Subsection (G) also deals with the case of a change of name of a debtor and provides some guidelines when mergers or other changes of corporate structure of the debtor occur with the result that a filed financing statement might become seriously misleading. Not all cases can be imagined and covered by statutes in advance. However, the principle sought to be achieved by the Subsection is that after a change which would be seriously misleading, the old financing statement is not effective as to new collateral acquired more than four months after the change, unless a new appropriate financing statement is filed before the expiration of the four months. The old financing statement, if legally still valid under the circumstances, would continue to protect collateral acquired before the change and, if still operative under the particular circumstances, would also protect collateral acquired within the four months. Obviously, the Subsection does not undertake to state whether the old security agreement continues to operate between the secured party and the party surviving the corporate change of the debtor.

7. Subsection G) also deals with a different problem, namely whether a new filing is necessary where the collateral has been transferred from one debtor to another. This article answers the question in the negative. Thus, any person searching the condition of the ownership of a debtor must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it. But see § 9-307.

8. Subsection (H) is in line with the policy of this article to simplify formal requisites and filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements.

Cross References

Point 1: Section 9-110.

Point 2: Section 9-208.

Point 3: Sections 9-103, 9-306 and 9-401(C).

Point 4: Section 9-110.

Point 5: Section 9-403(F).

Point 6: Section 9-403(H).

Point 7: Section 9-311.

Definitional Cross References

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Goods". Section 9-105.

"Party". Section 1-201.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

"Transmitting utility". Section 9-105.

Special Plain Language Comment

This section describes the form for various types of "financing statements" and "fixture filings" and the preparation and use of such forms.

§ 9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer

A. Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this article.

B. Except as provided in Subsection (F) a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five year period, which ever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

C. A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in Subsection (B). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with § 9-405(B), including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in Subsection (B) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement.

D. Except as provided in Subsection (G), a filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition, the filing officer shall index the statement according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

E. The uniform fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement shall be set by regulation. The uniform fee for each name more than one required to be indexed shall be set by regulation.

F. If the debtor is a transmitting utility (§ 9-401(E)) and a filed financing statement so states, it is effective until a termination statement is filed. A real estate mortgage which is effective as a fixture filing under § 9-402(F) remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

G. When a financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to § 9-103(E), or is filed as a fixture filing, the filing officer shall index it under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors; in a mortgage of the real estate described, and, to the extent that the law of this jurisdiction provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as if the financing statement were a mortgage of the real estate described.

History

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-403 of the Uniform Commercial Code as adopted by the states, except for adjustments which have been made because of the establishment of a Navajo filing system.

Commentary. 1. Subsection (A) clarifies that a financing statement filed for record gives constructive notice from the time of presentation to the filing officer, rather than from the time of indexing.

2. Subsection (B) establishes five years as the filing period, with an exception for the cases mentioned in Subsection (F). Subsection (C) provides for the filing of one or more continuation statements (which need be signed only by the secured party), if it is desired to continue the effectiveness of the original filing.

The theory of this article is that the public files of financing statements are self-clearing, because the filing officer may automatically discard each financing statement after a period of five years, unless a continuation statement is filed or the financing statement is stiff effective under Subsection (F). This theory materially lessens the tension that would otherwise exist to have the files cleared by termination statements under § 9-404. Similarly, a person searching the files need not go back into the past indefinitely, and he has a limited and defined search problem.

Subsection (F) provides certain special filing rules, namely, filings against transmitting utilities (§ 9-105), for which financing statements are filed in the Commerce Department of the Division of Economic Development and real estate mortgages which serve as fixture financing statements and which are filed in the Commerce Department of the Division of Economic Development or its successor. In both of these cases the financing statement is valid for the life of the obligations secured. No confusion as to the required scope of search should result, because of the special nature of the filings involved.

3. Under Subsection (B) the security interest becomes unperfected when filing lapses. Thereafter, the interest of the secured party is subject to defeat by purchasers and lienors even though before lapse the conflicting interest may have been junior. Compare the situation arising under § 9-103(A)(4) when a perfected security interest under the law of another jurisdiction is not perfected in this jurisdiction within four months after the property is brought into this jurisdiction.

Thus, if "A" and "B" both make non-purchase money advances against the same collateral, and both perfect security interests by filing, "A" (who files first) is entitled to priority under § 9-312(E). But if no continuation statement is filed, "A's" filing may lapse first. So long as "B's" interest remains perfected thereafter, he is entitled to priority over "A's" unperfected interest.

4. Subsection (G) makes clear that the filings in real estate records (§§ 9-401 and 9-402(C) and (E)), shall be indexed in the real estate records, where they will be found by a real estate searcher. Where the debtor is not an owner of record, the financing statement must show the name of an owner of record, and the statement is to be indexed in his name. See §§ 9-313(D)(2) and (3); 9-402(C); and 9-402(E).

Cross References

Point 3: Sections 9-103(C), 9-301 and 9-312(E).

Definitional Cross References

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Transmitting utility". Section 9-105.

Special Plain Language Comment

This section describes the mechanical aspects for the filing of "financing statements" and for filing "continuation statements" needed to avoid the lapse of a prior filing.

§ 9-404. Termination statement

A. If a financing statement covering consumer goods is filed on or after July 30, 1986, then within (i) one month or (ii) within 10 days following written demand by the debtor, whichever occurs first, after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must file with each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. In other cases, whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the security party must on written demand by the debtor send the debtor, for each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record complying with § 9-405(B), including payment of the required fee. If the affected secured party fails to file such a termination statement as by this Subsection, or to send such a termination statement within 10 days after proper demand therefor, he shall be liable to the debtor for one hundred dollars ($100.00) and (in addition) for any loss caused to the debtor by such failure.

B. On presentation to the filing officer of such a termination statement he must note it in the index. If he has received the termination statement in duplicate, he shall return one copy of the termination statement to the secured party stamped to show the time of receipt thereof. If the filing officer has a microfilm or other photographic record of the financing statement, and of any related continuation statement, statement of assignment and statement of release, he may remove the originals from the files at any time after receipt of the termination statement, or if he has no such record, he may remove them from the files at any time after one year after receipt of the termination statement.

C. If the termination statement is in the standard form prescribed by the Commerce Department within the Division of Economic Development or its designated successor, the uniform fee for filing and indexing the termination statement shall be set by regulation.

History

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-404 of the Uniform Commercial Code as adopted by the states, except for adjustments which have been made because of the establishment of a Navajo filing system.

Commentary. 1. The purpose of this section is to provide a procedure for noting discharge of the secured obligation on the records and for noting that a financing arrangement has been terminated.

Since most financing statements expire in five years unless a continuation statement is filed (§ 9-403), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance of clearing the situation as it appears on file, an affirmative duty is put on the secured party in that case. However, many purchase money security interests in consumer goods will not be filed, except for motor vehicles (§ 9-302(A)(4)), in which case a certificate of title law may control instead of the filing provisions of Article 9.

2. This section adds a provision covering the problem which arises because a secured party under a notice filing system may file notice of an intention to make advances which may never be made. Under this section a debtor may require a secured party to send a termination statement when there is no outstanding

obligation and no commitment to make future advances.

Cross References

Point 2: Section 9-402(A).

Definitional Cross References

"Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Value". Section 1-201.

"Written". Section 1-201.

Special Plain Language Comment

This section describes the arrangements for terminating financing statements.

§ 9-405. Assignment of security interest

A. A financing statement may disclose an assignment of a security interest in the collateral described in the financing statement by indication in the financing statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in § 9-403(D). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be set by regulation.

B. A secured party may assign of record all or part of his rights under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement, or in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to § 9-103(E), he shall index the assignment under the name of the assignor as grantor and, to the extent that Navajo law provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be set by regulation. Notwithstanding the provisions of this Subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (§ 9-402(F)) may be made only by an assignment of the mortgage in the manner provided by the law applicable to the recording of such mortgages.

C. After the disclosure or filing of an assignment under this section, the assignee is the secured party of record.

History

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-405 of the Uniform Commercial Code as adopted by the states, except for adjustments which have been made because of the establishment of a Navajo filing system.

Commentary. This section provides a permissive device whereby a secured party who has assigned all or part of his interest may have the assignment noted of record. Note that under § 9-302(B) no filing of such an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. A secured party who has assigned his interest might wish to have the fact noted of record, so that inquiries concerning the transaction would be addressed not to him but to the assignee (see Point 2 of comment to § 9-402). After a secured party has assigned his rights of record, the assignee becomes the "secured party of record" and may file a continuation statement under § 9-403, a termination statement under § 9-404, or a statement of release under § 9-406.

Where a mortgage of real estate is effective as a financing statement filed as a fixture filing (§ 9-402(F)), then an assignment of record of the security interest may be made only in the manner in which an assignment of the mortgage may be made under the law applicable to such mortgages.

Cross References

Sections 9-302(B) and 9-402 through 9-406.

Definitional Cross References

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Signed". Security 1-201.

"Written". Section 1-201.

Special Plain Language Comment

This section describes certain mechanical arrangements for the transfer of a secured party's position to a new secured party.

§ 9-406. Release of collateral

A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with § 9-405(B), including payment of the required fee. Upon presentation of such a statement of release to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be set by regulation.

History

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-406 of the Uniform Commercial Code as adopted by the states, except for adjustments which have been made to reflect the establishment of a Navajo filing system.

Commentary. Like the preceding section, this section provides a permissive device for noting of record any release of collateral. There is no requirement that such a statement be filed when collateral is released (*cf.* § 9-404 on Termination Statements). It is merely a method of making the record reflect the true state of affairs so that fewer inquiries will have to be made by persons who consult the files.

It the statement of release is not signed by the secured party of record, the assignment procedure of § 9-405(B) must be followed.

Cross References

Section 9-404.

Definitional Cross References

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Secured party". Section 9-105.

"Signed". Section 1-201.

Special Plain Language Comment

This section describes the mechanics for a secured party to release some collateral without terminating the entire financing statement.

§ 9-407. Information from filing officer

A. If the person filing any financing statement, termination statement, statement of assignment, or statement of release, furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.

B. Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be set by regulation. Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of to be set by regulation.

History

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-407 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. Subsection (A) requires the filing officer upon request to return to the secured party a copy of the financing statement on which the material data concerning the filing are noted. Receipt of such a copy will assure the secured party that the mechanics of filing have been complied with.

Note, however, that under § 9-403(A) the secured party does not bear the risk that the filing officer will not properly perform his duties; under that section the secured party has complied with the filing requirements when he presents his financing statement for filing and the filing fee has been tendered or the statement accepted by the filing officer.

2. Subsection (B) requires the filing officer on request to issue to any person who has tendered the proper fee his certificate as to what filings have been made against any particular debtor and to furnish copies of such filed financing statements. In view of the centralized filing system adopted by this article (see § 9-401 and Comment thereto), this provision is of obvious convenience to a person who wishes to know what the files contain but who cannot conveniently consult files located in the capital of the Navajo Nation.

Cross References

Point 1: Section 9-403(A).

Point 2: Section 9-401.

Definitional Cross References

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Send". Section 1-201.

§ 9-408. Financing statements covering consigned or leased goods

A consignor or lessor of goods may file a financing statement using the terms "consignor", "consignee", "lessor", "lessee" or the like instead of the terms specified in § 9-402. The provisions of this part shall apply as appropriate to such a financing statement, but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (§ 1-201(KK)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing.

History

CJA-1-86, January 29, 1986.

Official Comment

This section is intended to have the same meaning and effect as § 9408 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. Where filing is required under §§ 2-326(C) and 9-114 for a consignment which is not a security interest (§ 1-201(KK)), this section authorizes the appropriate adaptations of terminology.

Apart from the rules in Part 4, the rules of this article using the terms "debtor" and "secured party" will not apply to consignments if they are not security interests. Section 9-114 on consignments essentially parallels § 9-312(C) on inventory priorities, and the latter rule therefore does not apply to consignments. Section 2-326 states the rights of creditors of a consignee who has not filed or otherwise complied with Subsection (C), and § 9-301 on unperfected security interests is therefore not applicable. Section 2-326 and the law of consignments supply rules which are provided by § 9-311 for security interests and that section is therefore not applicable to consignments. For reasons indicated in the Comment to § 9-114, § 9-306 on proceeds is inapplicable to consignments. An equivalent to the protection of a buyer in ordinary course of business against a security interest under § 9-307(A) is provided against consignments by § 2-403(B) and (C).

2. If a lease is actually intended as security (§ 1-201(KK)), this article applies in full. However, this question of intention is a doubtful one, and the lessor may choose to file for safety even while contending that the lease is a true lease for which no filing is required. This section authorizes filing with appropriate changes of terminology, and without affecting the substantive question of classification of the lease. If the lease is a true lease, none of the provisions of the Article is applicable to the lease as an interest in the chattel. Note, however, that the Article may be applicable to the lease in its aspect as chattel paper. See § 9-105(B).

Cross References

Point 1: Sections 1-201(KK), 2-326, 2-403, 9-114, 9-301, 9-306, 9-307, and 9-312.

Point 2: Sections 1-201(KK) and 9-105(B).

Definitional Cross References

"Debtor". Section 9-105.

"Financing Statement". Section 9-402.

"Goods". Section 9-105(A)(8).

"Secured Party". Section 9-105.

Special Plain Language Comment

Persons who allow others to sell their goods (e.g. "consignors") and persons who allow others to use their goods (e.g., "lessors") sometimes do not want to be treated as "secured parties" under this article, but wish to file under this article to protect themselves in case they are determined by a court to be a "secured party". This section accommodates that concern.

Part 5. Default

§ 9-501. Default; procedure when security agreement covers both real and personal property

A. When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and, except as limited by Subsection (C), those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights remedies and duties provided in § 9-207. The rights and remedies referred to in this Subsection are cumulative.

B. After default, the debtor has the rights and remedies provided in this part, those provided in the security agreement and those provided in § 9-207.

C. To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the Subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (§ 9-504(C) and § 9-505) and with respect to redemption of collateral (§ 9-506), but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured, if such standards are not manifestly unreasonable.

1. Section 9-502(B) and § 9-504(B) insofar as they require accounting for surplus proceeds of collateral;

2. Section 9-504(C) and § 9-505(A) which deal with disposition of collateral;

3. Section 9-505(B) which deals with acceptance of collateral as discharge of obligation;

4. Section 9-506 which deals with redemption of collateral;

5. Section § 9-507(A) which deals with the secured party's liability for failure to comply with this part; and

6. Section 9-503 which deals with the repossession of personal property-7 N.N.C. § 621.

D. If the security agreement covers both real and personal property or fixtures, the secured party may proceed under this part as to the personal property or fixtures, or he may proceed as to both the real and the personal property or fixtures in accordance with his rights and remedies in respect of the real property, in which case the provisions of this part do not apply.

E. When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

History

CJA-1-86, January 29, 1986.

Note. Repossession of personal property moved from 7 N.N.C. § 607 to 7 N.N.C. § 621 and renamed "Repossession of consumer goods."

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-501 of the Uniform Commercial Code as adopted by the states, except as adjusted for clarification of the position regarding fixtures in Subsection (D).

Commentary. 1. The rights of the secured party in the collateral after the debtor's default are of the essence of a security transaction. These are the rights which distinguish the secured from the unsecured lender. This section and the following six sections state those rights as well as the limitations on their free exercise which legislative policy requires for the protection not only of the defaulting debtor but of other creditors. However, Subsections (A) and (B) make it dear that the statement of rights and remedies in this part does not exclude other remedies provided by agreement.

2. Following default and the taking possession of the collateral by the secured party, there is no longer any distinction between the security interest which before default was non-possessory and that which was possessory under a pledge. Therefore, no general distinction is taken in this part between the rights of a non-possessory secured party and those of a pledgee; the latter, being in possession of the collateral at default, will of course not have to avail himself of the right to take possession under § 9-503.

3. Section 9-207 states rights, remedies and duties with respect to collateral in the secured party's possession. That Section applies not only to the situation where he is in possession before default, as a pledgee, but also, but Subsections (A) and (B) of this section, to the secured party in possession after default. Nevertheless, the relations of the parties have been changed by default, and § 9-207 (as it applies after default) must be read together with this part. In particular, agreements, permitted under § 9-207 cannot waive or modify the rights of the debtor contrary to Subsection (C) of this section.

4. Section 1-102(C) states rules to determine which provisions of this Code are mandatory and which may be varied by agreement. In general, provisions which relate to matters which come up between immediate parties may be varied by agreement. In the area of rights after default our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor's rights and free the secured party of his duties: no mortgage clause has ever been allowed to clog the equity of redemption. The default situation offers great scope for overreaching; the suspicious attitude of the courts have been grounded in common sense. Subsection (C) of the section contains a codification of this long-standing and deeply rooted attitude: the specified rights of the debtor and duties of the secured party may not be waived or varied except as stated. Provisions not specified in Subsection (C) are subject to the general rules stated in § 1-102(C).

5. The collateral for many corporate security issues consists of both real and personal property. In the interest of simplicity and speed Subsection (D) permits, although it does not require, the secured party to proceed as to both real and personal property in accordance with his rights and remedies in respect of the real property. Except for the permission so granted, this Code leaves to other applicable law all questions of procedure with respect to real property. For example, this Code does not determine whether the secured party can proceed against the real estate alone and later proceed in a separate action against the personal property in accordance with his rights and remedies against the real estate. By such separate actions the secured party "proceeds as to both", and this part does not apply in either action. However, Subsection (D) does give the secured party an option to proceed under this part as to the personal property.

6. Under Subsection (A) a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure, outside this article, which applicable law may provide. The first sentence of Subsection (E) makes clear that any judgment lien which the secured party may acquire against the collateral is, so to say, a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore stated to relate back to the date of perfection of the security interest. The second sentence of the Subsection makes clear that a judicial sale following judgment, execution and levy is one of the methods of foreclosure contemplated by Subsection (A); such a sale is governed by other law and not by this article and the restrictions which this article imposes on the right of a secured party to buy in the collateral at a sale under § 9-504 do not apply.

Cross References

Point 2: Section 9-503.

Point 3: Section 9-207.

Point 4: Section 1-102(C).

Point 5: Sections 9-102(A) and 9-104(j).

Point 6: Section 9-504.

Definitional Cross References

"Agreement". Section 1-201.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Documents". Section 9-105.

"Goods". Section 9-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

Special Plain Language Comment

This section describes the extent to which the rights and obligations of "debtors" and "secured parties" may be changed by agreement. This section also describes the interaction between this article and other laws and procedures dealing with creditor rights after default.

§ 9-502. Collection rights of secured party

A. When so agreed in a conspicuous manner in writing and, in any event, on default the secured party is entitled to notify an account debtor or the obligor on an instrument or deposit account to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which the secured party is entitled under § 9-306.

B. A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-502 of the Uniform Commercial Code as adopted by the states, except that it has been adjusted to include a remedy for the security interest in deposit accounts and to require conspicuous written agreement to predefault collection of assigned rights to payment.

Commentary. 1. The assignee of accounts, deposit accounts, chattel paper, or instruments hold as collateral property which is not only the most liquid asset of the debtor's business, but also property which may be collected without any interruption of the business (assuming that it continues after default). The situation is far different from that where the collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore, the problems of valuation and identification, present where the collateral is tangible goods, do not arise so sharply on the assignment of intangibles. Considerations, similar although not identical, apply to assignments of general intangibles, which are also covered by the rule of the section. Consequently, this section recognizes the fact that financing by assignment of intangibles lacks many of the complexities which arise after default in other types of financing, and allows the assignee to liquidate in the regular course of business by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "non-notification" financing). By agreement, of course, the secured party may have the right to give notice and to make collections before default.

2. In one form of accounts receivable financing, which is found in the "factoring" arrangements, which are common in the textile industry, the assignee assumes the credit risk-that is, he buys the account under an agreement which does not provide for recourse or charge-back against the assignor in the event the account proves uncollectible. Under such an arrangement, neither the debtor nor his creditors have any legitimate concern with the disposition which the assignee makes of the accounts. Under another form of accounts receivable financing, however, the assignee does not assume the credit risk and retains a right of full or limited recourse. or charge-back for uncollectible accounts. In such a case, both debtor and creditors have a right that the assignee not dump the accounts, if the result will be to increase a possible deficiency claim or to reduce a possible surplus.

3. Where an assignee has a right of charge-back or a right of recourse, Subsection (B) provides that liquidation must be made with due regard to the interest of the assignor and of his other creditors—"in a commercially reasonable manner" (compare § 9–504 and see § 9–507(B)) and the proceeds allocated to the expenses of realization and to the indebtedness. If the "charge-back" provisions of the assignment arrangement provide only for "charge-back" of bad accounts against a reserve, the debtor's claim to surplus and his liability for a deficiency are limited to the amount of the reserve.

4. Financing arrangements of the type dealt with by this section are between businessmen. The last sentence of Subsection (B) therefore preserves freedom of contract, and the Subsection recognizes that there may be a true sale of accounts or chattel paper, although recourse exists. The determination whether a particular assignment constitutes a sale or a transfer for security is left to the courts. Note that, under § 9–102, this article applies both to sales and to security transfers of such intangibles.

Cross References

Sections 9–205 and 9–306.

Point 3: Sections 9–504 and 9–507(B).

Point 4: Sections 9–102(A)(2) and 9–104(F).

Definitional Cross References

"Account". Section 9-106.

"Account debtor". Section 9-105.

"Agreement". Section 1-201.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Instrument". Section 9-105.

"Notify". Section 1-201.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

Special Plain Language Comment

This section describes the operation of a remedy by which the secured party may enforce collection of collateral in the form of rights to payment owing to the debtor.

§ 9-503. Secured party's right to take possession after default

A secured party has on default the right to take possession of the collateral solely in accordance with the Navajo law which does not permit a secured party to repossess personal property of Navajo Indians without judicial process. See 7 N.N.C. § 621. If the security agreement so provides, the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may, in accordance with applicable Navajo law, render equipment unusable, and may dispose of collateral on the debtor's premises under § 9-504.

History

CJA-1-86, January 29, 1986.

Note. Repossession moved from 7 N.N.C. § 607 to 7 N.N.C. § 621.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-503 of the Uniform Commercial Code as adopted by the states, except that repossession of collateral located within Navajo Indian Country and entry on Navajo Indian Country to exercise such remedies must be done in accordance with applicable Navajo law.

Commentary. Under this article the secured party's right to possession of the collateral (if he is not already in possession as pledgee) accrues on default unless otherwise agreed in the security agreement. In the case of collateral such as heavy equipment, the physical removal from the debtor's plant and the storage of the equipment pending resale maybe exceedingly expensive and in some cases impractical. The section therefore provides that in lieu of removal, the lender may render equipment unusable or dispose of collateral on the debtor's premises. The authorization to render equipment unusable or to dispose of collateral without removal would not justify unreasonable action by the secured party, since, under § 9-504(C), all his actions in connection with disposition must be taken in "commercially reasonable manner". However, all such remedies of the secured party must be exercised on Navajo Indian Country in accordance with the laws and procedures of that jurisdiction.

Cross References

Section 9-504.

Definitional Cross References

"Action". Section 1-201.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Equipment". Section 9-109.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

Navajo Rules of Court Relating to Repossession.

Special Plain Language Comment

This section describes the remedy of the secured party after default by the debtor on the obligation secured by collateral to recover possession of that collateral from the debtor or to enter the debtor's property in order to assemble the collateral, to render the collateral inoperable, or to sell it.

§ 9-504. Secured party's right to dispose of collateral after default; effect of disposition

A. A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). Unless otherwise provided in the security agreement, the proceeds of disposition shall be applied in the order followed to:

1. The reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party; and

2. The satisfaction of indebtedness secured by the security interest under which the disposition is made; and

3. The satisfaction of indebtedness secured by any subordinate security, interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

B. If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

C. Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. Such notices must be delivered personally or be deposited in the United States mail postage prepaid addressed: (i) to the debtor at his address as set forth in the financing statement or in the security agreement or at such other address as may have been furnished to the secured party for such purpose, or if no address has been so set forth or furnished, at his last known address; and (ii) to any other secured party at the address set forth in his request for notice. Unless a debtor is entitled to greater notice and advertising by agreement, there is a rebuttable presumption that: (i) a private sale or disposition notice shall be commercially reasonable if it is given at least 10 days in advance of the disposition; and (ii) a public sale or disposition notice shall be deemed commercially reasonable if it is given at least 10 days in advance of the disposition and if notice of the time and place of such disposition is given at least five days before such disposition by publication at least twice in both a newspaper of general circulation in the county in which the sale is to be held and a newspaper of general circulation in the Navajo Indian Country. Any public sale or disposition may be postponed from time to time by public announcement at the time and place last scheduled for the disposition and by commercially reasonable notice of the new sale or disposition. The secured party may buy at any public sale, and, if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations, he may buy at private sale.

D. When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings:

1. In the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

2. In any other case, if the purchaser acts in good faith.

E. A. person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-504 of the Uniform Commercial Code as adopted by the states, except that certain issues are clarified such as the notice arrangement. In order to prevent uncertainty concerning reasonable time for notice of a sale or disposition, the Subsection (C) states a rebuttable presumption for a satisfactory minimum notice standard which will create a "safe harbor" in all but the most unusual cases where greater notice is obviously necessary (e.g., in order to allow advertising of specialty collateral in a specialized trade publication). Nothing in this section is intended to discourage greater notice or advertising, and this section focuses solely upon minimum standards.

Commentary. 1. Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect this section follows the provisions of the section on resale by a seller following a buyer's rejection of goods. (§ 2-706). Subsection (A) does not restrict disposition to sale: the collateral may be sold, leased or otherwise disposed of-subject of course to the general requirement of Subsection (B) that all aspects of the disposition be "commercially reasonable". Section 9-507(B) states some tests as to what is "commercially reasonable".

2. Subsection (A) contains provisions for the application of proceeds and for the debtor's right to surplus and liability for deficiency. Under Subsection (A)(3) the secured party, after paying expenses of retaking and disposition and his own debt, is required to pay over remaining proceeds to the extent necessary to satisfy the holder of any junior security interest in the same collateral if the holder of the junior interest has made a written demand and furnished on request reasonable proof of his interest. This provision is necessary in view of the fact that under Subsection (D) the junior interest is discharged by the disposition. Since the requirement is conditioned on written demand, it should not result in undue burden on the secured party making the disposition. It should be noted also that under § 9-112 where the secured party knows that the collateral is owned by a person who is not the debtor, the owner of the collateral and not the debtor is entitled to any surplus.

3. In any security transaction the debtor (or the owner of the collateral if other than the debtor: see § 9-112) is entitled to any surplus which results from realization on the collateral. The debtor will also, unless otherwise agreed, be liable for any deficiency, and Subsection (B) so provides. Since this article covers sales of certain intangibles as well as transfers for security, the Subsection also provides that (apart from agreement) the right to surplus or liability for deficiency does not accrue where the transaction between debtor and secured party was a sale and not a security transaction.

4. Subsection (D) provides that a purchaser for value from a secured party after default takes free of any rights of the debtor and of the holders of junior security interests and liens, even though the secured party has not complied with the requirements of this part or of any judicial proceedings. Where the purchaser for value has bought at a public sale, he is protected under paragraph (1) if he has no knowledge of any defects in the sale and was not guilty of collusive practices. Where the purchaser for value has bought at a private sale he must, to receive the protection of paragraph (2), qualify in all respects as a purchaser in good faith. Thus, while the purchaser at a private sale is required to proceed in the exercise of good faith, the purchaser at public sale is protected so long as he is not actively in bad faith, and is put under no duty to inquire into the circumstances of the sale.

5. Under Subsection (C), the secured party in most cases is required to give reasonable notification of disposition to the debtor unless the debtor has after default signed a statement renouncing or modifying his right to notification of sale. The secured party must also (except for consumer goods) give notice to any other secured parties who have in writing given notice of a claim of an interest in the collateral. This latter notice must be given before the debtor renounces his rights or before the secured party gives his notification to the debtor. Compare § 9-505(B). Except for the requirement of notification, there is no statutory period during which the collateral must be held before disposition. "Reasonable notification" is not defined in this article, although certain rebuttable presumptions are included as guides to the parties. At a minimum, notice must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by paying the defaulted obligation or by taking part in the sale or other disposition if they so desire.

6. No period is set within which the disposition must be made, except in the case of consumer goods which under § 9-505(A) must in certain instances be sold

within 90 days after the secured party has taken possession. The failure to prescribe a statutory period during which disposition must be made is in line with the policy adopted in this article to encourage disposition by private sale through regular commercial channels. It may, for example, be wise not to dispose of goods when the market has collapsed, or to sell a large inventory in parcels over a period of time instead of in bulk. Note, however, that under Subsection (C) every aspect of the sale or other disposition of the collateral must be commercially reasonable; this specifically includes, method, manner, time, place and terms. See § 9-507(B). Under that provision a secured party who without proceeding under § 9-505(B) held collateral a long time without disposing of it, thus running up large storage charges against the debtor, where no reason existed for not making a prompt sale, might well be found not to have acted in a "commercially reasonable" manner. See also § 1-203 on the general obligation of good faith.

Cross References

Point 1: Sections 2-706 and 9-507(B).

Point 2: Section 9-112.

Point 3: Sections 9-102(A)(2) and 9-112.

Point 4: Section 2-706.

Point 6: Sections 9-505 and 9-507(B).

Definitional Cross References

"Account". Section 9-106.

"Agreement". Section 1-201.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Gives" notification. Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Proceeds". Section 9-306.

"Purchaser". Section 1-201.

"Receives" notification. Section 1-201.

"Rights". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

"Written". Section 1-201.

Special Plain Language Comment

This section describes the procedures for a secured party to follow in selling or otherwise disposing of the collateral after default on the secured obligation of the debtor.

§ 9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge obligation

A. If the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods or sixty percent (60%) of the loan in the case of another security interest in consumer goods, and the debtor has not signed after default a statement renouncing or modifying his rights under this part, a secured party who has taken possession of collateral must dispose of it under § 9-504, and, if the secured party fails to do so within 90 days after he takes possession, the debtor at his option may recover in conversion or under § 9-507(A) on secured party's liability.

B. In any other case involving consumer goods or any other collateral, a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation (or, if agreed by the debtor after default, in satisfaction of an agreed part of the obligation). Written notice of such proposal shall be sent to the debtor and, except in the case of consumer goods, notice shall be sent to any other secured party from whom the secured party has received (before sending his, notice to the debtor) written notice of a claim of an interest in the collateral. If the secured part/ receives objection in writing from the debtor or other secured party entitled to receive notification within 30 days after the notice was sent, the secured party must dispose of the collateral under § 9-504 or collect collateral consisting of rights to payment under § 9-502. In the absence of such written objection, the secured party may retain the collateral in satisfaction of the debtor's obligation.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as 9-505 of the Uniform Commercial Code as adopted by the states, except that it (i) clarifies the right of the debtor to agree after default to a transfer of collateral in satisfaction of less than all of the debt, ii) maintains the absolute right of the debtor to written notice from the 1962 version of the Uniform Commercial Code (this section was modified in the 1972 amendments to permit waiver of such notice by the debtor), (iii) maintains the 30-day notice period from the 1962 version of the Uniform Commercial Code; and (iv) clarifies the right of a secured party whose proposal has been rejected to collect rights to payment under § 9-502 instead of selling them under § 9-504.

Commentary. 1. Experience has shown that the parties are frequently better off without a resale of the collateral; hence this section sanctions an alternative arrangement. In lieu of resale or other disposition, the secured party may propose under Subsection (B) that he keep the collateral as his own, thus discharging the obligation and abandon any claim for a deficiency unless otherwise agreed by the debtor after default. This right may not be exercised in the case of consumer goods where the debtor has paid sixty percent (60%) of the price or obligation and thus has a substantial equity, and this right may be exercised in other cases only on notification to the debtor, and (except in the case of consumer goods) to any other secured party who was given written notice of a claim of an interest in the collateral. In the latter case, notice must be given before the secured party sends his notice to the debtor. The secured party may keep the goods in lieu of sale on failure of anyone receiving notification to object within 30 days.

2. When an objection is received by the secured party, he must then proceed to dispose of the collateral in accordance with § 9-504 (or, in the case of rights to payment, to collect it under § 9-502), and on failure to do so would incur the liabilities set out in § 9-507. In the case of consumer goods where sixty percent (60%) of the price or obligation has been paid, the disposition must be made within 90 days after possession taken. For failure to make the sale within the 90-day period the secured party. is liable in conversion or alternatively may incur the liabilities set out in § 9-507. In the absence of objection the secured party is bound by this notice.

3. After default (but not before) a consumer-debtor who has paid sixty percent (60%) of the cash price may sign a written renunciation of his rights to require resale of the collateral.

Cross References

Sections 9-504 and 9-507(A).

Definitional Cross References

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Knows". Section 1-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchase money security interest". Section 9-107.

"Receives" notification. Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Signed". Section 1-201.

"Written". Section 1-201.

Special Plain Language Comment

This section describes a procedure whereby the secured party enforces his proposal to keep the collateral in satisfaction of the secured obligation unless the debtor objects within thirty (30) days, except in certain specified cases involving consumer goods or other agreements among the parties.

§ 9-506. Debtor's right to redeem collateral

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under § 9-504 or before the obligation has been discharged under § 9-505(B), the debtor or any other secured party may (unless otherwise agreed in writing after default) redeem the collateral by tendering fulfillment of an obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and, to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-506 of the Uniform Commercial Code as adopted by the states.

Commentary. Except in the case stated in § 9-505(A) (consumer goods) the secured party is not required to dispose of collateral within any stated period of time. Under this section so long as the secured party has not disposed of collateral in his possession or contracted for its disposition, and so long as his right to retain it has not become fixed under § 9-505(B), the debtor or another secured party may redeem. The debtor must tender fulfillment of all obligations secured, plus certain expenses: if the agreement contains a clause accelerating the entire balance due on default in one installment, the entire balance would have to be tendered. "Tendering fulfillment" obviously means more than a new promise to perform the existing promise; it requires payment in full of all monetary obligations then due and, performance in full of all other obligations then matured. If unmatured obligations remain, the security interest continues to secure them as if there had been no default.

Under § 9-504 the secured party may make successive sales of parts of the collateral in his possession. The fact that he may have sold or contracted to sell part of the collateral would not affect the debtor's right under this section to redeem what was left. In such a case, of course, in calculating the amount required to be tendered the debtor would receive credit for net proceeds of the collateral sold.

Cross References

Sections 9-504 and 9-505.

Definitional Cross References

"Agreement". Section 1-201.

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Secured party". Section 9-105.

"Writing". Section 1-201.

Special Plain Language Comment

This section describes the debtor's right to reclaim his collateral by satisfying the secured obligations and certain expenses of the secured party before the secured party has disposed of such collateral or obligated himself to do so.

§ 9-507. Secured party's liability for failure to comply with this part

A. If it is established that the secured party is not proceeding in accordance with the provisions of this part, disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred, the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover, in any event, an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time price differential plus ten percent (10%) of the cash price.

B. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured, party either sells the collateral in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

History

CJA-1-86, January 29, 1986.

Official Comment

Changes. This section is intended to have the same meaning and effect as § 9-507 of the Uniform Commercial Code as adopted by the states.

Commentary. 1. The principal limitation on the secured party's right to dispose of collateral is the requirement that he proceed in good faith (§ 1-203) and in a commercially reasonable manner. See § 9-504. In the case where he proceeds, or is about to proceed, in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted. The section further provides for damages where the unreasonable disposition has been concluded, and, in the case of consumer goods, states a minimum recovery.

A case may be put in which the liquidation value of an insolvent estate would be enhanced by disposing of all the debtor's property (including that subject to a security interest) in the liquidation proceeding and in which, if a secured party repossesses and sells that part of the property which he holds as collateral, the remainder will have little or no resale value. In such a case the question may arise whether a particular court has the power to control the manner of disposition, although reasonable in other respects, in order to preserve the estate for the benefit of creditors. Such a power is no doubt inherent in a federal bankruptcy court, and perhaps also in other courts of equity administering insolvent estates.

2. In view of the remedies provided the debtor and other creditors in Subsection (A) when a secured party does not dispose of collateral in a commercially reasonable manner, it is of great importance to make clear what types of disposition are to be considered commercially reasonable, and in an appropriate case to give the secured party means of getting, by court order or negotiation with a creditors' committee or a representative of creditors, approval of a proposed method of disposition as a commercially reasonable one. Subsection (B) states rules to assist in the determination, and provides for such advance approval in appropriate situations. One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns, since the secured party does not usually maintain his own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable under the second sentence of Subsection (B). However, none of the specific methods of disposition set forth in Subsection (B) is to be regarded as either required or exclusive, provided only that the disposition made or about to be made by the secured party is commercially reasonable.

Cross References

Point 1: Section 1–203, 9–202 and 9–504.

Definitional Cross References

"Collateral". Section 9–105.

"Consumer goods". Section 9–109.

"Creditor". Section 1–201.

"Debtor". Section 9–105.

"Knows". Section 1–201.

"Notification". Section 1–201.

"Person". Section 1–201.

"Representative". Section 1–201.

"Rights". Section 1–201.

"Secured party". Section 9–105.

"Security interest". Section 1–201.

conducting all KTC business openly without taint of impropriety, serving the KTC, Kayenta Chapter and the Navajo Nation to the very best of their ability in full compliance with the Navajo Nation Ethics in Government Law.

History

CAU-47-03, August 29, 2003, Overrode veto of Resolution CJY-42-03.

CJY-42-03, July 25, 2003, Amended section generally.

CN-86-85, November 5, 1985.

§ 4086. Amendments and revisions

This Subchapter may from time to time be amended as necessary and appropriate by a two-thirds majority of the full Navajo Nation Council with recommendations from the KTC and the Kayenta Chapter.

History

CAU-47-03, August 29, 2003, Overrode veto of Resolution CJY-42-03.

CJY-42-03, July 25, 2003, Amended section to create Kayenta Township as home rule municipality.

CN-86-85, November 5, 1985.

Title 3

Agriculture and Livestock

United States Code

Loans of livestock by United States to Indians, cash settlements, disposition of moneys received in settlement of, 25 U.S.C. §§ 442, 443.

Relief in stricken agricultural areas, expenditures not considered in offsetting gratuities in suits of Tribes against United States, 25 U.S.C. § 475a.

Chapter 1. Agricultural Leases, Assignments, and Permits

Subchapter 1. Leases

§ 1. Authority to negotiate and grant

A. The Resources Committee of the Navajo Nation Council is authorized and empowered, with the approval of the General Superintendent, to negotiate and grant leases of economic unit sized tracts of Navajo Nation land to qualified members of the Navajo Nation for agricultural purposes.

B. The President of the Navajo Nation, with the approval of the General Superintendent, is authorized to enter into lease agreements upon approval of the Resources Committee on behalf of the Navajo Nation.

History

CJN-37-59, June 5, 1959.

Note. References to "Advisory Committee" changed to "Resources Committee" pursuant to 2 N.N.C. § 691 *et seq*.

Cross References

Powers of the Resources Committee, see 2 N.N.C. § 691 *et seq*.

Powers and Duties of the President, see 2 N.N.C. § 1005 *et seq*.

United States Code

Lease of Indian lands generally, see 25 U.S.C. § 391 *et seq*.

Code of Federal Regulations

Agricultural leases, see 25 CFR § 162.200 *et seq*.

Annotations

See annotations under Licenses and Permits in digest.

1. Easements

RE: dispute involving Red Lake Irrigation Project: " ... [N]o prescriptive right can be acquired in property belonging to the Navajo Nation or dedicated to a community use. To allow prescription is similar to authorizing only a few individuals to utilize public property to the exclusion of others. This process would disrupt the beneficial use of that property and result in numerous disputes." *Yazzie v. Jumbo*, 5 Nav. R. 75, 77 (Nav. Sup. Ct. 1986).

§ 2. Regulations, procedures, and forms; adoption

The Resources Committee is authorized to adopt regulations, procedures, and forms to govern the granting of agricultural leases to individual applicants.

History

CJN-37-59, June 5, 1959.

ACJL-100-59, July 17, 1959, approved United States Department of Interior, Bureau of Indian Affairs Lease Form 5-180-January 1957 with addendum attached. The same Resolution also approved form of application for lease which was to be made a part of each lease.

Note. References to "Advisory Committee" changed to "Resources Committee" pursuant to 2 N.N.C. § 691 *et seq*.

§ 3. Rentals

Rentals for leases of tracts of Navajo Nation land for agricultural purposes shall be established by the Resources Committee with the approval of the Commissioner or his/her authorized representative.

History

CJN-37-59, June 5, 1959.

Note. References to "Advisory Committee" changed to "Resources Committee" pursuant to 2 N.N.C. § 691 *et seq*.

§ 4. Permits

Permits issued and in force under provisions of §§ 41-43 of Subchapter 3 shall remain in effect and the procedures set forth in such sections shall continue to be effective should any Navajo Indian desire a permit instead of a lease as provided in this Subchapter.

History

CJN-37-59, June 5, 1959.

Note. ACS-118-80, September 11, 1980. Sections 41-43 of Subchapter 3 referenced above have been rescinded.

Subchapter 3. Irrigated lands generally

§§ 41 to 43. [Rescinded]

History

ACS-118-80, September 11, 1980.

ACO-38-54, October 19, 1954.

§ 44. Regulations, procedures, and forms; authority to adopt

The Resources Committee is authorized to adopt regulations, procedures, and forms to govern the duties of the Land Boards in administering the provisions of §§ 41-43 of this Subchapter.

History

CJN-37-59, June 5, 1959.

Note. References to "Advisory Committee" changed to "Resources Committee" pursuant to 2 N.N.C. § 691 *et seq*. Also, ACS-118-80, §§ 41-43 of Subchapter 3 referenced above have been rescinded.

§ 45. Hogback and Navajo Irrigation Projects

A. There is established a policy of establishing farm units containing sufficient land to sustain and provide Navajo families with an adequate livelihood.

B. The farm units for the Hogback and Navajo Irrigation Projects are established at not less than 120 acres each.

C. The Resources Committee of the Navajo Nation Council, in full cooperation with the appropriate offices of the Bureau of Indian Affairs, shall formulate forms and implement procedures it may deem necessary for the orderly allocation of the farm units as set forth in Subsection (B) of this Section, and to take whatever other steps which in its opinion are necessary to fully protect the best interests of the Navajo Nation and that of its individual members in carrying out the provisions of this Section.

History

ACJ-67-58, June 13, 1958.

Note. Subsection (A) slightly reworded for statutory form. "Advisory Committee" changed to "Resources Committee" pursuant to 2 N.N.C. § 691 et seq. and for purposes of conformance with the 1989 amendments to Title 2, CD-68-89.

Subchapter 4. Major Irrigation Projects Farm Boards

History

Scope of Subchapter. Introduction to Plan of Operation for Major Irrigation Projects Farm Boards, in ACD-228-85, states in part: "This Plan of Operation will only cover the major irrigation projects, including Many Farms; Ganado; Red Lake, NM; Cudei, Hogback and Fruitland, which are regularly administered and maintained by the Division of Water Resources and such other projects as are designated by the Resources Committee of the Navajo Tribal Council. All other irrigation projects are classified as Miscellaneous Projects and remain under the jurisdiction of the District Grazing Committee."

§ 61. Establishment

Farm Boards are hereby established.

A. There are hereby established Farm Boards within the Executive Branch of the Navajo Nation Government.

B. Farm Boards shall be established through the Government Services Committee of the Navajo Nation Council upon the recommendation of the Resources Committee, provided the following criteria are met:

1. A proposed Plan of Operation is submitted and approved by the Navajo Nation Department of Agriculture; and

2. A certified Chapter(s) of the Navajo Nation supports the formation of a Farm Board; and

3. The Farm Board is comprised of farm lands which meet one of the following projects:

a. "Lake Projects" means that the farm lands are located near lakes, man-made or natural or reservoirs.

b. "River Projects" means that farm lands are located near rivers, or perennial streams.

c. "Miscellaneous Projects" means that farm lands are located in areas that receive high amounts of rain fall, from 0-18, more or less, inches per year, and have the capacity to sustain viable crops: or areas that receive run off water from mountains, i.e. intermittent streams, and have capacity to sustain viable crops.

C. A Farm Board may be comprised of several chapters or districts, but a Chapter shall have no more than one Farm Board.

D. Unless otherwise stated, applicable District Grazing Committees or District Land Boards shall maintain authority over farmlands not under the jurisdiction of a Farm Board.

History

CAU-67-97, August 7, 1997.

ACD-228-85, December 12, 1985.

CJA-1-81, January 28, 1981.

ACS-118-80, September 11, 1980.

CAU-51-80, August 7, 1980.

Note. Slightly reworded.

§ 62. Purposes

It is the purpose of the Farm Boards:

1. To build up locally the capacity and responsibility to ensure the proper and full protection, conservation, management, sustainable and economic use and development of local farmland and irrigation water systems.

2. To promote coordination among the Navajo Nation, private entities, state and federal agencies, local Navajo farmers and farm communities for ensuring proper operation, maintenance, rehabilitation and improvement of local irrigation systems.

3. To promote coordination among the Navajo Nation, private entities, state and federal agencies to provide Navajo farming communities with adequate research, education and training in all aspects of agricultural production, irrigation management, marketing and

financial mismanagement, and other areas related to agriculture within the Navajo Nation.

4. To promote full utilization of idle farmland.

History

CAU-67-97, August 7, 1997.

ACD-228-85, December 12, 1985.

ACS-118-80, September 11, 1980.

Note. Slightly reworded for purposes of statutory form.

References to "Division of Water Resources" have been changed to "Division of Natural Resources" pursuant to CAP-41-94, April 20, 1994.

Cross References

Division of Community Development, 2 N.N.C. § 1451.

Division of Natural Resources, 2 N.N.C. § 1901 *et seq.*

§ 63. Personnel Officers

Each Farm Board shall select from its membership, the following officers:

A. Chairperson. The Chairperson shall preside over Farm Board meetings and insure that the business of the Farm Board is conducted in an orderly manner.

B. Vice-Chairperson. The Vice-Chairperson shall perform the duties of the Chairperson in the absence of the Chairperson as well as other duties that may be delegated to him or her.

C. Secretary. The Secretary shall be responsible for keeping the records of the Farm Board.

History

CAU-67-97, August 7, 1997.

ACJA-27-89, January 24, 1989.

ACD-228-85, December 12, 1985.

ACS-118-80, September 11, 1980.

§ 64. Meetings

A. Monthly meetings. Each Farm Board must hold at least two scheduled meetings per month to address issues of farming, land use permits, land use matters, and disputes.

B. Special Meetings. Special meetings may be called by over one-half of the Farm Board members, subject to availability of funds.

C. Quorum. A quorum shall consist of a simple majority of the Farm Board members.

History

CAU-67-97, August 7, 1997.

ACD-228-85, December 12, 1985.

ACD-18-80, September 11, 1980.

Note. Reference to "Division of Water Resources" has been changed to "Division of Natural Resources" pursuant to CAP-41-94, April 20, 1994.

Cross References

Resources Committee of the Navajo Nation Council, see 2 N.N.C. § 691, *et seq*.

§ 65. Powers

Subject to applicable laws, each Farm Board shall have the following powers:

A. Enumerated Powers.

1. To review and approve the granting, assignment, reassignment, cancellation, relinquishment, transfer, agriculture leasing and subleasing of agricultural land use permits with the concurrence of the Division of Natural Resources and Department of Agriculture;

2. To review and recommend approval to the Resources Committee of the Navajo Nation Council of the granting of agricultural land use permits, and the construction of irrigation project boundary fences, irrigation canal rights-of-way, water use assessments or other matters involving agricultural land or irrigation water management in accordance with applicable laws;

3. To assess and collect fees for water assessments, which shall revert directly to the Farm board collecting such assessments and be used to improve local irrigation operations and maintenance;

4. To mediate and maintain official written records of any disputes which may arise among agricultural land use permit holders. Copies of all such official written records shall be furnished to the Navajo Nation's Division of Natural Resources and to the Bureau of Indian Affairs.

5. To serve as mediators by resolving disputes of land use rights, fences, land boundaries, rights-of-way, weed or pest control, water use assessments or other agricultural related disputes, within the Navajo

Reservation, except disputes involving divorce, separation, and probate which shall be resolved by the Navajo Nation Courts. The Board may submit recommendations to the Court in agricultural matters regarding divorce, separation, and probate. Unresolved disputes shall be submitted to the Office of Hearings and Appeals, although the Board may submit its own recommendations.

6. To resolve inter-district agricultural-related disputes by holding joint meetings with the adjoining Farm Boards. Unresolved matters shall be submitted to the Office of Hearings and Appeals.

7. To submit in writing to the Resources Committee of the Navajo Nation Council, any recommendations and suggestions of general interest and any problem which the Farm Board is unable to resolve or beyond its authority.

B. Management Functions

1. To develop and recommend for Resources Committee approval, such policies, procedures, rules and regulations as may be required to implement the provisions of this plan of operation.

2. To develop, review and implement standard procedures manuals and short and long-range plans for the rehabilitation, improvement, operation and maintenance of irrigation systems, in coordination with appropriate Navajo Nation, private, state and federal agencies.

3. To oversee plans, budgets, staffing, decisions and activities of Navajo Nation agriculture land with the responsibility for management, operations, maintenance and repairs on irrigation projects under the authority of the local Farm Board.

4. To cooperate and enter into agreements, consistent with applicable Navajo Nation laws, with Navajo Nation, private, state, and federal agencies to carry out programs for the construction, rehabilitation, improvement, operation and maintenance of any irrigation structures or systems.

5. To conduct surveys, investigation, research, education and demonstrations relating to methods and results of agricultural production, farm management and crop marketing, irrigation management and other measures as well as aiding agricultural productivity and irrigation water management, in coordination and cooperation with appropriate Navajo Nation, private, state and federal agencies.

6. Subject to the availability of funds to employ administrative, clerical and technical staff personnel.

7. To acquire, administer, and make available on such terms as the Farm Board may prescribe, all plant materials, supplies, tools, machinery, equipment and other property necessary for the implementation of proper economic agriculture and irrigation system rehabilitation, improvement, operations and maintenance, in coordination with appropriate Navajo Nation and federal agencies.

8. To perform other duties as may be directed by the Resources Committee of the Navajo Nation Council, the President of the Navajo Nation, and the Navajo Nation Council.

9. To sign Homesite applications pursuant to rules and regulations adopted by the Resources Committee of the Navajo Nation Council and Navajo Nation laws.

History

CO-59-03, October 21, 2003.

CAU-67-97, August 7, 1997.

ACD-228-85, December 12, 1985.

ACS-118-80, September 11, 1980.

Note. Slightly reworded for purposes of statutory form. Also,"Enumerated Powers" and "Management Functions" designated as Subsections (A) and (B), respectively. Accordingly, sections thereunder were redesignated by numerical sequence.

References to "Division of Water Resources" have been changed to "Division of Natural Resources" pursuant to CAP-41-94, April 20, 1994.

§ 66. Accountability

A. Farm Board members shall be accountable to their respective local Chapters by attending Chapter meetings and submitting monthly reports.

B. Farm Board members shall be accountable to the Executive Director, Division of Natural Resources, or his/her designee by submitting monthly reports.

History

CAU-67-97, August 7, 1997.

Note. Central Farm Board plan of operation was removed from the Code and currently exists as an uncodified administrative regulation/code.

§ 67. Compensation

A. Farm Board members shall be paid from funds provided annually in the Navajo Nation budget for that purpose, subject to the availability of funds.

B. Farm Board members shall be compensated at a rate determined by the Navajo Nation Council for per diem for attending official meetings. Per diem shall be made pursuant to the submittal of an official claim form together with a roll sheet and meeting agenda. Compensation of the Farm Board may be withheld for failure to cooperate with officials of the Navajo Nation or attending chapter meetings or any other official scheduled meetings.

History

CAU-67-97, August 7, 1997.

CMA-16-90, March 29, 1990.

ACD-228-85, December 12, 1985.

§ 68. Legislative Oversight

Farm Boards shall operate under the legislative oversight of the Resources Committee of the Navajo Nation Council, pursuant to 2 N.N.C. § 695(B)(15).

History

CAU-67-97, August 7, 1997.

Note. Reference to "2 N.N.C. § 695(B)(14)" changed to "2 N.N.C.§ 695(B)(15)" pursuant to CAP-17-03 and CO-59-03.

§ 69. Amendments

The Plan of Operation of the Farm Boards may be amended from time to time by the Navajo Nation Council upon the recommendation of the Resources Committee and the Government Services Committee of the Navajo Nation Council.

History

CAU-67-97, August 7, 1997.

ACD-228-85, December 12, 1985.

ACS-118-80, September 11, 1980.

Note. Reference to "Advisory committee" was deleted and substituted therein is the "Government Services Committee" pursuant to CD-18-89, 2 N.N.C. § 343(B)(2).

Subchapter 5. [Reserved]

Subchapter 7. Small Irrigation Projects; District Grazing Committees

Article 1. Land Assignments

§ 151. Applications for land assignment; land use permit

A. Applications for assignments of land outside the six major irrigation projects shall be made to the Grazing Committee which has jurisdiction over the District in which the land is located. The Grazing Committee shall review all applications, select the best applicant, and forward his/her application to the General Superintendent recommending approval and issuance of a land use permit.

B. No land assignment shall be made to a person under 18 years of age.

C. Before an owner's claim to a tract of farm land is valid he/she must have in his/her possession a land use permit describing the tract of land signed by the General Superintendent.

History

ACS-144-59, September 23, 1959.

§ 152. Plan of operation

Land users should have a Plan of Operation for tracts of land under their use. Such a plan may be developed in cooperation with Navajo Nation Range and Livestock Department (or its successor) and Bureau of Indian Affairs Branch of Land Operation in the subagency.

History

ACS-144-59, September 23, 1959.

Note. "Agriculture and Livestock Department" changed to "Range and Livestock Department" to conform with CMA-34-66, 2 N.N.C. § 3151.

§ 153. Cancellation of land use permits

Land use permits may be canceled by the General Superintendent upon recommendation of the local Grazing Committee for reason of non-use for two years, failure to pay assessments, request for relinquishment, or any other valid reason presented by the local District Grazing Committee to the Office of Hearings and Appeals and the General Superintendent.

History

CO-59-03, October 21, 2003.

ACS-144-59, September 23, 1959.

§ 154. Death of assignee

A. Upon the death of an assignee, his/her land use permit shall be transferred to his/her most logical heir as determined by the Navajo Nation Court. The Court shall make every effort to assign the land assignment as one unit or combine it with another. The Court should make every effort to keep the land assignment in one tract and not subdivide it.

B. The disposition of personal property and improvements placed by the deceased upon the land assigned must be determined by the Navajo Nation Court. Probable heirs shall be advised to file a probate petition to bring such matters to the attention of the Court for settlement.

History

ACS-144-59, September 23, 1959.

Cross References

Decedents' estates generally, 8 N.N.C. § 1 *et seq*.

Annotations

1. Construction and application

"The Navajo Nation has long disapproved of fragmenting agricultural and grazing lands." *In re: Estate of Wauneka, Sr.*, 5 Nav. R. 79, 82 (Nav. Sup. Ct. 1986).

Article 2. Regulation by District Grazing Committees

§ 171. Authority

A. The Grazing Committee of each District shall have the authority to enforce and carry out the duties and responsibilities for small irrigation projects and scattered farm acreage within their districts and outside the six major irrigation projects as a part of their regular duties.

B. No fences shall be built on Navajo Nation land without the approval of the Grazing Committee.

History

ACS-144-59, September 23, 1959.

Cross References

Grazing Committees generally, see § 831 *et seq*. of this title.

Annotations

1. Allotment fencing

"Given that fencing on all lands, including allotments in the Eastern Navajo Agency, are subject to some local Navajo board or committee's approval, the Court concludes that, read together, the purpose of the various provisions is to deal with fencing within the Nation comprehensively. To foster a uniform, predictable system of regulating fencing within the Reservation, this purpose is facilitated by requiring district grazing committee approval of allotment fencing within the Reservation. Under this analysis, elected officials within local communities may hear and decide disputes when land owners propose to fence their land off from other users. Such fencing affects not just the parcel proposed to be fenced, but affects all other surrounding land users." *Gishie v. Morris, et al.,* No. SC-CV-36-06, slip op. at 5 (Nav. Sup. Ct. June 4, 2008).

§ 172. Procedures for fencing of lands

The Navajo Nation Council hereby instructs and directs the District Grazing Committees to follow the procedures set forth herein whenever any lands are proposed to be fenced.

A. Advise each and every stockman who has customary use rights or interest in the area proposed to be fenced.

B. Give each and every stockman who has such an interest an opportunity to protest such proposed fencing.

C. Advise each and every stockman of his/her rights to appeal according to the procedures set forth in the Navajo Nation Code.

D. Advise the Central Grazing Committee in writing of the decision of the District Grazing Committees to recommend a fencing project (list of names and addresses of all parties who may be affected by such a fencing project and further advise the Central Grazing Committee that the District Grazing Committees have fully complied with the requirements set forth herewith).

E. Refrain from recommending fencing to the Agency Superintendent until concurrence and approval of such fencing project has been obtained from the Chapter officers and the Council delegate of the district.

F. All stockmen who have fenced their customary use areas shall confine the grazing of their livestock to within the fenced area at all times. No relative from a distant area or from another district shall move his/her livestock into the fenced area.

History

CO-59-03, October 21, 2003.

CMY-34-67, May 9, 1967.

Annotations

1. Customs

"The Navajo Nation has long disapproved of fragmenting agricultural and grazing lands." *In re: Estate of Wauneka, Sr.*, 5 Nav. R. 79, 82 (Nav. Sup. Ct. 1986).

2. Allotment fencing

"Given that fencing on all lands, including allotments in the Eastern Navajo Agency, are subject to some local Navajo board or committee's approval, the Court concludes that, read together, the purpose of the various provisions is to deal with fencing within the Nation comprehensively. To foster a uniform, predictable system of regulating fencing within the Reservation, this purpose is facilitated by requiring district grazing committee approval of allotment fencing within the Reservation. Under this analysis, elected officials within local communities may hear and decide disputes when land owners propose to fence their land off from other users. Such fencing affects not just the parcel proposed to be fenced, but affects all other surrounding land users." *Gishie v. Morris, et al.,* No. SC-CV-36-06, slip op. at 5 (Nav. Sup. Ct. June 4, 2008).

§ 173. Duties and responsibilities

The District Grazing Committees shall have the following duties and responsibilities:

A. Make every effort to assign a tract large enough to comprise an economic unit.

B. Devise plans for the proper distribution of available irrigation water and recommend penalties for failure to comply with water use regulations. Such regulations and penalties shall be made by each Grazing Committee in writing and explained to all assignees of the project.

C. Arbitrate land disputes and recommend action to be taken to the Office of Hearings and Appeals.

D. Cooperate with the Bureau of Indian Affairs and Navajo Nation personnel in carrying out their program and policies.

E. In cooperation with the Navajo Nation Range and Livestock Department (or its successor) and Bureau of Indian Affairs Branch of Land Operations, plan an education program for families in their jurisdiction.

F. Perform other duties as assigned by the Central Grazing Committee.

History

CO-59-03, October 21, 2003.

ACS-144-59, September 23, 1959.

Note. "Agriculture and Livestock Department" changed to "Range and Livestock Department" to conform Section to CMA-34-66, 2 N.N.C. § 3151.

§ 174. Meetings

One regular meeting shall be held each month which may be part of a meeting for grazing matters. Special meetings may be called by the Chairperson but notices must be posted in conspicuous places at least 10 days before such meeting date.

History

ACS-144-59, September 23, 1959.

§ 175. Expenses

The expenses for conducting the business under this Subchapter shall be paid from the regular Grazing Committee fund using the same procedures as for Grazing Committee business.

History

ACS-144-59, September 23, 1959.

§ 176. Appeal of decisions

Appeal of decisions of the local Grazing Committee shall be made to the Office of Hearings and Appeals.

History

CO-59-03, October 21, 2003.

ACS-144-59, September 23, 1959.

Annotations

1. Allotment fencing

"The Council clearly authorizes OHA to hear fencing disputes on appeal from a recommendation of a district grazing committee." *Gishie v. Morris, et al.,* No. SC-CV-36-06, slip op. at 3 (Nav. Sup. Ct. June 4, 2008).

Subchapter 9. Farm or Grazing Land; Land Boards

Article 1. Land Assignments

§ 211. Application for land assignment; land use permit

A. An application for a land assignment or permit for farm or range land shall be made to the Land Board in the District where the land is located. The Land Board shall review all applications and select the best applicant and forward his/her application either to the General Superintendent or his/her authorized representative on Navajo Nation trust lands or the President of the Navajo Nation on all other lands under Navajo Nation control, recommending approval and issuance of a land use permit.

B. No land assignment or permit shall be made to a person under 18 years of age.

C. Before an owner's claim on a tract of farm or grazing land is valid he/she must have in his/her possession a land use permit describing the tract of land signed either by the General Superintendent or his/her authorized representative or the President of the Navajo Nation.

History

ACS-144-59, September 23, 1959.

§ 212. Plan of operation

Each land user should have a Plan of Operation for all tracts of land under his/her use. Such plans must be developed in cooperation with the Navajo Nation Range and Livestock Department (or its successor) and Bureau of Indian Affairs, Branch of Land Operation in the subagency.

History

ACS-144-59, September 23, 1959.

Note. "Agriculture and Livestock Department" changed to "Range and Livestock Department" to conform Section to CMA-34-66, 2 N.N.C. § 3151.

§ 213. Fencing of range land

Range land in Navajo Nation trust status or lands leased or purchased by the Navajo Nation may be fenced only after an applicant has received a written permit signed by the Subagency Superintendent. All applications to fence must be submitted to the District Land Board and forwarded with recommendations to the Subagency Superintendent for the issuance of fencing permits for approved applications.

History

ACS-44-59, September 23, 1959.

Cross References

Fences generally, see §§ 2401, 2402 of this title.

§ 214. Disputes; settlement

Any farming disputes, boundary disputes, grazing disputes, rights-of-way disputes, water disputes, weed and plant disease control disputes, etc., shall be taken before the Land Board for settlement.

History

ACS-144-59, September 23, 1959.

§ 215. Transfer of assignment; construction of buildings

No land user may give or transfer any part of his/her land assignment permit or lease to another person without the recommendation of the Land Board and approval of either the General Superintendent or his/her authorized representative or the President of the Navajo Nation, nor shall anyone except himself/herself be allowed to construct buildings on his/her assignment.

History

ACS-144-59, September 23, 1959.

Cross References

Death of assignee, transfer on, see § 217 of this title.

§ 216. Cancellation of land use permits

Land use permits may be canceled either by the General Superintendent or the President of the Navajo Nation upon recommendation of the local Land Board for reason of non-use for two years, failure to pay assessments, request for relinquishment, or any other valid reason presented by the local Land Board to the Office of Hearings and Appeals.

History

CO-59-03, October 21, 2003.

ACS-144-59, September 23, 1959.

§ 217. Death of assignee

A. Upon the death of an assignee, his/her land use permit shall be transferred to his/her most logical heir as determined by the Navajo Nation Court. The Court shall make every effort to assign the land assignment as one unit or combine it with another. The Court should make every effort to keep the land assignment in one tract and not subdivide it.

B. The disposition of personal property and improvements placed by the deceased upon the land assigned must be determined by the Navajo Nation Court. Probable heirs shall be advised to file a probate petition to bring such matters to the attention of the Court for settlement.

History

ACS-144-59, September 23, 1959.

Cross References

Decedents' estates generally, see 8 N.N.C. § 1 *et seq*.

Transfer of assignment generally, see § 215 of this title.

Annotations

1. Construction and application

"In Begay v. Keedah, 6 Nav. R. 416, 421 (Nav. Sup. Ct. 1991), this Court acknowledged the following Navajo Nation policies gleaned from Navajo statutes to be considered when determining the award of a grazing permit: 1) animal units in grazing permits must be sufficiently large to be economically viable, 2) land must be put to its most beneficial use, 3) the most logical person should receive land use rights, 4) use rights must not be fragmented, and 5) only those who are personally involved in the beneficial use of land may be awarded it. Id. The Court now holds that these factors are to be considered and applied consistent with the Navajo Fundamental Law which defines the role and authority of Diné women in our society." *Riggs v. Estate of Tom Attakai*, No. SC-CV-39-04, slip op. at 3 (Nav. Sup. Ct. June 13, 2007).

"The Navajo Nation has long disapproved of fragmenting agricultural and grazing lands." *In re: Estate of Wauneka, Sr.*, 5 Nav. R. 79, 82 (Nav. Sup. Ct. 1986).

Article 2. Land Boards

§ 231. Number of Boards

There shall be three District Land Boards. There shall be one each for Districts 15, 16 and 19. Ramah, Canoncito and Alamo will be included with District 16, until such time as a different management plan is specifically adopted for one or more of those communities. There shall be a total of twenty individual Board members participating in the three Boards, divided as indicated in § 234(A).

History

CD-92-85, December 4, 1985.

ACS-144-59, September 23, 1959.

Note. See also CD-59-64, which directed drafting a Land Code, which included the functions and responsibilities of the District 15, 16 and 19 Land Boards. ACMY-73-66, as amended by ASC-187-68, accepted the Cooperative Agreement for the Administration of the Checkerboard Area. The Resources Committee of the Navajo Nation Council, by Resolution dated March 15, 1966, delegated to the District Land boards implementation of the Land code.

§ 232. Definitions

The terms used herein shall be given the same meanings as they have in the Off-Reservation Grazing Code.

A. "Commissioner" means the Commissioner of Indian Affairs.

B. "Area Director" means the Director of the Navajo Area, Bureau of Indian Affairs.

C. "Superintendent" means the Superintendent of the Eastern Navajo Agency of the Bureau of Indian Affairs.

D. "Individually Owned Lands" means land or any interest therein held in trust by the United States for the benefit of individual Navajo Indians and land or any interest therein held by individual Indians subject to federal restrictions against alienation or encumbrance.

E. "Tribal Trust Land" means land or any interest therein held by the United States in trust for the Navajo Nation, and land that is held by the Navajo Nation subject to federal restrictions against alienation or encumbrance. This term also includes assignments of Navajo Nation land. Unless the terms of the assignment provide for the leasing of the land by the holder of the assignment, the Navajo Nation must join with the assignee to issue a grazing permit.

F. "Tribal Fee" means land owned in fee simple by the Navajo Nation.

G. "Government Land" means land, other than Navajo Nation land, acquired or reserved by the United States for Indian Bureau administrative purpose which are not immediately needed for the purposes for which they are acquired or reserved, and land transferred to or placed under the jurisdiction of the Bureau of Indian Affairs but does not include unreserved public domain land leased to the Navajo Nation under Section 15 of the Taylor Grazing Act.[1]

H. "Tribal Lease Lands" means land leased to the Navajo Nation under Section 15 of the Taylor Grazing Act,[1] and the state lands leased to the Navajo Nation but shall not include land within Navajo Nation ranches.

I. "Permit" means a revocable privilege granted to an individual, in writing, to enter on and use a specified tract of land for a specified purpose.

J. "Animal Unit" means one mature cow (or calf, six months or over) or other approved equivalent. Example: five sheep = one cow; five sheep = one horse (or as amended).

K. "Range Unit"—A range unit shall consist of such lands as the District Land Board, after consultation with land users and the Bureau of Indian Affairs range technicians, shall consider the nearest to fitting the conditions required by Range Management, land status, conservation, and Indian needs.

L. "Grazing Community"—A grazing community shall consist of range units combined into a larger administrative unit, as determined by the District Land Boards based on common interests.

M. "Immediate Family" means the Indian's descendants as controlled by the state laws of descent wherein the land is situated.

N. "Allocation" means the assignment of range use without competitive bidding, including the determination of who may graze livestock, the number and kind of livestock, and the place such livestock will be grazed.

O. "District Land Board" means a board comprised of representative Navajo Indian membership elected for the purpose of administering grazing and resolving problems attendant thereto, and representing one of the Land Management Districts in the Eastern Agency.

P. "Joint Agency Land Board" means a board comprised of the combined membership of all District Land Boards in the Off-Reservation area.

Q. "Tribal Office" means the Tribal Land Office of Crownpoint or such other office as may assume these responsibilities.

R. "Indians" means enrolled Navajo Indians.

S. "Resources Committee" means the duly appointed Resources Committee of the Navajo Nation Council.

T. "Livestock" means all neat animals (horses and cattle) and sheep, goats and swine.

History

CD-92-85, December 4, 1985.

Note (2006). Letter designation of subsections were corrected from "M. Immediate Family" to "T. Livestock".

United States Code

Taylor Grazing Act, see 43 U.S.C. § 315 *et seq*.

§ 233. Purposes and objectives of the District Land Boards

It is the purpose of the District Land Boards to:

A. Preserve, through proper grazing management, the land, water, forest, forage, wildlife and recreational values in the Off Reservation area and improve and build up these resources where they may have deteriorated.

B. Promote use of the range resources by Indians to enable them to earn a living, in whole or in part, through the grazing of their own livestock.

C. Balance the rights and equities of the individual landowners and land users with the demands of Navajo Nation programs through the granting of grazing privileges in a manner which will yield a fair return to land users consistent with undiminished future use.

History

CD-92-85, December 4, 1985.

§ 234. Representatives, qualifications, and election procedures

A. District Land Board Composition. There shall be a total of 20 District Land Board representatives. In the event that the volume of work justifies additional members, additional representatives may be authorized by the Government Services Committee of the Navajo Nation Council. The Land Board members shall represent the following Chapters:

1. District 15 – Seven Representatives.

   a. Standing Rock (1)

   b. Dalton Pass (Nahodishgish) (1)

   c. White Rock (1)

   d. Lake Valley and Becenti (1)

   e. Crownpoint and Littlewater (1)

   f. Whitehorse Lake (1)

   g. Pueblo Pintado and Torreon (1)

2. District 16 – Nine Representatives.

   a. Mariano Lake and Smith Lake (1)

   b. Thoreau, Baca and Casamero Lake (1)

c. Pinedale and Iyanbito (1)

d. Church Rock, Bread Springs, and Red Rock (1)

e. Manuelito and Chichiltah (1)

f. Rock Springs and Tsayatoh (1)

g. Ramah (1)

h. Alamo (1)

i. Tóhajjilee (1)

3. District 19 - Four Representatives.

a. Huerfano (2)

b. Nageezi (1)

c. Counselor and Ojo Encino (1)

B. Qualifications for Land board Members.

[This Section has been superseded by CAP-23-90. Qualifications for Land Board members are listed in the Election Code, 11 N.N.C. § 8(D)(1)].

C. Nominations and Election Procedures for the Land Boards.

[This Section has been superseded by CAP-23-90. Candidacy and election procedures for Land Board members are now in the Election Code at 11 N.N.C. § 21 *et seq*.]

History

CAP-23-90, April 6, 1990.

CD-68-89, December 15, 1989.

CAP-24-87, April 29, 1987.

CD-92-85, December 4, 1985.

Note. "Advisory Committee" changed to "Government Services Committee".

Cross References

Navajo Nation Election Code, see 11 N.N.C. § 1 *et seq*.

§ 235. Officers of the District Land Boards

A. Positions and Responsibilities. Each District Land Board shall select from its membership the following officers:

1. Chairperson. The Chairperson shall preside over the meeting and insure that the business of the boards is conducted in an orderly manner.

2. Vice-Chairperson. The Vice-Chairperson shall perform the duties of the Chairperson in the absence of the Chairperson as well as other duties which may be delegated to him/her.

3. Secretary. The Secretary shall be responsible for the records of the Board and shall insure that the Bureau or Navajo Nation employees which assist with the minutes or record keeping do so in a proper manner.

B. Election and Terms. The officers of the district Land boards shall be elected by majority vote of the Board members at the first regular meeting following the election of the Boards' members. The officers shall serve four year terms.

History

CD-92-85, December 4, 1985.

§ 236. Removal of Board members [Superseded]

History

Note. Sections pertaining to grounds and procedure for removal of Land Board members have been superseded by CAP-23-90. Removal procedures for all elected officials covered by the Navajo Nation Code at 11 N.N.C. § 240 *et seq*. See also, removal provisions of the Navajo Nation Ethics in Government Law, 2 N.N.C. § 3741 *et seq*.

§ 237. Duties and responsibilities of the District Land Boards

Duties and responsibilities of the District Land Boards are as follows:

A. Review all applications for grazing permits, determine eligibility, allocate grazing privileges through the permit system, and designate use areas.

B. Make every effort to permit a land tract large enough to comprise an economic unit.

C. Arbitrate land disputes, and in cases of disputes or protests that they are unable to solve, refer them in writing to the Eastern Navajo Joint Land Board.

D. In cooperation with the Division of Natural Resources and the Bureau of Indian Affairs, Branch of Land Operations, plan and implement an educational program for stockmen in their jurisdiction.

E. Cooperate and work with the Navajo Nation offices, state land office, Bureau of Indian Affairs, and the Bureau of Land Management on mutual issues including individual problems arising from mineral development or other governmental proposals.

F. Cancel grazing permits when related to forage depletion, death of permittee, failure to pay grazing fees, failure to use permits for an extended period or other reasons within their authority.

G. Act on all proposed range improvements and conservation plans for range units within the District.

H. Enforce the applicable grazing regulations and perform duties as required in said Code.

I. Organize and conduct dipping, spraying and dusting programs and assist livestock owners in organizing livestock sale programs.

J. Assist the Superintendent or his/her authorized representative in obtaining an annual livestock inventory.

K. Establish range units, after consultation with the Indians and consideration of all relevant factors, and adjust such units as may be necessary.

L. Include Navajo Nation trust, unreserved public domain land leased by the Navajo Nation, and other Navajo Nation controlled land within the range units under permit.

M. Establish grazing fees after consultation with and review by the Bureau of Indian Affairs.

N. Modify, cancel, and reissue grazing permits.

O. Authorize any improvement to be placed on any range unit prior to its construction and grant permission for removal of existing improvements. No improvements shall be constructed or removed in the absence of such authorization.

P. Review, investigate, conduct a formal hearing, and levy appropriate penalties for any livestock trespass.

Q. Approve and authorize any stud horses allowed in the District.

R. Perform other duties as assigned by the Eastern Navajo Agency Joint Land Board, the Resources Committee of the Navajo Nation Council, or the Office of the President of the Navajo Nation.

S. Assist the Navajo Nation with land acquisition and the administration of these lands after they are acquired.

T. Assist on the Navajo Irrigation Project and with energy development in such matters as livestock, land exchange, relocation of families, etc.

U. Provide input and counseling to individuals and provide comment and advice to governmental agencies on issues arising from proposed land exchanges, mineral development, or other land use in the Eastern Agency.

History

CD-92-85, December 4, 1985.

Annotations

1. Powers of Land Board

"The Land Board possesses the authority to settle boundary disputes, water disputes, right of way disputes, etc." *Yazzie v. Jumbo*, 5 Nav. R. 75, 77 (Nav. Sup. Ct. 1986).

2. Allotment fencing

"Given that fencing on all lands, including allotments in the Eastern Navajo Agency, are subject to some local Navajo board or committee's approval, the Court concludes that, read together, the purpose of the various provisions is to deal with fencing within the Nation comprehensively. To foster a uniform, predictable system of regulating fencing within the Reservation, this purpose is facilitated by requiring district grazing committee approval of allotment fencing within the Reservation. Under this analysis, elected officials within local communities may hear and decide disputes when land owners propose to fence their land off from other users. Such fencing affects not just the parcel proposed to be fenced, but affects all other surrounding land users." *Gishie v. Morris, et al.,* No. SC-CV-36-06, slip op. at 5 (Nav. Sup. Ct. June 4, 2008).

§ 238. Enumerated powers and responsibilities for individual Board members

The Land Board members, in addition to their general duties and powers as members of the Boards, shall be responsible for conducting certain specific actions within the communities they represent. These include, but are not limited to, the following:

A. To conduct all local investigations and surveys necessary for the various recommendations and decisions that involve land within their Chapter(s).

B. To conduct the dipping, vaccinating, roundup, branding, inspecting, recording and counting activities within their Chapter(s).

C. To attempt to mediate all local disputes and to perform necessary investigations for appeals.

D. To verify permitted land users consent for all lease or permit applications and to investigate all proposals regarding improvements.

E. To enforce applicable Navajo grazing regulations.

F. To perform such other duties as may be delegated by the District Land Board, the Joint Land Board, the Director of the Division of Natural Resources, the Resources Committee, or the Navajo Nation Council.

History

CD-92-85, December 4, 1985.

§ 239. Meetings and procedures

A. Each District Land Board shall establish a meeting schedule which will provide for at least one meeting day per month. These scheduled meetings are to be known as the "regular meetings" for that District Land Board. These meetings shall be scheduled with as much advance notice as is practical under the circumstances.

B. The schedule of "regular meetings" shall be posted at all Chapters within the District, with copies forwarded to the Resources Committee and Director, Division of Natural Resources, listing the exact date, time, and location for such meetings. Any amendments shall also be posted and forwarded in this manner.

C. All "regular meetings" shall be open to the public and shall be conducted informally, in an orderly manner. In the event that rules have been adopted for the resolution of any particular type of issue, such as regulations for settlement of land and grazing disputes, those rules shall be applied.

D. The Board may at its discretion call "special meetings" or call for "executive sessions" as necessary. All special meetings and executive sessions shall be conducted in an orderly manner. Special meetings shall be open to the public.

E. All substantive actions by the Board shall be initiated and undertaken by written resolution, or memorialized in a written memorandum setting forth the action taken. Said writing shall be signed by the presiding officer and retained by the Secretary of the Board.

F. A quorum shall consist of a simple majority of all committee members for that district. All decisions shall be made by a majority vote if no consensus can be reached. All Board members, including officers, shall be eligible to vote.

History

CD-92-85, December 4, 1985.

§ 240. Compensation

A. The Land Board Members shall be paid from funds provided annually in the Navajo Nation budget.

B. Land Board Members shall be compensated at a rate of six hundred dollars ($600.00) per month. All Land Board members may be paid on a regular basis and may be subject to appropriate payroll deductions for insurance coverage as determined and approved by the Navajo Nation Insurance Commission pursuant to the provisions of 2 N.N.C. § 932 (A). In addition, Land Board members shall receive a travel allowance of sixty-six dollars ($66.00) per month (300 miles per month at 22 cents per mile).

C. Land Board Members attending their respective Chapter, District and/or agency meeting may receive fifty dollars ($50.00) per diem for each meeting wherein official business is conducted, subject, however, to Navajo Nation Council appropriations and availability of funds.

History

CMA-16-90, March 29, 1990.

CD-92-85, December 4, 1985.

§ 241. Eastern Agency Joint Land Board

A. Composition and officers of the Joint Land Board:

1. The Eastern Agency Joint Land Board shall consist of all of the members of the three District Land Boards.

2. The Joint Land Board shall, at its first regular meeting following the election of the District Land Board Members, select the following officers:

a. Chairperson. The Chairperson shall preside over the meeting and insure that the business of the Board is conducted in an orderly manner. The Chairperson is authorized to call any necessary special meetings.

b. Vice-Chairperson. The Vice-Chairperson shall perform the duties of the chairman, in the absence of the chairman, as well as other duties which may be delegated by the Board.

c. Secretary. The secretary shall be responsible for the records of the Board and shall insure that the Bureau of Indian Affairs or Navajo Nation employees which assist with the minutes or record keeping do so in a proper manner.

B. In fulfilling its duties and responsibilities, the Joint Land Board shall:

1. Act as Board of Appeals on all protests, disagreements, disputes or appeals from decisions of the District Land Boards.

2. Recommend to the Resources Committee of the Navajo Nation Council a uniform grazing fee on all Navajo Nation and Bureau of Indian Affairs controlled lands.

3. Review range and forage conditions and needs from information furnished by Branch of Land Operations personnel and make recommendations and decisions on problems posed.

4. Review, on an annual basis, the Off-Reservation Range Code, Land Code, and Cooperative Agreement, for the purpose of making recommended changes.

5. Serve as principal coordinator between District Land Boards, the Navajo People, and the Bureau of Indian Affairs, in all matters

pertaining to livestock control and improvement, and proper management of the range resources.

6. Refer all appeals that cannot be solved to the Office of Hearings and Appeals for a final decision.

C. Meetings and procedures of the Joint Land Board:

1. The Joint Land Board shall establish a meeting schedule which will provide for at least one meeting day per month. These scheduled meetings are to be known as the "regular meetings" for the Joint Land Board. These meetings shall be scheduled with as much advance notice as is practical under the circumstances.

2. The schedule of "regular meetings" shall be announced at the District Land Boards meetings with notices forwarded to the Resources Committee, the Director, Division of Natural Resources, listing the exact date, time and location for such meetings. Any amendments shall also be announced and forwarded in this manner.

3. All "regular meetings" shall be open to the public and shall be conducted informally, in an orderly manner. In the event that rules have been adopted for the resolution of any particular type of issue, such as Regulations for Settlement of Land and Grazing Disputes, those rules shall be applied.

4. The Board may at its discretion call "special meetings" or call for "executive sessions" as necessary. All special meetings and executive sessions shall be conducted in an orderly manner. Special meetings shall be open to the public.

5. All substantive actions by the Board shall be initiated and undertaken by written resolution, or memorialized in a written memorandum, setting forth the action taken. Said writing shall be signed by the presiding officer and retained by the Secretary of the Board.

6. A quorum shall consist of a simple majority of all Board members. All decisions shall be made by a majority vote if no consensus can be reached. All Board members, including officers, shall be eligible to vote.

History

CO-59-03, October 21, 2003.

CD-92-85, December 4, 1985.

ACS-324-7 1, September 28, 1971.

§ 242. Amendments

This Plan of Operation may be amended, as necessary, to insure the proper administration of grazing and land use within the Eastern Agency, by the Government Services Committee of the Navajo Nation Council, with the recommendation of the Joint Land Board and the Resources Committee of the Navajo Nation Council.

History

CD-68-89, December 15, 1989.

CD-92-85, December 4, 1985.

Note. "Advisory Committee" changed to "Government Services Committee". "Resources Committee of the Navajo Nation Council" was added pursuant to 2 N.N.C. § 695.

Chapter 2. [Reserved]

History

CAP-41-94, April 20, 1994.

Note. Previous Chapter 2, "Department of Range Management" deleted.

Chapter 3. Range Land Leases for Pasture of Livestock

§ 501. Authority

The President of the Navajo Nation, with the advice and assistance of the Director of the Division of Natural Resources and the Department Manager of Department of Agriculture, is authorized and directed to select eligible Navajo stock owners, in accordance with the policy of the Navajo Nation contained in 16 N.N.C. § 1 *et seq.* for the purpose of leasing to such stock owners off-Reservation range lands for the pasture of livestock under the terms and conditions set out in the lease and Plan of Operation.

History

GSCJA-04-08%E0A, January 18, 2008.

ACS-185-60, September 19, 1960.

Note. Slightly reworded for the purposes of statutory form.

Cross References

Grazing generally, see § 701 of this title.

§ 502. [Reserved]

History

ACJA-21-89, January 13, 1989.

ACO-161-86, October 14, 1986.

Note. Form deleted pursuant to § 506 of this title.

§ 503. Navajo Nation Ranches

A. Since 1954 the Navajo Nation has acquired a number of "Ranches" through acquisition. These "Ranches" are made up of Fee Patent Lands, Trust Lands, Allotted Lands, BLM Leased Lands, State Leased Lands, and other forms of land, in the States of New Mexico and Arizona.

B. Rationale and guidelines for the management of these Ranches, and all lands subsequently acquired by the Navajo Nation, unless specifically exempt, are contained in 3 N.N.C. §§ 1, 2, 3, 4, 501, 502, 503 and 504, 16 N.N.C. §§ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 401, 451, 452, 453, 454, 601, 602, and 603, and ACJY-97-80 and CJA-1-81.

History

ACO-161-86, October 14, 1986.

Note. The list of Tribal Ranches has been deleted.

§ 504. Establishment—Navajo Nation Ranch Program

There is established a Navajo Nation Ranch Program within the Department of Agriculture, Division of Natural Resources. Except as otherwise stated herein, the Resources Committee of the Navajo Nation Council is empowered to exercise oversight of activities related to the utilization of the Navajo Nation Ranches. Utilization of Navajo Nation Ranches or unobligated lands shall not be deemed an entitlement program.

History

GSCJA-04-08%E0A, January 18, 2008.

ACO-161-86, October 14, 1986.

Cross References

Powers of the Resources Committee, 2 N.N.C. § 695.

§ 505. Purpose

The Navajo Nation Ranch Program shall exist to fulfill the following purposes:

A. Provide for productive and optimum use of lands under the direct control of the Navajo Nation designated as Ranch lands.

B. To ensure that sufficient revenues are realized to pay taxes, land use fees, and cost of administration.

C. To carry out select purposes for land acquisition, pursuant to 16 N.N.C. § 1 *et seq.*

History

ACO-161-86, October 14, 1986.

Note. Slightly reworded for purposes of statutory form.

Cross References

Land Acquisition, 16 N.N.C. § 1 *et seq*.

§ 506. Powers

A. The Resources Committee of the Navajo Nation Council is authorized to adopt a form of lease, as recommended by the Attorney General, Navajo Nation Department of Justice, that will ensure that the provisions of this Plan of Operation and provisions of the Navajo Nation Code are carried out.

B. The President of the Navajo Nation, with the advice and assistance of the Navajo Nation Ranch Program, Department of Agriculture, through the Executive Director, Division of Natural Resources and the Resources Committee, shall select eligible Navajo stock owners for the purposes of leasing Navajo Nation Ranches, in accordance with the criteria established in § 511 of this Plan of Operation.

C. The Resources Committee is authorized to establish use fees for Navajo Nation Ranch Lands and to adjust these fees as may be necessary to achieve a reasonable economic value for the use of these lands and to accomplish the purposes for which the land was acquired, as stated in the preceding Section. These fees may be adjusted annually for such reasons as unforeseen natural disasters and shall be adjusted at least every five years, based on the recommendation of the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources.

History

GSCJA-04-08%E0A, January 18, 2008.

ACO-161-86, October 14, 1986.

Note. Reference to "Advisory Committee" changed to "Resources Committee" pursuant to 2 N.N.C. § 695(B).

Cross References

Powers of the Resources Committee, 2 N.N.C. § 695(B).

§ 507. Operation

The following guidelines shall govern the operation, management and use of Navajo Nation Ranches:

A. Sound ranch management principles shall be adhered to at all times to ensure that Navajo Nation resources are adequately maintained.

B. Sound practice of livestock management shall be adhered to at all times.

C. Leasing of lands shall be done in such a manner as to ensure the optimum use of the resource and to protect the Navajo Nation's interests. For this purpose, the Resources Committee shall be authorized to determine the size of each unit to be leased, as recommended by the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources.

D. The Resources Committee shall be authorized to set aside lands for special management purposes such as a bull pasture, livestock impoundment pasture, or special range demonstration areas. In such instance, a Plan of Operation shall be prepared and attached to the set aside action to govern the management of these lands and shall be approved by the Government Services Committee of the Navajo Nation Council.

E. Under no circumstances whatsoever shall Navajo Nation funds, equipment, or employees be used for the care of livestock belonging to the Lessee, except as provided herein.

F. Timber, firewood (alive, or dead and down), all trees, shrubs, vegetation, fish, wildlife, water, surface rights, to ingress, egress, right-of-way, subsurface rights, mineral exploration rights and any other natural, recreational, or any other such rights, resources and proceeds from such resources shall remain the sole property and within the sole and exclusive jurisdiction of the Navajo Nation. However, the leaseholder shall be provided advance notice of the intent of the Nation in exercising these rights.

G. Should any violation of this Plan of Operation or the Navajo Nation Ranch Lease Agreement occur, the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Navajo Division of Resources, shall take immediate action to protect the interests of the Navajo Nation to the fullest extent, including the power to take immediate control over said leased lands to the extent necessary to protect Navajo resources.

H. The Navajo Nation Ranch Program will establish a management plan for bull pasture, livestock impoundment pasture and other activities consistent with the purposes of the Plan of Operation as specified in § 505.

History

GSCJA-04-08%E0A, January 18, 2008.

ACO-161-86, October 14, 1986.

CD-68-89, December 15, 1989.

Note. "Advisory Committee" changed to "Government Services Committee".

§ 508. Terms of lease

A. The Lessee shall be responsible for all costs associated with the minor upkeep as well as responsibility for maintenance of fences, minor maintenance of livestock water delivery systems, cattle guards, corrals, roads, and any other improvements, fixtures or structures contained within his/her leased area at the time of the lease or installed thereafter, except those major repairs as provided for in Paragraph (B) below.

B. The Lessee may request, through the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, major repairs for water systems, windmills, and water tanks to the extent that such repairs are beyond the means of the Lessee. These will be referred to the Department of Water Resources (or its successor), with a recommendation from the Executive Director, and the repairs may be made, subject to the availability of funding and the existing priorities for similar work, by the Department of Water Resources (or its successor). Upkeep, maintenance (and use) of headquarters structures, housing and corrals will remain the responsibility of the Division of Natural Resources.

C. The Lessee shall be responsible for the care of his/her livestock in accordance with the Navajo Nation Livestock and Foreign Animal Disease Response Act, 3 N.N.C. § 1501 *et seq*. Neglect of livestock shall be cause for termination of the lease.

D. The Lessee shall accept the lands and improvements such as fences, cattle guards, corrals, windmills, water tanks, and forage in an "as is" condition upon acceptance of the lease.

E. A lien may be granted on any and all livestock grazed on Navajo Nation Ranches in the event of default of payment or failure to satisfy other provisions of the lease agreement.

F. Any and all improvements, including reconstruction of fences, erection of corrals and/or other structures, shall be subject to the approval of the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, or his/her designee.

G. Livestock with brands so specified in the lease agreement shall be the only livestock authorized to graze or be held on Navajo Nation Ranches.

H. Lease agreements shall be non-transferable and are not to be sublet or assigned to heirs. At the time of application, the Lessee may designate an alternate Lessee for the purpose of completing the full term of the lease period in the event that Lessee cannot (for reasons beyond his control, illness or death) complete the full term of the lease. The designated alternate Lessee must meet the eligibility criteria as set forth in § 511 of this Plan of Operation and must sign the application and lease agreement and abide by the rules and regulations of the lease agreement. If the alternate Lessee is not designated by the applicant, Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, may designate an alternate Lessee in the event that the Lessee is unable to complete the full term of the lease.

I. All Lease agreements shall be for a period of 10 years with the option for renewal for another 10 year term, provided that a recommendation is made by the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources. Such recommendation shall be based on payment history, good performance, evaluation and demonstrate sound stewardship of the Navajo Nation Ranches. At any time during the term of the lease, the lease may be terminated for any violation of the terms herein.

J. Upon expiration or any earlier termination (not due to any default on the part of the Lessee), of the lease agreement, the Navajo Nation will conduct a field inspection of all improvements on the leased premises to determine which improvements will remain on the premises. Fair compensation will be provided for such improvements pursuant to 16 N.N.C. § 1401. Any other improvements shall become the property of the Navajo Nation, after 90 days from the termination date, if the Lessee does not exercise the option to remove said improvements. Any removal of improvements shall be approved by the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, per the field inspection.

History

GSCJA-04-08%E0A, January 18, 2008.

ACO-161-86, October 14, 1986.

§ 509. Payment

A. The annual grazing fee shall be due and payable in two equal payments; the first payment shall be due on or before November 15, and the second payment is due on or before January 15 of the same lease year.

B. Minimum lease fee shall be established by the Resources Committee based on the recommendation of the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, in accordance with the provisions of this Plan of Operation, on a per animal per month basis, and may be subject to adjustment to be made as needed or necessary, to cover costs as provided herein. The Lessee(s) will be informed in writing of any modifications made in the rental fee 60 days prior to the beginning of the succeeding year. Such modification will be attached as an amendment to the original lease and become a part of the lease.

C. In the event of any livestock reduction, the Lessee shall provide proof of reduction by sales receipts and/or other proof of dispersal of livestock transactions. In order for adjustments to be applied by Accounts Receivable any current invoice must be satisfied. The Lessee shall submit in writing to the Navajo Nation Ranch Program a request with supporting documents that reflects the reduction.

D. A minimum annual rental shall be stated in the lease agreement, and in no event shall the annual billing be less than the minimum rental, with the exception of § 506(C).

E. Any additional livestock over the stocking rate allowed per the lease agreement will be assessed at five times the current grazing fee and the Lessee shall remove all excess livestock within 30 days or the lease will be terminated.

F. All funds received in payment of lease fees shall be deposited into an

Enterprise Fund and used:

1. To cover such costs and amortization as provided in § 505(A) of this Plan of Operation.

2. For range conservation or improvements; and

3. Administrative costs.

G. Assessment, billing and collection of grazing fees and default procedures for delinquency and non-payment of fees.

1. The Navajo Nation Ranch Program, Division of Natural Resources, shall:

a.[1] Prepare and submit a "Livestock Assessment and Fee Request" document to Accounts Receivable, Division of Finance, based on the applicable rental rate and the number of animals authorized on the leasehold. The Livestock Assessment and Fee Request document will contain the following information: (1) Name and address of the Lessee(s); (2) Lease agreement number; (3) Total Amount Due; (4) Number of livestock the fees were assessed on; and (5) Ranch/Unit Number.

2. Accounts Receivable, Division of Finance shall:

a. Prepare and send the invoice to the Lessee(s) within 15 days of receipt of the "Livestock Assessment and Fee Request" document from the Navajo Nation Ranch Program, Department of Agriculture through the Division of Natural Resources, on or before October 31. The annual billing shall be the same as the previous year in the event that Accounts Receivable is unable, for whatever reason, to prepare a new billing by October 31. In such event, a new bill either allowing for a credit and refund or requesting additional funds shall be prepared as soon as possible.

b. Receive payments, issue receipts, deposit receipts in the established Enterprise Fund, and submit payment information to the Navajo Nation Ranch Program.

H. Delinquency and Non-Payment Procedures: Accounts Receivable, Division of Finance, shall adopt the following procedure to collect delinquent accounts:

1. If full payment has not been received after 30 days from the due date of January 15, the account shall be considered delinquent.

2. If the bill is not paid by February 15, Accounts Receivable shall send a 30 day notice, charging the regular fee plus a two percent (2%) late charge of total fees due.

3. If the bill is not paid by March 1, Accounts Receivable shall send a 45 day late notice, charging the regular fee plus a late charge at four percent (4%) of total fees due.

4. If there is no response to the 45 days late notice by March 30,

Accounts Receivable shall send a final notice, charging the regular fees plus a late charge of six percent (6%) of total fee due.

5. After April 15, if all payments are not made or acceptable arrangements for payments are not made, the lease agreement shall be terminated.

6. After the lease is terminated, Accounts Receivable shall continue efforts to receive payments on the account to May 15. If all payments are not made, Accounts Receivable and the Navajo Nation Ranch Program shall turn the delinquent account over to the Department of Justice for collection purposes.

I. Collection. The Department of Justice shall follow established Navajo Nation Procedures for handling the collection of delinquent accounts.

History

GSCJA-04-08%E0A, January 18, 2008.

ACJA-21-89, January 13, 1989.

ACO-161-86, October 14, 1986.

§ 510. Termination of lease agreement and temporary use agreement

A. Should any violation or noncompliance of this Plan of Operation or the lease agreement occur, the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, shall immediately begin administrative proceedings to remedy such violations or to terminate the lease agreement.

B. If any violation or noncompliance occurs, the Lessee shall be given written notice of such violation and action necessary to remedy the violation. Violation of nonpayment of grazing fee payment shall be handled under § 509; and termination of the lease agreement, if such violation is not remedied, shall be handled under this Section.

C. The Lessee will have 30 days to remedy the violation and give written notice of the remedial actions to the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, within the 30 days to avoid termination of the lease.

D. The Navajo Nation Ranch Program, Department of Agriculture through the Division of Natural Resources shall conduct a field inspection and determine whether the violation has been removed to the satisfaction of the stipulation of this Plan of Operation and the lease agreement. If it is determined that the violation/non-compliance has not been remedied or removed, the lease shall be terminated.

E. At any time during the term of the lease agreement, the Lessee can terminate the lease agreement for any reason(s) by providing written notice to the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, at least 60 days prior to the "date of termination". The Lessee shall notify the Navajo Nation Ranch Program, Department of Agriculture through the Division of Natural Resources of the date that he/she will be vacating the leased premises.

F. The Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, shall acknowledge and will formally accept the relinquishment or termination of the lease agreement by providing a written statement within a reasonable time of the date of Lessee's written notice.

G. Any determination shall not relieve the Lessee from his/her obligations to pay any accrued rent. The Lessee is responsible for settling all grazing fee accounts within the 60 days before the termination becomes effective.

H. The Lessee shall not remove any livestock or other improvement (structures) from the leased premises until the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, has formally acknowledged, in writing, that no rental or other damage payments are due. If any payments are due, the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, shall exercise the rights of seizing all livestock or creating a lien for payment of said grazing fees due [per § 508(E)].

History

GSCJA-04-08%E0A, January 18, 2008.

ACO-161-86, October 14, 1986.

§ 511. Eligibility

All applicants must meet the following eligibility criteria:

A. Enrolled members of the Navajo Nation.

B. Non-Navajos are not eligible.

C. Applicants are not eligible if they hold other grazing permits, with more than 75 sheep units, issued by the Navajo Nation, BIA, or BLM within the Navajo Nation, including the Eastern Navajo Agency. For purposes of this Section, both interests of the husband and wife will be used to determine eligibility.

D. Allottees are eligible if they meet the other requirements and if they own less than a full interest in an allotment of 160 acres or more, or if they own cumulative interest in various allotments that, together, do not exceed such an interest.

E. All applicants must be at least 21 years of age, and demonstrate their ability to pay the established fees and manage land and livestock. Applicants shall submit, along with the application, a proposed Ranch Management Plan which shall include acceptable livestock management and range conservation plans for the unit(s) they are applying for.

F. Applicants are eligible to lease no more than two range units as so specified by the Resources Committee, based on recommendations by the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources.

G. Former leaseholders whose leases were terminated due to default shall not be eligible to reapply for a period of ten years from the date of default.

H. Former leaseholders whose leases were cancelled due to adverse disposition of Navajo Nation lands shall be given first preference to other ranch lands when available.

I. In the event that two or more applicants apply for the same unit and equally meet the qualifications, tie-breaker bidding shall be allowed. The applicant bidding the highest fee, above the minimum, shall be recommended to the Resources Committee.

History

GSCJA–04–08%E0A, January 18, 2008.

ACO–161–86, October 14, 1986.

§ 512. Adverse disposition

A. The Navajo Nation, through its normal governmental operations may authorize such actions as mineral exploration, development, power lines extensions, oil well projects, drilling projects and other energy development projects, right-of-ways and other "adverse disposition" which would severely impair or limit the use of the land for grazing purposes stated herein.

B. If any such adverse disposition of all or any portion of a lease is authorized, to the extent that the grazing capacity of the leasehold area is reduced, the lease shall be terminated or the leasehold description revised and the stocking rate adjusted accordingly.

C. For the purposes of this Section, the Lessee shall be entitled to compensation for the loss of grazing rights to the extent of advance payment for those rights (calculated in acreage) actually lost as determined by the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources.

History

GSCJA–04–08%E0A, January 18, 2008.

ACO–161–86, October 19, 1986.

§ 513. Unobligated land

A. Lands which are not adequate to comprise an economic ranch unit, or for which there are no qualified applicants, may be determined to be "unobligated lands" by action of the Resources Committee, based upon the recommendation of the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources.

B. These lands shall be managed in the best interest of the Navajo Nation as determined by the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources.

C. Former leaseholders who may not be eligible under the terms of this Plan of Operation may be given preference in the use of unobligated lands.

History

GSCJA-04-08%E0A, January 18, 2008.

ACO-161-86, October 14, 1986.

§ 514. Temporary use

A. The Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, shall have the authority to allow temporary use of Navajo Nation Ranches when it is deemed in the best interest of the resource to do so, or continuity of use is required to retain federal or state grazing rights, or under special circumstances when so directed by the Resources Committee.

B. All temporary use authorizations shall be in writing to coincide with the general terms of the lease agreement and this Plan of Operation, shall not exceed a term of six months and shall not be renewable without the approval of the Resources Committee.

History

GSCJA-04-08%E0A, January 18, 2008.

ACO-161-86, October 14, 1986.

§ 515. Amendment

This Plan of Operation may be amended from time to time as recommended by the Navajo Nation Ranch Program, Department of Agriculture through the Executive Director, Division of Natural Resources, to the Resources Committee of the Navajo Nation Council who then in turn recommends final action by the Government Services Committee of the Navajo Nation Council.

History

GSCJA-04-08%E0A, January 18, 2008.

ACO-161-86, October 14, 1986.

Note. "Advisory Committee" changed to "Government Services Committee" pursuant to CD-68-89.

Chapter 4. [Reserved]

History

CAP-41-94, April 20, 1994.

Note. Previous Chapter 4, §§ 601-604, "Navajo Agricultural Resources Department" deleted.

Chapter 5. Grazing

Cross References

Grazing offense, 17 N.N.C., § 350, §§ 460-466, and § 524.

United States Code

Rules and regulations, restriction on number of livestock grazed on range units, 25 U.S.C. § 466.

Code of Federal Regulations

Grazing permits, see 25 CFR § 166.1 *et seq*.

Navajo grazing regulations, see 25 CFR § 167.1 *et seq*.

Subchapter 1. Grazing Regulations

§ 701. Authority

It is within the authority of the Secretary of the Interior to protect Indian Tribal lands against waste. Subject to regulations of this Chapter, the right exists for Indian Tribes to authorize the granting of permits upon their Tribal lands and to prescribe by appropriate Tribal action the conditions under which their lands may be used.

History

ACO-339-71, October 8, 1971.

ACS-187-68, September 11, 1968.

ACMY-73-66, May 13, 1966.

CD-59-64, December 10, 1964.

CJ-3-56, January 27, 1956.

CJ-22-54, June 9, 1954.

ACM-14-54, March 29, 1954.

Note. CJ-3-56 adopted, as an ordinance of the Navajo Nation Part 72 (§§ 72.1-

72.17) of Title 25 of the Code of Federal Regulations, entitled "Navajo Grazing Regulations", which was reorganized as Part 152 (§§ 152.1-152.17) of Title 25 of the Code of Federal Regulations.

§ 702. General regulations

Part 151 of Title 25 of the Code of Federal Regulations authorizes the Commissioner of Indian Affairs to regulate the grazing of livestock on Indian lands under conditions set forth therein. In accordance with this authority and that of the Navajo Nation Council, the Central Grazing Committee and the District Grazing Committees, the grazing of livestock on the Navajo Reservation shall be governed by the regulations in this Chapter.

History

CJN-83-66, June 22, 1966.

ACAP-35-66, April 7, 1966.

CD-70-61, December 8, 1961.

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

ACF-14-53, February 20, 1953.

Cross References

1957 Navajo Reservation Grazing Handbook.

§ 703. Purpose

It is the purpose of the regulations in this Chapter to aid the Navajo Indians in achievement of the following objectives:

A. The preservation of the forage, the land, and the water resources on the Navajo Reservation, and the building up of those resources where they have deteriorated.

B. The protection of the interests of the Navajo Indians from the encroachment of unduly aggressive and antisocial individuals who may or may not be members of the Navajo Nation.

C. The adjustment of livestock numbers to the carrying capacity of the range in such a manner that the livestock economy of the Navajo Nation will be preserved.

D. To secure increasing responsibility and participation of the Navajo People, including Navajo Nation participation in all basic policy decisions, in the sound management of one of the Navajo Nation's greatest assets, its grazing lands, and to foster a better relationship and a clearer understanding between the Navajo People and the federal government in carrying out the grazing regulations.

E. The improvement of livestock through proper breeding practices and the maintenance of a sound culling policy. Buck and bull pastures may be established and maintained either on or off the Reservation through District Grazing Committee and Central Grazing Committee action.

History

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

§ 704. Effective date; scope; exceptions

The grazing regulations in this Chapter are effective as of the date of approval hereof, for the Navajo Reservation, the area described in Executive Order of December 16, 1882, except land Management District No. 6, all lands within the boundaries of the Navajo Reservation held in trust by the United States for the Navajo Nation and all the trust lands hereafter added to the Navajo Nation. The regulations in this Chapter do not apply in individually owned allotted lands within the Navajo Nation nor to Navajo Nation purchases, allotted or privately owned Navajo Indian lands outside the exterior boundaries of the Navajo Reservation.

History

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

Note. 1957 Navajo Reservation Grazing Handbook, p.10, Executive Order of December 16, 1882, provided as follows: "It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz: beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30' north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30' north; thence due east to the one hundred and tenth degree of longitude west, thence due north to place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon".

Cross References

Lands added to Reservation. McCracken Mesa Range Management Unit in District 12, see 16 N.N.C. § 1601 *et seq*.

Annotations

1. Allotment fencing

"Given that fencing on all lands, including allotments in the Eastern Navajo Agency, are subject to some local Navajo board or committee's approval, the Court concludes that, read together, the purpose of the various provisions is to deal with fencing within the Nation comprehensively. To foster a uniform, predictable system of regulating fencing within the Reservation, this purpose is facilitated by requiring district grazing committee approval of allotment fencing within the Reservation. Under this analysis, elected officials within local communities may hear and decide disputes when land owners propose to fence their land off from other users. Such fencing affects not just the parcel proposed to be fenced, but affects all other surrounding land users." *Gishie v. Morris, et al.,* No. SC-CV-36-06, slip op. at 5 (Nav. Sup. Ct. June 4, 2008).

§ 705. Land management districts

The Commissioner of Indian Affairs has established and will retain the present land management districts within the Navajo Indian Reservation, based on the social and economic requirements of the Navajo Indians and the necessity of rehabilitating the grazing lands. District boundary changes may be made when deemed necessary and advisable by the District Grazing Committees, Central Grazing Committee and Navajo Nation Council, with approval by the Superintendent, Area Director, and the Commissioner of Indian Affairs.

History

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

CJ-8-40, June 6, 1940.

Cross References

1957 Navajo Reservation Grazing Handbook.

Grazing Committees generally, see § 831 *et seq*. of this title.

Code of Federal Regulations

Land management districts, see 25 CFR 167.5.

§ 706. Carrying capacities

A. The Commissioner of Indian Affairs on June 26, 1943 promulgated the authorized carrying capacity for each land management district of the Navajo Reservation.

B. Recommended adjustments in carrying capacities shall be referred by the Superintendent to District Grazing Committee, Central Grazing Committee, and the Navajo Nation Council for review and recommendations prior to presentation to the Area Director and the Commissioner of Indian Affairs for approval.

C. Upon the request of the District Grazing Committee, Central Grazing

Committee and Navajo Nation Council to the Superintendent, recommendations for future adjustments to the established carrying capacities shall be made by range technicians based on the best information available through annual utilization studies and range condition studies analyzed along with numbers of livestock and precipitation data. The recommendations of the range technicians shall be submitted to the Superintendent, the Area Director and the Commissioner of Indian Affairs.

D. Carrying capacities shall be stated in terms of sheep units yearlong, in the ratio of horses, mules, and burros one to five; cattle one to four; goats one to one. The latter figure in each case denotes sheep units. Sheep, goats, cattle, horses, mules, and burros one year of age or older shall be counted against the carrying capacity.

History

ACN–83–57, November 8, 1957.

CJ–3–56, January 27, 1956.

Note. Promulgation of carrying capacity. The promulgation of the Commissioner of Indian Affairs of June 26, 1943, determined the carrying capacity of land management districts of the Navajo Reservation pursuant to 25 CFR 71.5 (151.1), setting out the area of the range in acres, length of grazing season, acres per cow unit, number of cattle and cow months under maximum stocking, and the ratio of cattle to sheep for each district.

Cross References

1957 Navajo Reservation Grazing Handbook.

Carrying capacity of McCracken Mesa Range Management Unit of District 12, see 16 N.N.C. § 1606.

Code of Federal Regulations

Carrying capacities, see 25 CFR 167.6.

§ 707. Records

A. The District Grazing Committee, the Superintendent, and his authorized representatives shall keep accurate records of all grazing permits and ownership of all livestock. Master files shall be maintained by the Superintendent or his/her authorized representatives.

B. The District Grazing Committee shall be responsible for and assist in organizing the sheep and goat dipping and horse and cattle branding program and obtaining the annual livestock count.

C. In order to obtain true records of ownership the permittee shall personally appear at the dipping vat or tallying point designated by the Grazing Committee with his or her sheep and goats and at branding and tallying points for cattle and horses. Should the permittee be unable to appear personally he or she shall designate a representative to act for and in his or her behalf. The sheep and goats will be dipped and the cattle and horses will be branded and recorded in the name of the permittee.

D. The Superintendent shall prepare and keep current a register containing the names of all permittees using the range, the number of each class of stock by age classes grazed annually and the periods during which grazing shall be permitted in each part thereof. An annual stock census will be taken to insure that the carrying capacity is not exceeded. All classes of livestock 12 months of age or over will be counted against range use and permitted number, except that yearling colts will not be counted against permitted numbers, on all permits with less than six horses.

History

ACN–83–57, November 8, 1957.

CJ–3–56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Control of livestock disease, see § 712 of this title.

False report of livestock ownership or refusal to make true report of such ownership as offense, 17 N.N.C. § 464.

Grazing permits generally, see § 781 *et seq.* of this title.

Livestock brands generally, see §§ 2001, 2002 of this title.

Code of Federal Regulations

Records, see 25 CFR 167.7.

§ 708. Grazing rights

A. The Superintendent shall determine grazing rights of bona fide livestock owners based on recommendations of District Grazing Committees. Grazing rights shall be recognized for those permittees having ownership records as established in accordance with 3 N.N.C. § 707 or who have acquired grazing rights by marriage, inheritance, purchase or division of permits. Whenever the permitted number of sheep units within a district is less than the carrying capacity, new permits to the carrying capacity limit may be granted as provided in 3 N.N.C. § 781.

B. All enrolled members of the Navajo Nation over 18 years of age are eligible to acquire and hold grazing permits. Minors under 18 years of age can get possession of grazing permits only through inheritance or gift, and in each case trustees must be appointed by the Navajo Nation courts to manage the permits and livestock of such minors until they become 18 years of age and can hold grazing permits in their own right.

C. No person can hold a grazing permit in more than one district on the

Navajo Reservation.

D. Determination of rights to grazing permits involved in cases of divorce, separation, threatened family disruption, and permits of deceased permittees shall be the responsibility of the Court of the Navajo Nation under existing laws, rules, and regulations.

History

ACN–83–57, November 8, 1957.

CJ–3–56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Code of Federal Regulations

Grazing rights, see 25 CFR 167.8.

§ 709. Grazing fees

Grazing fees shall not be charged at this time.

History

ACN–83–57, November 8, 1957.

CJ–3–56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Code of Federal Regulations

Grazing fees, see 25 CFR 167.12.

§ 710. Trespass

A. The owner of any livestock grazing in trespass in Navajo Nation ranges shall be subject to action by the Courts of the Navajo Nation; however, upon recommendations of the District Grazing Committee, first offenses may be referred to the Office of Hearings and Appeals and the Superintendent or his/her authorized representative for proper settlement out of court.

B. The following acts are considered as trespass:

1. Any person who sells an entire permit must dispose of an his/her livestock or be in trespass. Any person selling a portion of his/her permit must not run more stock than covered by his/her remaining permit, or be subject to immediate trespass.

2. All persons running livestock in excess of their permitted number must either obtain permits to cover their total livestock numbers or reduce to their permitted number; or be in trespass. Additional time may be granted in unusual individual cases as determined and approved by the District Grazing Committee, Central Grazing Committee, and the Superintendent or his/her authorized representative.

3. Failure to comply with the provisions in 3 N.N.C. § 781 shall be considered as trespass.

4. Any person who willfully allows his/her livestock to drift from one district to another shall be subject to trespass action. The grazing of livestock in customary use areas extending over district boundary lines, when such customary use areas are defined and agreed upon by the District Grazing Committees involved, shall not be considered as willful trespass.

5. The owner of any livestock who violates the customary or established use units of other permittees shall be subject to trespass action.

History

CO-59-03, October 21, 2003.

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

Note. Amendments. 1959, 24 F.R. 1178, February 17, 1959, amended Paragraph (B)(2) by substituting "1959" for "1958".

Cross References

1957 Navajo Reservation Grazing Handbook.

For criminal offenses involving livestock, see generally 17 N.N.C. §§ 350, 460 to 466 and 524.

Trespass by livestock generally, see § 2402 of this title.

Violations of regulations covering buying and movement of livestock as trespass, see § 711 of this title.

Code of Federal Regulations

Trespass, see 25 CFR 167.13.

§ 711. Movement of livestock to market

Annually prior to the normal lamb buying season, the Central Grazing Committee after consultation with District Grazing Committees shall issue regulations covering the buying period and the procedures and methods to be used in moving livestock to market. All movements of livestock other than trucking from buying areas to loading or shipping points must be authorized by trailing permits issued by the District Grazing Committees on the approved forms. Failure to comply with this Section and with annual lamb buying regulations will be considered as trespass.

History

ACN–83–57, November 8, 1957.

CJ–3–56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Trespass generally, see § 710 of this title.

Code of Federal Regulations

Movement of livestock, see 25 CFR 167.14.

§ 712. Control of livestock disease

A. The District Grazing Committees with the approval of the Superintendent shall require livestock to be dipped, vaccinated, inspected and be restricted in movement when necessary to prevent the introduction and spread of contagious or infectious disease in the economic interest of the Navajo stock owners. Upon the recommendation of the District Grazing Committee livestock shall be dipped annually when such dipping is necessary to prevent the spread of contagious diseases. These annual dippings shall be completed on or before September 1st each year. Livestock, however, may be dipped at other times when necessary. The Superintendent or his/her authorized representative and the District Grazing Committee may also require the rounding up of cattle, horses, mules, etc., in each District for the purpose of inspection for disease, vaccinating, branding and other related operations.

B. No livestock shall be brought onto the Reservation without a permit issued by the Superintendent or his/her authorized representative following inspection, in order to safeguard Indian livestock from infectious and contagious disease and to insure the introduction of good quality sires and breeding stock.

C. Any unusual disease conditions beyond the control measures provided herein shall be immediately reported by the District Grazing Committee to the President of the Navajo Nation and the Superintendent who shall attempt to obtain specialists and provide emergency funds to control and suppress the disease.

History

ACN–83–57, November 8, 1957.

CJ–3–56, January 27, 1956.

Cross References

1957 Navajo Reservation Handbook.

Code of Federal Regulations

Control of livestock disease and introduction of livestock, see 25 CFR 167.15.

§ 713. Fences

Favorable recommendation from the District Grazing Committee and a written authorization from the Superintendent or his/her authorized representative must be secured before any fences may be constructed in non-agricultural areas. The District Grazing Committee shall recommend to the Superintendent that the removal of unauthorized existing fences, or fences enclosing demonstration areas no longer used as such, if it is determined that such fences interfere with proper range management or an equitable distribution of range privileges. All enclosures fenced for the purpose of protecting agricultural land shall be kept to a size commensurate with the needs for protection of agricultural land and must be enclosed by legal four strand barbed wire fence or the equivalent.

History

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Fences on cultivated lands, see §§ 2401, 2402 of this title.

Code of Federal Regulations

Fences, see 25 CFR 167.16.

Annotations

1. Allotment fencing

"Given that fencing on all lands, including allotments in the Eastern Navajo Agency, are subject to some local Navajo board or committee's approval, the Court concludes that, read together, the purpose of the various provisions is to deal with fencing within the Nation comprehensively. To foster a uniform, predictable system of regulating fencing within the Reservation, this purpose is facilitated by requiring district grazing committee approval of allotment fencing within the Reservation. Under this analysis, elected officials within local communities may hear and decide disputes when land owners propose to fence their land off from other users. Such fencing affects not just the parcel proposed to be fenced, but affects all other surrounding land users." *Gishie v. Morris, et al.,* No. SC-CV-36-06, slip op. at 5 (Nav. Sup. Ct. June 4, 2008).

§ 714. Construction near permanent livestock water developments

A. The District Grazing Committee shall regulate the construction of all dwellings, corrals and other structures within one-half mile of Government or Navajo Nation developed permanent livestock waters such as springs, wells, and charcos or deep reservoirs.

B. A written authorization from the District Grazing Committee must be secured before any dwellings, corrals, or other structures may be constructed within one-half mile of Government or Navajo Nation developed springs, wells and charcos or deep reservoirs.

C. No sewage disposal system shall be authorized to be built which will drain into springs or stream channels in such a manner that it would cause contamination of waters being used for livestock or human consumption.

History

CJ–3–56, January 27, 1956.

Cross References

ACN–83–57, November 8, 1957.

Navajo Reservation Grazing Handbook.

Code of Federal Regulations

Construction near permanent livestock water developments, see 25 CFR 167.17.

Subchapter 3. Grazing Permits

§ 781. Generally

A. All livestock grazed on the Navajo Reservation must be covered by an authorized grazing permit issued by the Superintendent based upon the recommendations of the District Grazing Committee. All such grazing permits will be automatically renewed annually until terminated. District Grazing Committees shall act on all grazing permit changes resulting from negotiability within their respective districts. The number of livestock that may be grazed under each permit shall be the number originally permitted plus or minus any changes as indicated by transfer agreements and court judgment orders.

B. Any permittee who has five or more horses on his/her current permit will be required to apply any acquired sheep units in classes of stock other than horses. If the purchaser wishes more than his/her present number of horses, he/she must have his needs evaluated by the District Grazing Committee. Yearling colts will be counted against permitted number on all permits with six or more horses. Yearling colts will not be counted against permitted number on all permits with less than six horses. In hardship cases the District Grazing Committee may reissue horses removed from grazing permits through negotiability to permit holders who are without sufficient horses on their present permits to meet minimum needs.

C. No permittee shall be authorized to graze more than 10 head of horses or to accumulate a total of over 350 sheep units.

History

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Code of Federal Regulations

Grazing permits, see 25 CFR 167.9.

Annotations

1. Construction and application

Livestock grazing is not allowed on Navajo trust land without a valid grazing permit. *Yazzie v. Catron*, 7 Nav. R. 19, 21 (Nav. Sup. Ct. 1992).

§ 782. Special permits

The problem of special grazing permits shall be settled by the Bureau of Indian Affairs working in cooperation with the Navajo Nation Council, or any committee designated by it, with a view to terminating these permits at a suitable date and with the least hardship to the Indians concerned.

History

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Code of Federal Regulations

Special grazing permits, see 25 CFR 167.10.

§ 783. Tenure of permits; unused permits

A. All active regular grazing permits shall be for one year and shall be automatically renewed annually until terminated. Any Navajo eligible to hold a grazing permit as defined in 3 N.N.C. § 708 may become a livestock operator by obtaining an active grazing permit through negotiability or inheritance or both.

B. In many districts, and portions of all districts, unused grazing permits or portions of grazing permits are beneficial in aiding range recovery. Each District Grazing Committee will handle each matter of unused grazing permit or portions of grazing permits on individual merits. Where ample forage is available operators will be encouraged to fill their permits with livestock or dispose of their unused permits through negotiability. In those areas where forage is in need of rehabilitation permittees will not be encouraged to stock to their permitted numbers until the range has sufficiently recovered to justify the grazing of additional livestock.

History

ACN–83–57, November 8, 1957.

CJ–3–56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Code of Federal Regulations

Tenure of grazing permits, see 25 CFR 167.11.

§ 784. Transfer

Upon recommendation of the District Grazing Committee and with the approval of the Superintendent, grazing permits may be transferred from one permittee to another in accordance with instructions provided by the Resources Committee of the Navajo Nation Council, or may be inherited; provided that the permitted holdings of any individual permittee shall not exceed 350 sheep units or the equivalent thereof. Should inheritance or other acquisition of permits increase the holdings of any permittee to more than 350 sheep units, said permittee shall dispose of all livestock in excess of 350 sheep units not later than November 15 following date of inheritance or other acquisition, and that portion of his or her permit in excess of 350 sheep units within one year from date of inheritance.

History

CD–70–61, December 8, 1961.

ACN–83–57, November 8, 1957.

CJ–3–56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Code of Federal Regulations

Grazing permits, transfer or inheritance, see 25 CFR 167.9(d).

Annotations

1. Construction and application

"A grazing permit can be sold, inherited or otherwise transferred and can be sub-leased to anyone eligible to receive it through inheritance." *Yazzie v. Catron*, 7 Nav. R. 19, 21 (Nav. Sup. Ct. 1992).

§ 785. Descent and distribution

Upon the death of a permittee or licensee, ownership of livestock upon which grazing permit is based shall first be determined. Upon a judicial finding as to the decedent's ownership of all or a portion of the livestock then the permit or license or that portion of said permit or license for livestock, so owned by the decedent shall be subject to the following rules of descent:

A. Permittees and licensees may execute a will designating the person or persons to receive the permit or license, which must be approved by the Court of the Navajo Nation after the death of said permittee or licensee. In the absence of such an instrument approved by the Court, and unless stipulated to the contrary under agreement of the potential heirs approved by the Court, the Court is hereby authorized to distribute such permits or licenses in accordance with moral and legal rights as determined by the said Court.

B. Permits or licenses in Grazing District No. 7 shall descend as heretofore set forth subject to confirmation by the Range Conservation Committee of Grazing District No. 7, New Mexico.

C. In no event shall any agreement or will be approved or distribution made by the Court of the Navajo Nation to a person or persons not enrolled with the Navajo Nation.

D. In no event shall a grazing permit or license covering Navajo Nation lands or grazing lands in District No. 7 be subdivided into less than 10 sheep units in one permit. In such case and in the absence of an approved agreement or an approved will, the Court of the Navajo Nation shall order a sale of the grazing permit or license to a Navajo Indian of the same district, to be approved by the General Superintendent or his/her authorized agent, with a preference right of purchase granted to the heirs.

E. The district Council Delegate(s) and the district supervisor who are familiar with the relationship of such deceased permittee may with the permission of the Court make recommendations to the Court pursuant to any grazing permit or license in dispute.

History

ACN–83–57, November 8, 1957.

Res. 1922–195 1, p. 240, July 26, 1946.

Note. 1922–1951, p. 237, July 11, 1943, app. by Indian Office November 3, 1943.

Cross References

1957 Navajo Reservation Grazing Handbook.

Annotations

1. Oral wills

This Section's provision that permittees and licensees may "execute" a will designating the person to receive the permit or license does not require the will to be in writing, and an oral will is sufficient. *In the Matter of Estate of Benally* (CA. 1978) 1 Nav. R. 219.

2. Trusts, generally

Discussion of "customary trust". See *In the Matter of the Estate of Benally*, 5 Nav. R. 174, 180 (Nav. Sup. Ct. 1987).

§ 786. Subletting

By request of a permittee to sublet all or a part of his or her regular grazing permit to a member of his/her family or to any person who would receive such permit by inheritance, such subletting of permits may be authorized by the District Grazing Committee and the Superintendent or his/her authorized representative.

History

ACN-83-57, November 8, 1957.

CJ-3-56, January 27, 1956.

Cross References

1957 Navajo Reservation Grazing Handbook.

Annotations

1. Construction and application

"All grazing permit transfers and subleases are subject to the approval of the District Grazing Committee and the Agency Superintendent." *Yazzie v. Catron*, 7 Nav. R. 19, 22 (Nav. Sup. Ct. 1992).

§ 787. [Reserved]

History

ACN-96-56, November 30, 1956.

Note. Form deleted; contact the Division of Natural Resources for an updated form.

Cross References

1957 Navajo Reservation Grazing Handbook.

Subchapter 5. Grazing Committees

Article 1. Central Grazing Committee

§ 831. Designation

The Central Grazing Committee shall be the Resources Committee of the Navajo Nation Council.

History

CD-70-61, December 8, 1961.

ACN-83-57, November 8, 1957.

ACF-14-53, February 20, 1953.

CJ-6-53, January 13, 1953.

Cross References

Resources Committee designated as the Central Grazing Committee, see 2 N.N.C. § 695(B)(1).

Off-Reservation Land Boards as Grazing Committees, see § 241 of this title.

§ 832. Duties

The duties and responsibilities of the Central Grazing Committee shall be as follows:

A. Furnish all District Grazing Committees and Navajo Partitioned Land District Grazing Precincts with information, instructions, and materials necessary for them to carry out their duties. Advise and direct District Grazing Committees and Navajo Partitioned Land District Grazing Precincts in the proper performance of their assignments.

B. Review recommendations, suggestions, and problems submitted by District Grazing Committees and Navajo Partitioned Land District Grazing Precincts. Appeals of individuals or groups to District Grazing Committee and Navajo Partitioned Land District Grazing Precinct action will be submitted to the Office of Hearings and Appeals.

C. Take appropriate action within the authority of the Central Grazing Committee.

D. In matters beyond the authority of the Central Grazing Committee, prepare recommendations and resolutions for Navajo Nation Council consideration.

E. Provide leadership and coordination between the Navajo stockmen and the Bureau of Indian Affairs on all matters pertaining to livestock disease control, surplus livestock removal programs, livestock inventories, branding activities and the use and management of the Navajo Range resources.

History

CO-31-09, October 20, 2009. Navajo Partitioned Land District Grazing Precincts Act.

CD-70-61, December 8, 1961.

ACN-83-57, November 8, 1957.

Cross References

Resources Committee designated as the Central Grazing Committee, See 2 N.N.C. § 695(B)(1).

Annotations

1. Grazing disputes

"The Court holds the OHA has jurisdiction to hear and decide a grazing dispute which predates Navajo Nation Council Resolution CO-59-03 where an official decision is inadequate to conduct an appellate review." *Charley and Looking Glass v. Benally, et al.,* No. SC-CV-19-07, slip op. at 8 (Nav. Sup. Ct. December 10, 2008).

Article 2. Navajo Nation Resources Committee

§ 851. Generally

The Resources Committee has functions in grazing matters as set forth in 3 N.N.C. § 852.

History

ACN-83-57, November 8, 1957.

Note. Slightly reworded for purposes of statutory form.

Cross References

Resources Committee of the Navajo Nation Council, see 2 N.N.C. § 691 et. seq.

§ 852. Duties

The duties and responsibilities of the Navajo Nation Resources Committee shall be as follows:

A. Meet periodically with the various District Grazing Committees and

Navajo Partitioned Land District Grazing Precincts at their regular meetings to inform them of current programs, provide them with instructions, materials, and supplies necessary for them to carry out their duties; and serve generally as Reservation-wide coordinators of District Grazing Committees and Navajo Partitioned Land District Grazing Precincts and their activities.

B. Assemble recommendations and suggestions submitted by District Grazing Committees, Navajo Partitioned Land District Grazing Precincts, groups, and individuals for action.

C. Serve as principal coordinators between the District Grazing Committees, and Navajo Partitioned Land District Grazing Precincts and the Bureau of Indian Affairs in all matters pertaining to livestock disease control, surplus livestock removal programs, livestock inventories, branding activities and programs for the use, improvement and management of the Navajo range resources.

History

CO-31-09, October 20, 2009. Navajo Partitioned Land District Grazing Precincts Act.

CO-59-03, October 21, 2003.

ACN-83-57, November 8, 1957.

Cross References

Resources Committee of the Navajo Nation Council, 2 N.N.C. § 691 *et seq.*

Article 3. District Grazing Committee

§ 870. Definitions

"Navajo Partitioned Lands" means that portion of the Former Joint Use Area awarded to the Navajo Nation under the Judgment of Partition issued April 18, 1979, by the United States District Court for the District of Arizona, and now a separate administrative area within the Navajo Nation.

History

CO-31-09, October 20, 2009. Navajo Partitioned Land District Grazing Precincts Act.

§ 871. Establishment

The District Grazing Committees and Navajo Partitioned Land District Grazing Precincts are established within the Executive Branch of the Navajo Nation. The Grazing Management Office, Division of Natural Resources within the Executive Branch of the Navajo Nation government shall provide technical assistance to the District Grazing Committees and the Navajo Partitioned Land District Grazing Precincts. Unless reauthorized by the Navajo Nation Council, the Navajo Partitioned Land District Grazing Precincts shall exist for a period of five years from the date of enactment of these amendments at which time the

Navajo Partitioned Lands shall be administered by the regular District Grazing Committees.

History

CO-31-09, October 20, 2009. Navajo Partitioned Land District Grazing Precincts Act.

CAP-38-98, April 22, 1998.

CA-30-52, April 24, 1952.

§ 872. Composition

A. Each Land Management District except for those which are organized under the Eastern Agency Land Boards, shall have one District Grazing Committee composed of one Committee member from each certified Chapter within that District.

B. With respect to the Navajo Partitioned Lands there are established three Navajo Partitioned Land District Grazing Precincts as follows:

NPL Precinct 1: (Fort Defiance Agency NPL) Jeddito, Low Mountain, Teesto, Tolani Lake, and Whitecone Chapters.

NPL Precinct 2: (Chinle Agency) Black Mesa, Blue Gap-Tachee, Forest Lake, Hard Rock, Pinon, and Whippoorwill Chapters.

NPL Precinct 3: (Western/Tuba City) Chilchinbeto, Kayenta, Shonto, and Tonalea Chapters.

History

CO-31-09, October 20, 2009. Navajo Partitioned Land District Grazing Precincts Act.

CAP-38-98, April 22, 1998.

CAU-66-85, August 2, 1985.

Cross References

Authority of Office of Hearings and Appeals, see CO-59-03 (amendments to Titles 2 and 3).

§ 873. Neighboring vacancy

In the event of a Grazing Official vacancy, the neighboring grazing official shall assist the community with grazing issues and receive compensation.

History

CAP-38-98, April 22, 1998.

CJN-31-86, June 23, 1986.

CAU-66-85, August 2, 1985.

ACA-31-55, August 3, 1955.

CA-30-52, April 24, 1952.

Note. On election dates and terms, see 11 N.N.C. §§ 3, 6 and 7.

§ 874. Chairperson and Vice-Chairperson

A member of the District Grazing Committee shall be chosen as the Chairperson and another member of such committee shall be chosen as the Vice Chairperson to act in the absence of the Chairperson.

History

CAP-38-98, March 17, 1998.

ACN-83-57, November 8, 1957.

§ 875. Duties

A. The general duties and responsibilities of District Grazing Committees and Navajo Partitioned Land District Grazing Precincts shall be as follows:

1. Organize and conduct sheep and goat dipping, spraying or dusting programs, branding activities, livestock disease prevention programs, surplus livestock removal programs, and conduct or assist the Superintendent and his/her authorized representatives in obtaining the annual livestock tally count.

2. Coordinate and explain the Navajo Grazing Regulations and other grazing related laws to stockmen, explain and complete transfers and subletting of grazing permits, cooperate with Navajo Nation and Bureau conservation programs and planning, including the determination of priorities on major range improvement and development projects.

3. Assist and advise Navajo stockmen at formal Grazing Committee meetings, and by individual contact, in proper grazing practices, proper classes of productive livestock to operate, ways of developing and improving range areas, and proper maintenance of range improvements and developments.

4. Advise and inform individual Navajos of proper procedures to follow in either obtaining or disposing of grazing permits.

5. Cooperate with local stockmen and Bureau personnel on all matters pertaining to range water development, range re-vegetation, erosion control, and range management. This will include the determination of individual or group range use areas for settling range use disputes and for developing range management and improvement plans.

6. Enforce Navajo Grazing Regulations as required in such regulations.

7. Serve as mediators in adjusting and settling range difficulties between parties and groups within their respective districts. In serving as mediators, the District Grazing Committee will hear both sides of a dispute and attempt to get the two parties or groups to agree to a mutual settlement of differences within the terms of the Navajo Grazing Regulations. The Grazing Committee in serving as mediator is not to assume the role of judge and jury. Difficult cases not settled in the above manner shall be referred to the Office of Hearings and Appeals in an attempt to settle differences out of court.

8. Committees of adjoining districts shall hold joint meetings to resolve their inter-district difficulties.

9. All Grazing Committee actions shall be conducted in formally called meetings with a quorum present. This applies to grazing permit transfers and subletting as well as other matters of business. The Chairperson or Vice-Chairperson shall sign all grazing permit transfers and subletting agreements approved by the District Grazing Committee after agreement is reached between the parties as to the method of payment.

10. Submit in writing to the Central Grazing Committee, any recommendations and suggestions of general interest and any problem which the District Grazing Committee is unable to solve or which is beyond its authority.

11. Perform such other duties and functions related to the purposes of the Grazing Committees they may be directed to do by the Central Grazing Committee or the Office of the President, Navajo Nation.

12. Preserve forage, land and water resources within the Navajo Nation and to build up those resources where they have deteriorated.

13. Protect grazing interests of Navajo permittees from the encroachment of non-Navajo individuals or businesses.

14. Adjust livestock numbers to carrying capacities of ranges in such a manner that the livestock economy of the Navajo Nation is preserved.

15. Educate Navajo Grazing Permittees on the improvement of livestock through proper breeding practices and maintenance of a sound culling policy and to recommend to appropriate Navajo Nation offices, departments and the Resources Committee the establishment of buck and bull pastures.

16. Maintain the Land Management Districts and to recommend changes in District boundaries when deemed necessary to the Resources Committee and the Navajo Nation pursuant to the Navajo Grazing Regulations.

17. Maintain livestock inventory data gathered while carrying out the various disease and parasite control program and branding activities and to maintain all Grazing Committee records.

18. Recommend to the Bureau grazing rights of bona fide livestock owners.

19. Recommend approval of transfer of grazing permits.

20. Approve subletting agreements of transfer of grazing permits provided that the sublessor or Grantor will not own and operate more livestock than he or she has remaining on the regular Grazing permit and provided that subletting agreements are made only at District Grazing Committee meetings with a quorum present pursuant to the Navajo Grazing Regulations.

21. Recommend construction of fences and Range Management Units or removal of unauthorized existing fences and to regulate the construction of all dwelling, corrals, and other structures within one-half mile of permanent livestock waters such as springs, wells, and deep reservoirs.

22. Shall have transportation with full insurance coverage and valid state driver's license.

23. Navajo Partitioned Land District Grazing Precincts shall re-issue grazing permits on the Navajo Partitioned Lands, establish range unit boundaries; mediate grazing disputes; inform and educate potential permittees in probating grazing permits cancelled by the U.S. District Court of Arizona in October 1972; develop guidelines for individual and community range management plans; coordinate with departments of the Navajo Nation, the Hopi Tribe and the Bureau of Indian Affairs for effective grazing enforcement; and other related matters.

History

CO–31–09, October 20, 2009. Navajo Partitioned Land District Grazing Precincts Act. Added Subsection 23.

CAP–38–98, April 22, 1998.

ACN–83–57, November 8, 1957.

CA–30–52, April 24, 1952.

Note. Grammatical errors corrected at Subsection (A)(9).

Cross References

Small irrigation projects, duties and responsibilities for, see § 151, *et seq.* of this title.

Annotations

1. Authority of committee

"The law is clear—a district grazing committee has no authority to decide a land dispute. Its only responsibility is to serve as a mediator in a land dispute in an attempt to have the parties agree to a mutual settlement. A district grazing committee is not to act as a judge or jury; a role that requires a decision." *In re: Mary Ellis Joe Customary Use Area*, 6 Nav. R. 177, 179 (Nav. Sup. Ct. 1990).

§ 876. Meetings

A. Each District Grazing Committee shall establish a meeting schedule for at least three meeting days per month to include the District and Agency meetings. Any additional meetings shall be special meetings. All meetings of the District Grazing Committees and the Navajo Partitioned Land District Grazing Precincts shall commence at 9 a.m.

B. Unless otherwise established by the Resources Committee, all meetings shall be conducted in accordance with the Rules of Order of the standing committees of the Navajo Nation Council.

C. Navajo Partitioned Land District Grazing Precincts meetings shall occur with the same frequency as Agency meetings (monthly). Such monthly meetings are to be held in each of the three Precincts, with District Grazing Committee members attending their respective Precinct meetings. Quarterly meetings involving all of the Precincts shall be held in lieu of a monthly meeting.

History

CO-31-09, October 20, 2009. Navajo Partitioned Land District Grazing Precincts Act.

CAP-38-98, April 22, 1998.

ACN-83-57, November 8, 1957.

§ 877. Quorum

A quorum shall consist of over one-half of the Grazing Committee members.

History

CAP-38-98, April 22, 1998.

ACN-83-57, November 8, 1957.

§ 878. Compensation

A. The Grazing Committee members shall be paid from funds provided annually in the Navajo Nation budget for that purpose.

B. District Grazing Committee members shall be compensated at a rate of eight hundred dollars ($800.00) per month. All District Grazing Committee members shall be paid on a regular basis and may be subject to appropriate payroll deduction for insurance coverage as determined and approved by the Navajo Nation Insurance Commission pursuant to the provisions of 2 N.N.C. § 933(A). In addition, District Grazing Committee members shall receive travel allowance of two hundred dollars ($200.00) per month.

C. District Grazing Committee members attending their respective Chapter, Precinct, District and/or Agency meetings may be compensated for each meeting wherein official business is conducted, subject to Navajo Nation Council appropriations and availability of funds. District Grazing Committee members shall be paid as follows:

1. A stipend of one hundred twenty-five dollars ($125.00) each for attendance at Chapter/Planning meetings;

2. A stipend of one hundred twenty-five dollars ($125.00) each for attendance at Agency Grazing Committee meetings;

3. A stipend of one hundred twenty-five dollars ($125.00) each for attendance at District Grazing Committee meetings;

4. A stipend of one hundred twenty-five dollars ($125.00) each for attendance at Agency Council meetings;

5. A stipend of one hundred twenty-five dollars ($125.00) each for attendance at District Council meetings;

6. A stipend of one hundred twenty-five dollars ($125.00) each for attendance at Navajo Partitioned Land District Grazing Precinct meetings. Such stipend precludes payment for any stipends for attendance at Agency meetings and is contingent on attendance for the entire Precinct meeting.

D. Compensation of District Grazing Committee members may be withheld by the Division of Natural Resources through the Grazing Management Office for failure to turn in all tribal property at the end of his/her term, or for non-performance of prescribed duties and responsibilities.

History

CO–31–09, October 20, 2009. Navajo Partitioned Land District Grazing Precincts Act.

CAP–38–98, April 22, 1998

CMA–16–90, March 29, 1990.

CAU–66–85, August 2, 1985.

Note. Slightly reworded for purposes of statutory form.

§ 879. Accountability

A. Individual Committee members shall be directly accountable to his/her local Chapter and "administratively" accountable to the Director, Division of Natural Resources, or his/her designee, to whom he or she shall be required to submit written reports of his or her activities.

B. District Grazing Committee members shall be required to attend Chapter and planning meetings in addition to other Committee meetings and travel as required.

C. The Chairperson of each District Grazing Committee shall present quarterly reports to the Resources Committee. Quarterly reports shall include the activities of the District Grazing Committees related to its Plan of Operation.

History

CAP-38-98, April 22, 1998.

CAU-66-85, August 2, 1985.

Note. Advisors, voice and vote deleted.

§ 880. Amendments

The District Grazing Committee Plan of Operation may be amended from time to time by the Navajo Nation Council upon the recommendation of the Resources Committee and Government Services Committee of the Navajo Nation Council.

History

CAP-38-98, April 22, 1998.

Subchapter 7. Off-Reservation Grazing

§ 931. Definitions

A. "Commissioner" means the Commissioner of Indian Affairs.

B. "Area Director" means the Director of the Navajo Area of Bureau of Indian Affairs.

C. "Superintendent" means the Superintendent of the Eastern Navajo Agency of the Bureau of Indian Affairs.

D. "Individually Owned Land" means land or any interest therein held in trust by the United States for the benefit of individual Navajo Indians and land or any interest therein held by individual Indians subject to federal restrictions against alienation or encumbrance.

E. "Navajo Nation Trust Land" means land or any interest therein held by the United States in trust for the Navajo Nation, and land that is held by the Navajo Nation subject to federal restrictions against alienation or encumbrance. This term also includes assignments of Navajo Nation land. Unless the terms of the assignment provide for the leasing of the land by the holder of the assignment, the Navajo Nation must join with the assignee to issue a grazing permit.

F. "Navajo Nation Fee" means land owned in fee simple by the Navajo Nation.

G. "Government Land" means land, other than Navajo Nation land, acquired or reserved by the United States for Indian Bureau administrative purposes which are not immediately needed for the purposes for which they are acquired or reserved, and land transferred to or placed under the jurisdiction of the Bureau of Indian Affairs but does not include unreserved public domain land leased to the Navajo Nation under § 15 of the Taylor Grazing Act.[1]

H. "Navajo Nation Lease Lands" means land leased to the Navajo Nation under § 15 of the Taylor Grazing Act,[1] and the state lands leased to the Navajo Nation but shall not include land within Navajo Nation ranches.

I. "Permit" means a revocable privilege granted to an individual in writing to enter on and use a specified tract of land for a specified purpose.

J. "Animal Unit" means one mature cow (or calf six months or over) or other approved equivalent. Example: five sheep = one cow; five sheep = one horse (or as amended).

K. "Range Unit" — a range unit shall consist of such lands as the District Land Board, after consultation with land users and the Bureau of Indian Affairs range technicians, shall consider the nearest to fitting the conditions required by Range Management, land status, conservation, and Indian needs.

L. "Grazing Community" — a grazing community shall consist of range units combined into a larger administrative unit, as determined by the District Land Boards based on common interest.

M. "Immediate Family" means the Indian's descendants as controlled by the state laws of descent wherein the land is situated.

N. "Allocation" means the assignment of range use without competitive bidding, including the determination of who may graze livestock, the number and kind of livestock, and the place such livestock will be grazed.

O. "District Land Board" — a board comprised of representative Navajo Indian membership selected for the purpose of administering grazing and problems attendant thereto, and representing a Land Management District in the Off-Reservation area.

P. "Joint Agency Land Board" — a board comprised of the combined membership of all District Land Boards in the Off-Reservation area.

Q. "Navajo Nation Office" means Crownpoint Navajo Nation Range and Livestock Office.

R. "Indians" means enrolled Navajo Indians.

S. "Resources Committee" means the duly appointed Resources Committee of the Navajo Nation Council.

T. "Livestock" means all neat animals (horses and cattle) and sheep, goats and swine.

History

ACO-300-69, October 1, 1969.

CMY-33-69, May 19, 1969.

United States Code

Taylor Grazing Act, see 43 U.S.C. § 315 *et seq*.

§ 932. General authority

A. The General Grazing Regulations, 25 CFR 151, are effective for all Navajo Indian lands and Government lands under the jurisdiction of the Bureau of Indian Affairs except as superseded by special instructions from the Commissioner of Indian Affairs or by properly approved Navajo Nation action. This Subchapter constitutes Navajo Nation action designed to govern the administration of grazing in the Off-Reservation area not included in the Bureau of Land Management Districts, pursuant to the Cooperative Agreement for the Administration of the Checkerboard Area, approved June 28, 1966, by the Navajo Tribal Council Chairperson; July 19, 1966, by the State Director of the Bureau of Land Management; and by the Area Director of the Bureau of Indian Affairs, July 25, 1966. The administration of this Subchapter shall be the responsibility of the Off-Reservation District Land Boards, and the ministerial function shall be executed by the Crownpoint Navajo Nation Range and Livestock Office.

B. The provisions of the Off-Reservation Grazing Code shall become effective upon acceptance and approval by the Navajo Nation Council and the Bureau of Indian Affairs.

History

CMY-33-69, May 19, 1969.

Annotations

1. Covered lands

"Appellant Charlie's grazing permit covers range unit #33 within the checkerboard area of the Eastern Agency of the Navajo Nation. As such, she is subject to the Navajo Nation's Off-Reservation Grazing Code at 3 N.N.C. §§ 932-35." *Castillo, et al. v. Charlie, et al.*, 7 Nav. R. 181, 182 (Nav. Sup. Ct. 1995).

§ 933. Objectives

It is the purpose of the regulations of this Subchapter to:

A. Preserve, through proper grazing management, the land, water, forest, forage, wildlife and recreational values in the Off-Reservation area and improve and build up these resources where they have deteriorated;

B. Promote use of the range resources by Indians to enable them to earn a living, in whole or in part, through the grazing of their own livestock; and

C. Balance the rights and equities of the individual landowners and Navajo Nation programs through the granting of grazing privileges in a manner which will yield a fair return to landowners consistent with undiminished future use.

History

CMY-33-69, May 19, 1969.

§ 934. Establishment of range units

The conservation, development, and effective utilization of the range resources requires consolidation of small individual and Navajo Nation ownerships and the organization of the total range area into management units. The District Land Board shall establish range units after consultation with the Indians and consideration of the land status, Indian needs, customary use area, and land use problems involved, and adjust such units as needed.

History

CMY-33-69, May 19, 1969.

§ 935. Grazing capacity

The Superintendent or his authorized representative shall determine the grazing capacity of each range unit and the season, or seasons, of use to achieve the objectives cited in 3 N.N.C. § 933 and this shall serve as a stocking rate guide in granting permits. The utilization and range conditions of the units shall be reviewed by qualified range experts on a continuing basis. The District Land Boards and Permittees shall be notified of the need to adjust stocking rates for the long range benefit of both livestock and land.

History

CMY-33-69, May 19, 1969.

§ 936. Grazing on range units authorized by permit

A. All grazing use on range units shall be authorized only by a grazing permit except use which is exempt pursuant to 3 N.N.C. § 937. Subject to recommendations and approval of the District Land Boards, the Crownpoint Navajo Nation Range and Livestock Office and the Bureau of Indian Affairs, shall prepare all permits, and they shall be approved by the Supervisor of the Crownpoint Navajo Nation Range and Livestock Office and the Superintendent. The following shall be made a part of each permit:

1. A map of the unit showing boundary and existing range improvements;

2. An inventory of range improvements showing ownership; and

3. Range use stipulations.

B. Copies of the permit shall be furnished the permittee, the Crownpoint Navajo Nation Range and Livestock Office, the Navajo Nation Land Investigation Department (for record keeping only), and the Superintendent.

History

CMY-33-69, May 19, 1969.

§ 937. Grazing exempt from permit

The following may, without the approval of the Superintendent or the Navajo Nation, graze livestock on his or her individually owned grazing land or other grazing land for which they are responsible, provided the lands are excluded from the Range Unit by fencing out said land: (1) an adult, except those non compos mentis; and (2) an adult, except those non compos mentis, on behalf of his or her minor child and on behalf of a minor child to whom he or she stands in loco parentis when such child does not have a legal representative. The term "graze livestock" means the grazing of livestock which are either owned by a person defined in (1) and (2) above, or if not owned, are under his or her direct management and supervision. Grazing of livestock under any other arrangement is considered a lease or permit subject to approval of the Superintendent.

History

CMY-33-69, May 19, 1969.

§ 938. Authority to include land in grazing permits

A. The Superintendent may include individually owned land on a grazing permit on behalf of:

1. A person who is adjudicated by a state, Navajo Nation, or federal court to be non compos mentis;

2. An orphaned minor;

3. An adult whose location or whereabouts is unknown, after reasonable attempts have been made to locate him/her;

4. Heirs or devisees who have not been able to agree on the permitting of their land not in use by any of the heirs or devisees during a three-month period immediately following the date of constructive notice from the Superintendent given by posting general notices in appropriate chapter houses in the area where the land is located, and with the District Land Boards; also published in a newspaper of local general circulation;

5. A Navajo Indian owner defined in 3 N.N.C. § 937, who gives the

Superintendent written authority to grant grazing privileges; and

6. A guardian, conservator, or other fiduciary, appointed by a state, federal, or Navajo Nation court who gives the Superintendent written authority to grant grazing privileges for any land held in trust for a minor, person who is non compos mentis, or is otherwise legally disabled.

B. The Superintendent may include Government land on a grazing permit; provided such land is not already under a revocable permit or lease to the Navajo Nation, in which case, the Navajo Nation must authorize the land to be included.

C. The District Land Board may include Navajo Nation trust, unreserved public domain land leased by the Navajo Nation, and other Navajo Nation controlled land on the grazing permits.

History

CMY-33-69, May 19, 1969.

Note. Words "to locate him/her" were added at end of Subsection (A) (3) for purpose of clarity.

§ 939. Allocation of grazing privileges

A. Grazing privileges shall be allocated in accordance with 3 N.N.C. § 938, by the District Land Board who will review all applications for permits, determine the eligibility, and designate the use area.

B. Eligibility requirements: An applicant must be a member of the Navajo Nation, 18 years of age or older, show a sincere interest in the livestock business, furnish proof of livestock ownership, and proof of a recognized use area. An applicant may be requested to appear at a hearing. Each applicant must submit a written application on an approved form.

History

CMY-33-69, May 19, 1969.

§ 940. Establishment and payment of grazing fees

A. The Area Director shall establish a minimum acceptable grazing fee for grazing privileges on individually owned land. Except as otherwise provided in Subsection (B) of this Section, the rate established shall provide a fair annual return to the landowner. The Superintendent shall provide the Navajo Nation Land Boards with all available information.

B. An adult Indian, in giving the Superintendent written authority to grant grazing privileges on his or her individually owned land, may stipulate a higher rate above the minimum rate set by the Area Director if justified because of above average value. He or she may also stipulate a lower rate than the minimum rate, subject to approval of the Superintendent when the permittee is a member of the landowner's immediate family.

C. Grazing fees for Navajo Nation controlled land shall be established by the District Land Board and it may establish the fee to be paid by the permittee. This condition is given with the provision that each individual landowner receives the minimum rate established by the Area Director or stipulated in the authority under 3 N.N.C. § 938(C) above.

D. Grazing fees shall be payable annually and in advance and date due shall be a provision of the permit. Delinquent fees shall be a first lien on the livestock grazed under permit. Payment shall be made to the Bureau of Indian Affairs for individually owned lands and the Navajo Nation for Tribally controlled lands.

E. Grazing fees shall be established by the District Land Board after consultation and review with representatives of the Bureau of Indian Affairs and the Navajo Nation before commencement of each permit period. The grazing year shall be from May 1 to April 30. Grazing fees shall be payable annually and in advance and will be due on or before May 1. Fees not paid by May 1 will be delinquent upon that date.

History

CMY-33-69, May 19, 1969.

ACO-300-69, October 1, 1969.

§ 941. Assignment, modification, cancellation and duration of permits

A. A grazing permit shall not be assigned, sublet, or transferred by the permittee. In event of death of the permittee, the permit shall be cancelled. A new permit on the range unit involved will be issued after review and recommendation of the District Land Board, who shall consider legal heirs and land users pursuant to Navajo custom.

B. The District Land Board may modify or cancel a grazing permit by mutual consent, by a 30 day advance written notice for violation of the terms of the permit, or because of change of status of the land involved.

C. Duration of the permit period shall be determined by the District Land Board subject to a maximum period of five years.

D. Time limit for non-use will be two years. Non-use permit must be renewed each year.

History

CMY-33-69, May 19, 1969.

§ 942. Conservation and land use provisions

A. Grazing operations shall be conducted in accordance with recognized principles of good range management. Stipulations or management plans necessary to accomplish this may be made a part of the grazing permit.

B. The Superintendent shall withdraw areas from grazing for reseeding or other conservation practices and to protect the said lands from further damages and shall also issue notices to this effect to all concerned.

History

CMY-33-69, May 19, 1969.

§ 943. Range improvements

All improvements placed on range units shall be approved by the District Land Board and shall become affixed to the property unless specifically excepted therefrom under the terms of the permit. Written permission to remove improvements must be secured from the District Land Board prior to removal. The permit will specify the maximum time allowed for removal of improvements so excepted.

History

CMY-33-69, May 19, 1969.

Annotations

1. Construction and application

"The Off-Reservation Grazing Code states, in relevant part, that '[a]ll improvements placed on range units shall be approved by the District Land Board and shall become affixed to the property.' 3 N.N.C. § 943 (1969). This, contrary to Appellants' assertion, a permittee is not barred from constructing improvements to prevent her livestock from straying onto the highway." *Castillo, et al. v. Charlie, et al.*, 7 Nav. R. 181, 182 (Nav. Sup. Ct. 1995).

2. Allotment fencing

"Given that fencing on all lands, including allotments in the Eastern Navajo Agency, are subject to some local Navajo board or committee's approval, the Court concludes that, read together, the purpose of the various provisions is to deal with fencing within the Nation comprehensively. To foster a uniform, predictable system of regulating fencing within the Reservation, this purpose is facilitated by requiring district grazing committee approval of allotment fencing within the Reservation. Under this analysis, elected officials within local communities may hear and decide disputes when land owners propose to fence their land off from other users. Such fencing affects not just the parcel proposed to be fenced, but affects all other surrounding land users." *Gishie v. Morris, et al.,* No. SC-CV-36-06, slip op. at 5 (Nav. Sup. Ct. June 4, 2008).

§ 944. Special permit requirements and provisions

All grazing permits shall contain the following provisions:

A. While the lands covered by the permit are in trust or restricted status, all of the permittees obligations under the permit and the obligation of his/her sureties are to the United States as well as to the owner of the land.

B. Nothing contained in the permit shall operate to delay or prevent the termination of federal trust responsibilities with respect to the land by the issuance of fee patent or otherwise during the term of the permit.

C. The permittee agrees he/she will not use or cause to be used any part of permitted area for any unlawful conduct or purpose.

D. This permit authorizes the grazing of livestock only and the permittee shall not utilize the permitted area for hay cutting, hunting, post cutting, or any other use without proper authorization from the Superintendent or the Navajo Nation authorities.

History

CMY-33-69, May 19, 1969.

Note. Paragraph (C) rephrased for purpose of clarity.

§ 945. Bonding and insurance requirements

A. A satisfactory performance bond may be required in an amount that will reasonably assure performance of the contractual obligation. A bond, when required, may be for the purpose of guaranteeing the estimated construction cost of any improvement to be placed on the land which will become the property of the permitter or to insure compliance with special or additional contractual obligations.

B. The permittee may be required to provide insurance in an amount adequate to protect any improvement on the permitted premises; and may also be required to furnish appropriate liability insurance and such other insurance as may be necessary to protect the permitter's interest.

History

CMY-33-69, May 19, 1969.

§ 946. Trespass

A. Definition of "Trespass". The following shall be considered trespass:

1. The grazing of livestock by an owner within a permitted area not covered by the permit issued to the owner of the livestock.

2. Not removing livestock from a grazing unit when the permit is cancelled after direction is given.

3. Permitting or allowing livestock to drift into another permitted unit except as covered in 3 N.N.C. § 937.

4. Grazing of livestock upon Navajo Indian controlled lands within an area closed to grazing of that class livestock.

5. Grazing or driving livestock across any individually owned,

Navajo Nation or Government lands without an approved grazing or crossing permit.

6. Grazing of livestock upon an area withdrawn from use for grazing purposes for reseeding or other conservation practices, or to prevent any further damage to the lands, or refusal to remove livestock from such a withdrawn area.

B. Notification of Trespass. When the trespass is reported or made known to the District Land Board and the Superintendent the Board shall review and investigate the trespass complaint and if the Board determines that the trespass is actually occurring or has actually occurred it shall take the following actions:

1. By letter request the person guilty of the trespass to correct such trespass, and inform the person of the grazing rules and regulations and the penalties that can be invoked if the trespass is not corrected.

2. After the initial notification, if the Board finds that the trespass is not corrected as directed, the Board shall direct the person guilty of the trespass to appear before the Board for a formal hearing to discuss the trespass and make every effort to resolve the trespass.

3. After the person guilty of the trespass has appeared before the Board and has not corrected the trespass as directed, the Board shall declare officially that a trespass exists and impose the penalty or penalties as prescribed in this Subchapter.

4. If a person has been guilty of a previous trespass, is known to be a "habitual trespasser", is known to disregard the authorities and the rules and regulations, and is uncooperative in the proper grazing administration, the Board shall use every means in its power to resolve the trespass or trespasses and if necessary shall immediately impose the penalties as prescribed in this Subchapter without notice or hearing.

C. Penalties: When the District Land Board finds that a person is guilty of a trespass, the Board and the Superintendent with the assistance of the Crownpoint Navajo Nation Range and Livestock Office shall take the following actions at their discretion:

1. Impose upon the owner of any livestock in trespass on Navajo Indian controlled land a penalty of forty cents (40 per head for each sheep unit in trespass, together with the reasonable value of the forage consumed and damages to the property injured or destroyed.

2. Take necessary action to collect for penalties and damages from the owner of livestock determined to be in trespass. All payments for damages shall be credited to landowners where the trespass occurs.

3. If deemed necessary, seize all livestock in trespass in accordance with the Livestock Laws referred to under 3 N.N.C. § 950, and to hold the livestock until the penalties are paid by the. trespasser. While holding the livestock the trespasser will also be charged at the rate of fifty cents (50 per sheep unit per day or the actual cost for

"holding fees" for the care, feeding, and protection of the seized livestock, whichever is greater.

History

CMY-33-69, May 19, 1969.

Cross References

See Navajo Nation Criminal Code, 17 N.N.C. §§ 350, 460-466, and 524.

Annotations

1. Construction and application

"Permitters are not allowed to graze or drive livestock across any individually owned, tribal or government lands without an approved permit." *Castillo, et al. v. Charlie, et al.*, 7 Nav. R. 181, 182 (Nav. Sup. Ct. 1995).

§ 947. Control of livestock diseases

Whenever livestock on Indian controlled lands become infected with contagious or infectious diseases, or have been exposed thereto, such livestock must be treated and the movement thereof restricted in accordance with applicable Navajo Nation, federal and state laws.

History

CMY-33-69, May 19, 1969.

§ 948. Use of undesirable sires

A. Bulls grazed on open range land shall be of a uniform breed, preferably registered breeds, and the breed shall be determined by the permittees within the unit.

B. Rams shall be of the fine wool breeds.

C. Horses allowed to run stud shall be approved by District Land Board members or their designated committee. Failure to abide by this provision will make the permittee guilty of an offense and the permittee shall pay a penalty of ten dollars ($10.00) per head for each offense.

History

CMY-33-69, May 19, 1969.

§ 949. Appeals

An applicant for a grazing permit or a grazing permittee may appeal to the Joint Agency Land Board on any action taken by the District Land Board. In order for an appeal to be considered, the appeal must be presented in writing to the Joint Agency Land Board within 30 days after receipt of the written decision of the District Land Board. The decision of the Joint Land Board may be appealed to the Office of Hearings and Appeals. The appeal must be presented in writing within 30 days after receipt of the written decision of the Joint Agency Land Board.

History

CO-59-03, October 21, 2003.

CMY-33-69, May 19, 1969.

§ 950. Livestock laws

The five articles embodied in the Livestock Laws of the Navajo Reservation and other lands within the jurisdiction of the Navajo Nation Courts, as adopted on June 22, 1966, or as may be amended, shall be adhered to by the permittees of the Off-Reservation Eastern Navajo Agency jurisdiction. Permittees shall abide by any grazing stipulation that might be attached to and made a part of the permit. Such stipulations may include such provisions as the observance of boundaries, tally of livestock, breeding seasons, areas closed to grazing, proper salting, etc.

History

CMY-33-69, May 19, 1969.

Chapter 7. Control and Inspection of Livestock

History

Note. This Chapter was initially codified at §§ 551 et. seq. of this title.

Subchapter 1. Generally

§ 1201. Definitions

A. "Abandonment" means and includes the leaving of an animal by its owners or other person or persons responsible for its care or custody without making effective provisions for its proper care and control.

B. "Animals" means any animal mammal, other than human, and includes birds, reptiles, fish, wild and domesticated animals.

C. "Animal fights" means it is unlawful for any person to promote stage, hold, manage, conduct, or carry on any game, exhibition or contest in which one or more animal are engaged for the purpose of injuring, killing, maiming, or destroying themselves, or any other animals. This does not apply to rodeo events.

D. "Cruelty" means it is unlawful for any person to willfully or maliciously kill, maim, disfigure, torture, beat, mutilate, burn, scald, or otherwise conduct cruelly set upon an animal, except that reasonable force maybe used. Cruelty also includes every act or omission, which causes or unreasonably permits the continuation of unnecessary or unjustifiable pain and suffering.

E. "Department" means the Department of Resource Enforcement, Navajo Veterinary Livestock Program or the Department of Agriculture.

F. "Deputy Livestock Inspector" as used in this Act shall mean a non-commissioned officer who provides livestock inspection services only and duties shall also include the seizure of livestock under this Title.

G. "Director" means the Director of the Department of Resource Enforcement and the Director of Navajo Nation Department of Agriculture.

H. "Disposal" means the deposit or dumping of any animal (carcass) into or on any land or water so that such animal (carcass) or any constituent (animal parts) thereof may enter the environment or be emitted into the air or discharged into any water, including ground water.

I. "Division" means the Navajo Nation Division of Natural Resources.

J. "Division Director" means Executive Director of Division of Natural Resources.

K. "Equine" as used in this Chapter means horses, mules, burros and asses.

L. "Feral" means any un-owned or free ranging animal, livestock or equine not under control of an owner.

M. "Livestock" as used in this Chapter means cattle, dairy cattle, buffalo, sheep, goats, swine, and llamas, except feral pigs.

N. "Law Enforcement Officer" means any person who has successfully completed training at a recognized police training academy, has been commissioned by a designated Navajo Nation authority as a police officer, ranger, forestry officer, or resource enforcement officer, and is vested by law with a duty to maintain public order or make arrests, whether that duty extends to all offenses or is limited to specific areas of offenses or offenders. This term includes police officers, rangers, forestry officers and resource enforcement officers.

O. "Livestock Officer" means a commissioned Law Enforcement Officer who has the duties and responsibilities to enforce Title 3 and Title 17 related to livestock and who is also an authorized person to conduct livestock inspection service.

P. "Livestock Trader Permit" means a certification of a person, corporation or business who conducts business involving the sale, barter and trade of livestock, equine, hay and feed and other agricultural products.

Q. "Neglect" means failure to provide food, water and normal veterinary care for the animal(s) health and well being. During time of drought and severe weather conditions, the owner is responsible to ensure animal, livestock or equine are properly maintained and not in a state of neglect.

R. "Nuisance" means, but is not limited to defecation, urination, disturbing the peace by the presence of, sound or cry, emitting noxious or offensive odor, or otherwise endangering the well being of the inhabitants and other livestock, or equine of the community.

S. "NNERFAD" means the Navajo Nation Emergency Response to Foreign Animal Disease.

T. "NNVLP" means the Navajo Nation Veterinary Livestock Program who is responsible for the investigation, diagnosis and treatment of disease incidents and/or outbreak.

U. "Poultry" means any domesticated bird, whether live or dead, and includes chickens, turkeys, ducks, geese, guineas, ratites and squabs.

V. "Range" means every character of lands, enclosed or unenclosed, and not withdrawn from grazing, outside/inside of cities and towns, upon which livestock are permitted to graze with a valid Navajo Nation grazing permit and Eastern Navajo grazing permit.

W. "Range equine" means equine customarily permitted to roam upon the ranges of the Navajo Nation, and not in the immediate actual possession or control of the owner although occasionally placed in enclosures for temporary purposes.

X. "Range livestock" means livestock customarily permitted to roam upon the ranges of the Navajo Nation, and not in the immediate actual possession or control of the owner although occasionally placed in enclosures for temporary purposes.

Y. "Ratite" means ostriches, emus, rheas and cassowaries.

Z. "Stray animal" as used in this Chapter, means livestock, equine or ratites whose owner is unknown or cannot be located, or any animal whose owner is known but permits the animal to roam at large on the streets, alleys, fenced paved roads, fenced right of ways, range or premises of another without permission.

AA. "Veterinarian" means accredited Navajo Nation, state or federal veterinarian.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Definitions under Chapter 9, Health Requirement Offenses; Control of Contagious Diseases; Penalties, see § 1501 of this Title.

Grazing Regulations, see § 701 *et seq.* of this title.

Resources Committee authority, see 2 N.N.C. § 691 *et seq*.

Subchapter 3. Inspection of Livestock

§ 1251. Livestock Officer and Deputy Livestock inspectors; appointment; powers and duties

A. The Director of the Division of Natural Resources shall have the authority to appoint livestock officers and deputy livestock inspectors to enforce the provisions of the livestock laws of the Navajo Nation and such other laws that may pertain to the transfer, importation, sale and/or health of livestock. Such livestock officer and deputy livestock inspectors shall be responsible to the Director of Department of Resource Enforcement.

B. Livestock officers and deputy livestock inspectors may authenticate bills of sale of livestock and equine, brands, marks and/or animal identification, deliver certificates of acknowledgment thereof under their hands and seals and take acknowledgments to applications for brands and marks. A service fee and administrative fee per form and inspection fee per head (on bill of sales) will be taken as payment to be determined by the Department administration as deemed necessary.

C. Livestock officers and deputy livestock inspectors shall not grant a certificate of inspection of unbranded hides or livestock, or of hides or livestock upon which the marks and brands cannot be ascertained or which disclose ownership by some person other than the one seeking the certificate of inspection. No certificate of inspection will be given without original documents. No Xerox copies will be accepted as proof of ownership without certified stamp from notary public, courts or Bureau of Indian Affairs (BIA).

D. A livestock officer may stop any person who is in possession of and is conveying, shipping or transporting livestock, equine or hides of livestock to examine brands, marks and other animal identification, certificates of brand inspection and bills of lading or bills of sale relating to the livestock in transit if the officer or inspector has probable cause or reasonable suspicion to believe that the person has violated this Title or Title 17 relating to livestock.

E. Livestock officers and deputy livestock inspectors may enter any premises where livestock are kept or maintained to examine brands or marks or other evidence of ownership or to determine the health or welfare of livestock. If admittance is refused or physically denied and probable cause exists, the livestock officer may immediately request a warrant from the nearest court of the Navajo Nation to allow such entry.

F. Livestock officers are law enforcement officers and shall have the powers of law enforcement officers and carry a Department-issued weapon, with respect to Title 3 and Title 17 relating to livestock, and shall cite, apprehend or arrest any person who violates the livestock laws, and shall, upon reliable information that any person has violated such law, make the necessary affidavits for arrest and examination of the person and shall, upon warrants issued therefor, immediately arrest the person.

G. Deputy livestock inspectors' powers and duties will not include Subsections D and F of this Section.

H. Livestock officers and deputy livestock inspectors' will investigate cases of livestock and equine abandonment, neglect, nuisance and cruelty.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Note. At Subsection A, "Supervisor of the Range and Livestock Department" corrected to "Director of Department of Resource Enforcement."

Cross References

On arrests, see 17 N.N.C. §§ 1803 and 1804.

§ 1252. Method, place and time of inspection of livestock

A. Livestock officers and deputy livestock inspectors shall inspect, other than equine previously inspected pursuant to Section 1354 and livestock subject to authorized self-inspection, livestock for health, marks and brands at loading stations, at places of exit from the Navajo Nation and at places where livestock are gathered to be sold, slaughtered, transported, conveyed, shipped or driven from their range for any purpose whatsoever, except when livestock are being moved from pasture to a destination within the Navajo Nation without leaving the exterior boundaries of the Navajo Nation and no change of ownership, slaughter or other disposition is involved and the owner is utilizing self-inspection approved by the department/division. Livestock officers and inspectors need not inspect outgoing livestock from feedlots, dairies and producers utilizing self-inspection but may conduct periodic inspections to ascertain compliance with this Chapter.

B. Brand inspection shall be made by daylight only and in a manner which enables the livestock officer or deputy livestock inspector personally to see, inspect and record each and every mark, brand and/or other animal identification. Inspections of livestock for health at a slaughterhouse may be made by other than daylight if adequate artificial light is provided.

C. Upon being advised that livestock is subject to inspection, livestock officers and inspectors shall arrange for the inspection of the livestock and inspect such livestock within 96 hours.

D. Feed lots, dairies and producers utilizing self-inspection approved by the Division shall comply with this Section and procedures established.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1253. Record of inspection; disposition of record and copies

A. Livestock officers and deputy livestock inspectors shall make a record of all inspections disclosing the place and date of the inspection, its purpose, the kind, sex and description necessary to identify the livestock, the number of head running in every brand and mark and/or other animal identification, the name of the seller if the livestock is to be sold, the name of the shipper if the livestock is to be shipped, change of premise and other necessary information.

B. Feedlots, dairies and producers utilizing self-inspection approved by the Division shall comply with this Section and procedures established by the Division.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1254. Inspection as to ownership of livestock

A. Livestock officers and deputy livestock inspectors, in making inspections, shall require from livestock auctions or the owner or person in charge of the livestock a list of the brands and marks or necessary evidence of ownership and shall determine by inspection of the livestock that the person in charge is the owner or an approved livestock auction or is authorized in writing to handle the livestock. If a person claims to own offspring of an equine that the person leased, the livestock officer or inspector shall require that the owner of the equine obtain an ownership and hauling certificate for the offspring and transfer ownership of the offspring to the lessee.

B. Feedlots, dairies and producers utilizing self-inspection approved by the Department/Division shall comply with this Section and procedures.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1255. Seizure of livestock to be shipped by unauthorized person

If livestock to be shipped by rail or other conveyance or transport is upon inspection found not to belong to the shipper, or if the handler is not authorized in writing to sell, ship, transport or drive the livestock, it shall be taken by the livestock officer and deputy livestock inspector.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1256. Certificate of inspection; delivery

A. Upon completion of an inspection, the livestock officer and deputy livestock inspector shall deliver to the person in charge of the livestock a certificate on a form provided by the Department disclosing the date of inspection, the purpose for which inspected, the number, sex and kind of animals inspected, all their brands, animal identification and the fee collected. The certificate of inspection shall have clearly imprinted on its face the legend: "This certificate of inspection is not and shall not be used as a bill of sale."

B. Feedlots, dairies and producers utilizing self-inspection approved by the Department/Division shall comply with this Section and procedures.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1257. Service charge and inspection fee; self-inspection; civil penalties

A. Livestock officers and deputy livestock inspectors shall collect from the person in charge of cattle inspected a service charge plus an inspection fee per head for making inspections for the transfer of ownership, change of premise, sale, slaughter or transportation of cattle.

B. Livestock officers and deputy livestock inspectors shall collect from the person in charge of sheep inspected a service charge plus an inspection fee per head for making inspections for the transfer of ownership, change of premise, sale, slaughter or transportation of sheep.

C. Livestock officers and deputy livestock inspectors shall collect from the person in charge of dairy cattle inspected a service charge plus an inspection fee per head for making inspections for the transfer of ownership, change of premise, sale, slaughter or transportation of dairy cattle.

D. The Department may approve self-inspection by feedlots and dairies. Movement shall be documented on forms provided by the Department. Feedlots and dairies, which utilize self-inspection, shall pay an outgoing inspection fee of 50 cents ($.50) per head.

E. Service charges and inspection fees collected by the livestock officers and inspectors, feedlots and dairies utilizing self-inspection shall be remitted to the Division. Service charges and inspection fees incurred by feedlots and dairies shall be remitted to the Department within 10 days after the end of the month in which the livestock were inspected.

F. Qualified deputy livestock inspectors shall be compensated for their time as livestock inspector to half of the service charge for each livestock inspection done by said person.

G. Service charge will be determined by the administrator of the Department with consultation with surrounding state and Navajo Nation control that is in charge of livestock inspection service.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJA-1-84, January 19, 1984.

CJN-83-66, June 22, 1966.

§ 1258. Transportation of livestock, equine, animal, poultry and/or ratite by person without certificate of inspection or health certification or validated auction invoice; classification

A. Except as otherwise provided in this Chapter, it is unlawful for any person, firm or corporation to carry, transport or convey livestock, equine and ratite by any conveyance without first having such livestock, equine and ratite inspected, and having in immediate possession the duplicate record of the inspection, an auction invoice issued pursuant to Section 1261 or a registration or identification card issued pursuant to Section 1264 or Section 1265, and any person who commits any such unlawful act is guilty of an offense.

B. It is unlawful for any person to transport livestock, equine and ratite without his/her issued certificate of inspection and any person who commits any such unlawful act is guilty of an offense.

C. It is unlawful for any person to transport livestock, equine and ratite without the required health documents/certificates as required by law and any person who commits any such unlawful act is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Penalty, see § 1267 of this Title.

§ 1259. Alteration of certificate or record of inspection

Any person who intentionally alters a certificate, auction invoice, bill of sale, or record of inspection or copy thereof issued by a livestock officer or deputy livestock inspector or other agent of the Department, is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Penalty, see § 1267 of this Title.

§ 1260. Substitution of livestock, equine, ratite and animals after issuance of certificate of inspection

Any person who removes livestock, equine, ratite and animals and substitutes another therefor or adds other animals to a lot of livestock for which an inspection certificate has been issued for shipment, sale or slaughter, is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Penalty, see § 1267 of this Title.

§ 1261. Inspection of livestock to be slaughtered, sold or transported; fees; violation; classification

A. Except as otherwise provided in this Section, livestock, other than equine previously inspected pursuant to Section 1264 and livestock inspected at feedlots or dairies shall not be slaughtered, sold, purchased, driven, transported, shipped or conveyed unless the animals have been inspected by a livestock officer or deputy livestock inspector for health, brands, animal identification and marks before they are slaughtered, sold, purchased, driven, transported, change of premise, shipped, or conveyed and the inspection fee paid.

B. The owner or agent of the owner of the livestock to be slaughtered, sold, driven, transported, changed of premise, shipped, or conveyed as provided in Subsection A of this Section shall notify the nearest livestock officer or inspector of that intention.

C. Equine consigned to either licensed livestock auctions or other special auctions approved by the Department from out of state or from Indian reservations in this state or from other state or federal agencies without prior inspection shall be inspected on delivery at an auction. Auction buyers of these equine shall obtain a new ownership and hauling certificate within 30 days pursuant to Section 1264. All equine sold at auctions shall be inspected out on an inspection certificate or auction invoice and the seller shall pay a service fee per head.

D. Equine bearing the registered brand of the owners and/or other animal identification from points of origin in this state, which do not have an ownership and hauling certificate, shall be inspected before being transported to an auction or to immediate slaughter on an inspection form provided by the Department. The seller shall pay a service fee per head and an administrative service charge.

E. All livestock sold at auctions shall be inspected on an inspection certificate or auction invoice validated by the Department. Equine may be transported within this state on either document for 30 days after purchase at auctions described in this Section.

F. The owner or producer of livestock excluding equine may slaughter or transport to another person to slaughter such livestock without having the animal inspected and without paying the inspection fee or service charge if the meat of such slaughtered livestock is solely for home consumption, ceremonial use by such owner providing that such owner contacts a livestock officer or inspector within a 48 hour period prior to slaughter and is able to establish proof of ownership either by a prior inspection certificate, by a recorded brand on the animal or other animal identification or that the animal was raised by said owner. If proof of ownership cannot be established to the satisfaction of the livestock officer or inspector then the livestock officer or inspector may require an inspection prior to slaughter.

G. The Director may waive an inspection for brands and marks before the slaughter of an animal if a Navajo Nation, federal or state certified meat inspector on the premises certifies on a form provided by the Department that, as determined by an ante mortem inspection, the animal is in a distressed condition and for humane reasons should be slaughtered immediately if it is otherwise fit for slaughter and if the hide, carcass and certification are segregated and held pending inspection for brands and marks. The Department Director may waive inspections under this Subsection only for individual animals, and a separate certification shall be made for each animal.

H. Livestock officers or inspectors shall not inspect livestock for health before they are slaughtered at an establishment, which is subject to federal meat inspections as provided under Chapter 7 of this Title.

I. A person violating this Section is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1267 of this Title.

§ 1262. Mobile slaughtering units; custom slaughtering; brand inspections

A. A mobile slaughtering unit or a locker plant slaughtering livestock on a custom basis shall notify the local livestock officer or inspector before any slaughtering operation. If brand inspection of an animal is not conducted before slaughter, the mobile slaughterer or the locker plant slaughtering the animal shall retain the hide for a 48 hour period for inspection by a livestock officer or inspector.

B. Mobile slaughtering units and locker plants which slaughter livestock shall maintain accurate records of the number of animals slaughtered, their source and ownership and the brands on the animals. These records shall be available for inspection by a livestock officer or inspector during regular business hours.

C. All locker plants and mobile slaughtering units licensed by the Navajo Nation or federal agencies shall collect the brand inspection fees and all other fees provided for by law and rules of the Director for each animal slaughtered and remit the fees to the Department.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1267 of this Title.

§ 1263. Unbranded livestock kept in close confinement; shipment, sale and inspection

A. Owners of livestock, other than equine, who do not have a recorded brand and who maintain their animals in close confinement not exceeding 10 acres may transport their animals to livestock auctions with the requirements of this Chapter.

B. Animals shipped, conveyed or transported under this Section shall be accompanied by proof of ownership, such as auction invoices or inspection certificates which the owner received at the time of purchase.

C. Any livestock, other than equine, that are transported, shipped or conveyed pursuant to this Section and that have not been inspected by a livestock officer or inspector within the previous 48 hours shall be inspected at a livestock inspection station by a livestock officer or deputy livestock inspector before the sale, slaughter or change of ownership and all applicable inspection fees shall be paid.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1264. Ownership and hauling certificates for equine; inspection; exemption; cancellation; civil penalty; fees

A. Except as otherwise provided in this Act, owners or persons in charge of equine shall obtain ownership and hauling certificates before weaning for equine that are born on the Navajo Nation or within 30 days of the entrance date of all equine into the Navajo Nation. A person who fails to obtain a certificate within the prescribed time is subject to a civil penalty of two dollars and fifty cents ($2.50) per day in excess of 30 days that the equine is in the Navajo Nation without a certificate, but not exceeding a total of one hundred and fifty dollars ($150.00).

B. Livestock officers or deputy livestock inspectors shall collect from the owner or person in charge of equine an inspection fee of twenty-five dollars ($25.00) per head for a permanent Navajo Nation Hauling Card.

C. Notwithstanding other Sections of this Title, ownership and hauling certificates issued pursuant to Subsection A of this Section shall be valid for the life of the animal or until transferred pursuant to Section 1265.

D. Ownership and hauling certificates issued with respect to any equine shall be surrendered to the Department if any of the following occurs:

1. The equine dies;

2. The equine is sold and shipped out of state; or

3. The equine is sent to slaughter or is disposed of for humane reasons.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1267 of this Title.

§ 1265. Transfer of ownership and hauling certificates; issuance of new

ownership and hauling certificates; fees; civil penalty

A. The seller of any equine who has a valid ownership and hauling certificate for such animal and the buyer of such animal, except a person who has been issued an equine trader's permit pursuant to Section 1268, shall both complete and date a transfer request form. One copy of the transfer request form shall be given to the seller.

B. Within 30 days of the transfer of ownership of any equine, provided for in Subsection A of this Section, the buyer shall forward to the Department the ownership and hauling certificate, the original copy of the completed transfer request form and twenty-five dollars ($25.00) per head fee. Upon receipt, the Department shall issue a new ownership and hauling certificate to the transferee and a blank transfer request form. Such certificate shall be valid for the life of the animal or until sold. A person who fails to transmit the required transfer documents to the Department within the prescribed time is subject to a civil penalty of two dollars and fifty cents ($2.50) per day in excess of 30 days that the documents are not furnished to the Department, but not exceeding a total of one hundred and fifty dollars ($150.00).

C. A Livestock trader permittee who purchases an equine on the Navajo Nation must receive from the seller the ownership and hauling certificate and the original and buyer's copy of a transfer request form with the seller's portion completed. When the equine is sold, the buyer shall complete the buyer's portion of the form and comply with the requirements of Subsection B of this Section.

D. A livestock trader permittee shall sign and enter his permit number on the transfer document when he transfers ownership of an equine.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1267 of this Title.

§ 1266. Seasonal inspection for exhibition and summer/winter pastures livestock; fees

A. Seasonal inspection certificates may be issued for exhibition livestock for any purpose other than slaughter, sale or trade. The fee for a seasonal brand inspection certificate is five dollars and fifty cents ($5.50) per head of livestock in excess of 10.

B. A livestock officer or inspector shall issue a seasonal inspection certificate on the request of the livestock's owner or his agent. The certificate shall state the date of issuance, the sex, color and breed, the brand or brands and their location and any other identifying marks/devices and the name of the owner of the livestock. The words "Seasonal Brand Inspection" shall be written across the face of the certificate.

C. The certificate is valid for the calendar year of the date of issuance and shall accompany the livestock while in transit.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1267 of this Title.

§ 1267. Penalties

Unless otherwise provided any person who violates any Sections of this Chapter and is convicted of such violation shall be subject to the following punishments: For violation of Sections 1258 to 1266, he/she shall be sentenced to labor for a period not to exceed 90 days or shall be fined a minimum fine of one hundred dollars ($100.00) sum and not to exceed one thousand dollars ($1,000.00), or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Note. Slightly reformatted for statutory consistency.

§ 1268. Livestock Trader Permit

A. The Department of Agriculture shall issue a Livestock Trader Permit to an applicant who pays a fee of two hundred and fifty dollars ($250.00) and who complies with the requirements of this Section. The permit is valid for one year from the date of issuance and may be renewed on payment of an annual renewal fee of two hundred and fifty dollars ($250.00) and on compliance with the requirements of this Section.

B. Applications for initial and renewal permits shall contain the following information:

1. The full name of the applicant;

2. The applicant's business and residence addresses with the appropriate premise identification coordinates;

3. The date and place of the applicant's birth;

4. Statement of Intent;

5. Information concerning livestock trading permits held in other states and their status;

6. Information concerning any felony convictions within seven years before the date of application, including any convictions subsequently set aside or resulting in restoration of civil rights;

7. Any other information, which the Department may require;

8. Bond information. All livestock traders will be bonded before issuance of a Livestock Trader Permit; and

9. Livestock trader must be knowledgeable and comply with individual animal identification and registration of change of premise for each livestock and equine purchase by such livestock trader.

C. The Director may adopt rules specifying additional information, which may be reasonably required to be submitted on an application for a Livestock Trader Permit or renewal of a permit to allow the Department to determine the fitness of the applicant to receive a permit or renewal of a permit.

D. The Director may deny, refuse to renew, suspend or revoke a Livestock Trader Permit pursuant to this Section and Section 1269, for any of the following reasons:

1. A violation of any Section of this Act or of any rule adopted pursuant to this Act;

2. The revocation or suspension for cause of and Livestock Trader Permit issued by the Department or by any other state within five years before the date of application;

3. A conviction of a felony involving a crime related to the livestock trade occupation within seven years before the date of application for a Livestock Trader Permit; or

4. To maintain requirements of the BIA livestock buyer specifications under the Code of Federal Regulations applicable to both, Non-Indians and Indians.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1274 of this Title.

§ 1269. Inventory and monthly report of livestock traders; mandatory requirements

Livestock trader permittee shall maintain inventory records of all livestock sold. The records shall include the date sold, the ownership, premise number and hauling certificate number and the name and address of the buyer. At the end of each month, each livestock trader permittee shall report to the Department the number of livestock bought and sold during the month. Each livestock trader permittee shall also surrender to the Department each month all bill of sales, ownership documents, and hauling certificates in his possession belonging to all livestock that have been moved out of the Navajo Nation. Authorized representatives of the Department may review the inventory records of any livestock trader permittee during normal business hours.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1274 of this Title.

§ 1270. Failure to possess a Livestock Trader Permit

Any person who trades livestock and fails to possess a Livestock Trader Permit in his/her possession, is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1274 of this Title.

§ 1271. Failure to comply with Livestock Trader Permit requirements

Any livestock trader who fails to comply with Livestock Trader Permit requirements shall be guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1274 of this Title.

§ 1272. Failure to stop at a livestock checkpoint

Any person who is transporting livestock, equine, buffalos or ratites and fails to stop at a livestock checkpoint is guilty of an offense and shall be fined a minimum of fifty dollars ($50.00) and not to exceed one hundred dollars ($100.00) or 30 days in jail or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1273. Cruelty of animal-extreme cruelty of animal, penalties, exception

A. Cruelty to animals prohibited:

1. Cruelty: It is unlawful for any person to willfully or maliciously kill, beat, sexually abuse, maim, poison, disfigure or scald any animal, except that reasonable force may be employed only to drive off and repel vicious or trespassing animals.

2. Molesting Animals: It is unlawful for any person to tease, annoy, disturb or molest any animal, which is on the property of its owner, or under the control of its owner.

3. Neglect:

a. It is unlawful for any owner of an animal to fail, refuse, or neglect to provide said animal with proper and adequate food and water. Any animal habitually kept outside shall be provided, by its owner, with a structurally sound, enclosure large enough to accommodate the animal in a manner suitable for that species, or other shelter suitable to the species.

b. An owner must keep the premise where an animal is kept free of garbage, hazardous materials, insect infestation, and other debris that may endanger the animal's health & safety.

c. An owner must provide an injured animal or sick animal with adequate veterinary care so as to reduce suffering.

4. Abandonment: It is unlawful for any person to abandon any livestock, equine, or animal within the Navajo Nation.

5. Animal Fights: It is unlawful for any person to promote stage, hold, manage, conduct, or carry on any game, exhibition or contest in which one or more animals are engaged for the purpose of injuring, killing, maiming or destroying themselves, or any other animal.

B. This Section does not apply to:

1. The practice of veterinary medicine as provided in any applicable Navajo Nation veterinary laws;

2. The treatment of livestock and other animals used on farms and ranches for the production of food, fiber or other agricultural products, when the treatment is in accordance with commonly accepted agricultural animal husbandry practices; and

3. Use of commonly accepted rodeo practices, unless otherwise prohibited by law.

C. Penalties:

1. Any person in violation of Subsection 1273(A)(1) Cruelty will be fined a minimum of five hundred dollars ($500.00) not to exceed five thousand dollars ($5,000.00) or sentenced to one year in jail or both.

2. Any person in violation of Subsection 1273(A)(2) Molesting Animal(s) will be fined a minimum of five hundred dollars ($500.00) not to exceed two thousand and five hundred dollars ($2,500.00) or sentenced to six months in jail or both.

3. Any person in violation of Subsection 1273(A)(3) Neglect will be fined a minimum of two hundred and fifty dollars ($250.00) not to exceed five thousand ($5,000.00) or sentenced to six months in jail or both.

4. Any person in violation of Subsection 1273(A)(4) Abandonment will be fined a minimum of five hundred dollars ($500.00) not to exceed two thousand and five hundred dollars ($2,500.00) or sentenced to six months in jail or both.

5. Any person in violation of Subsection 1273(A)(5) Animal Fighting will be fined a minimum of five hundred dollars ($500.00) not to exceed two thousand and five hundred ($2,500.00) or sentenced to six months in jail or both.

D. Courts may also forfeit animals under this Section to the Navajo Nation. Section 1306 shall be applied for restitution purposes. Restitution shall be included but not limited to the following: transportation costs, salary, veterinary medical fees and general feed and care requirements of the forfeited animals.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1274. Penalties

Any person who fails to comply with Sections 1268 to 1271 and is convicted of this violation shall be fined a minimum of two hundred and fifty dollars ($250.00) and not to exceed one thousand and five hundred dollars ($1, 500.00), or have his/her livestock buying privilege within the jurisdiction of the Navajo Nation suspended for one year or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Subchapter 5. Seizure of Livestock

§ 1301. When a livestock officer and deputy livestock inspector may seize livestock

Livestock officers and deputy livestock inspectors shall seize livestock, except unweaned animals running with their mother, wherever found, when the livestock officer questions the livestock's ownership. The question of ownership may be raised in the following circumstances:

A. The livestock is not branded as required by this Chapter;

B. The ownership of the livestock is questioned by the inspector or other person;

C. The livestock has brands so mutilated, indistinct, burned or otherwise disfigured as to be difficult of ascertainment;

D. The livestock bears a brand which is not recorded;

E. The livestock is freshly branded and not found with its mother;

F. The livestock has a brand or mark not the recorded brand or mark of the owner;

G. The livestock is that which is known as "leppys", "orejanas", "sleepers", "dogies", or "mavericks";

H. Circumstances raising questions as to the livestock's ownership;

I. Circumstances involving livestock abandonment, neglect and cruelty;

J. Circumstances where the livestock endangers public safety and right-of-way areas; or

K. When an owner or user allows his or her livestock or livestock under his or her control to occupy or graze upon the lands of another, where notice of trespass is given by actual communication, posting, fencing, or other means calculated to give notice by a livestock officer.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1302. Keeping livestock following seizure; expenses; use of livestock in criminal prosecution; sale of unclaimed livestock; non-liability of the Navajo Nation

A. When a livestock inspector has seized livestock, as provided by this Subchapter, he/she shall safely keep and care for it for a period of seven days, during which any person may inspect the livestock.

B. The expenses of seizure, feeding and caring for livestock for the seven day period shall be a charge against the Department and paid from any fund available for that purpose, including the Livestock Custody Fund.

C. At any time prior to the expiration of seven days after the seizure of livestock, the appropriate law enforcement officials may take charge of and keep the livestock at the expense of the Navajo Nation when deemed to be of evidentiary value in any criminal prosecution arising from the seizure.

D. The Director may contract with any person to handle, feed and care for livestock taken into custody under this Section. The Navajo Nation is not liable for the injury or death of any person or livestock or damage to property due to performance of the contract.

E. If the appropriate law enforcement officials have not possessed the seized livestock upon the expiration of the seven days after its seizure, it shall be sold by the inspectors for cash at a livestock auction or to a livestock buyer after five days notice given by posting written notice in three public places in the District where the livestock is held. Proceeds from the sale shall be transmitted to the Department to be deposited in the Livestock Custody Fund and upon final determination of all actions arising from the seizure of the livestock the Department shall pay the proceeds to the persons entitled thereto under the judgment of the court. The Department shall cause to be posted in three public places in the district where the livestock are held stating that the livestock will be sold at public auction for cash to the highest bidder. The notice shall be posted for seven days after the livestock have been seized and at least five days before the sale. The notice shall state the location where the livestock will be sold. Proceeds from the sale shall be transmitted to the Department to be deposited in the Livestock Custody Fund established by Section 1302, and upon final determination of all actions arising from the seizure of the livestock the Department shall pay the proceeds, less the veterinary cost, hauling charges and expense of feeding and caring for such livestock, to the persons entitled thereto under the judgment of the court.

F. The amount received by the Department of Resource Enforcement shall be remitted to the Controller of the Navajo Nation, and deposited in a special fund designated the Livestock Custody Fund. The Livestock Custody Fund may be used by the Department of Resource Enforcement for the enforcement of any of Sections of this Chapter.

G. Any livestock or equine seized by a livestock officer or deputy livestock inspector, if not vaccinated or proof of vaccination is not provided shall have said livestock or equine vaccinated before transporting said livestock or equine to the seizure pens.

H. Whenever a livestock officer or deputy livestock inspector finds any animal is or will be without proper care because of injury, illness, and/or incarceration of as a result of the absence of the owner or person responsible for the care of such animal, the livestock officer or deputy livestock inspector may enter the property or premises where said animal is located and may take up such animal for protective care; and in the event of sickness or injury of the animal, under the instruction of an accredited veterinarian, the livestock officer or deputy livestock inspector may take such as called for to prevent undue pain and suffering, including immediate destruction of the animal.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

ACD-166-82, December 21, 1982.

§ 1303. Report of seizure; filing and docketing

A. Livestock officers or deputy livestock inspectors shall forthwith report any seizure of livestock pursuant to this Subchapter to the appropriate law enforcement officials and to the Department.

B. The report of the livestock officer or deputy livestock inspector relating to the seizure of livestock shall give a general description of the livestock seized, brands and other animal identifications, if any, together with the place of and reason for the seizure and the probable value of the livestock and request that the owner and claimant be cited to appear and prove ownership.

C. The Department shall file the report and shall file an action in the Navajo Nation Court in the name of the Navajo Nation, and against the reputed owners of the livestock, if known, and if not known, against the unknown owners.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Note. See §§ 1301 and 1302 herein.

§ 1304. Setting time for hearing on ownership of seized stock; issuance of citation

A. The clerk of the court shall enter a brief statement thereof on the docket and set a time for hearing evidence of the ownership of the livestock, which shall be not less than seven and not more than 15 days after the date the report is filed.

B. The clerk shall issue a citation directing all persons claiming the livestock, or any portion thereof, to appear at the time set, and offer proof of ownership.

C. The citation shall be addressed to those whom it may concern. It shall set forth substantially the facts given in the report. The citation shall be delivered to and served by the livestock officer and deputy livestock inspector who made the seizure. The citation is returnable and shall be heard as a civil action.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1305. Service of citation on owner of stock seized; proceedings on default

A. If the livestock seized is branded and marked with an adopted and recorded brand, mark, or other animal identification, the citation shall be served upon the person who owns the brand or mark as shown by the record in the brand book if such person can be found on the Navajo Nation. The service shall be at least one day before the day set for the hearing and a copy of the citation shall be posted in at least three public and conspicuous places in the District at least five days before the day set for the hearing.

B. At the time set for hearing, the livestock inspector, or other officer, shall make return of the citation to the court. If it appears that due service of the citation has been made, as required by this Section, and no one appears to claim the livestock so seized, or any portion thereof, within the time provided, the court shall thereupon adjudge the livestock forfeited to the Navajo Nation and shall order it sold as provided in this Subchapter.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1306. Hearing on claim; release or sale of seized stock; appeals

A. If any person appears at the time fixed for the hearing and claims the livestock, or any portion thereof, the claim shall be stated and the judge of the court shall enter upon the minutes of the court the fact that the claim is made and the hearing shall proceed as in civil actions.

B. Livestock determined by the court to be owned by any person shall be released from seizure, upon payment of the pick up and hauling charges and expenses of feeding and caring for such livestock, and livestock not so adjudged, or the ownership of which is doubtful, shall be forfeited to the Navajo Nation and ordered sold by the livestock officer or deputy livestock inspector at public auction at a convenient public place in the district where seized, upon a fixed date after notice, as provided in 7 N.N.C. § 709.

C. An appeal from the judgment may be taken as in civil actions and shall be governed by the same rules.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1307. Sale of seized stock; disposition of proceeds

A. Livestock officers or deputy livestock inspectors shall execute the order of sale made pursuant to 3 N.N.C. § 1306 and deliver a bill of sale to the purchaser, describing the livestock sold and the amount sold for, and forward to the Department a duplicate of the bill of sale. Upon delivery of the bill of sale, title to the livestock shall pass to the purchaser.

B. Livestock officers or deputy livestock inspectors shall immediately after the sale is made, or after release to the owner who pays the hauling charges and expenses of feed and care of such livestock, remit the proceeds thereof to the Department, together with an itemized statement of the expense of the seizure and sale, which shall be paid as other claims.

C. The amount received by the Department shall be remitted to the Controller of the Navajo Nation, and deposited in a special fund designated the Livestock Custody Fund.

D. The Livestock Custody Fund may be used by the Department for the enforcement of this Chapter.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

§ 1308. Holding and sale of stray animals; repossession before and after sale; non-liability of Navajo Nation

A. When a livestock officer or deputy livestock inspector finds a stray animal he/she shall attempt to locate the owner, and if located notify him/her where the animal may be found. If the owner does not take immediate possession of the animal, or if the owner or claimant thereof is unknown or cannot be located, the inspector shall seize the stray animal and sell it at public auction to the highest bidder for cash, after giving at least five days notice of the sale.

B. The Department shall cause notice to be posted and shall describe the animal to be sold and shall state the time and place of sale, said notice shall be posted in at least three public and conspicuous places in the district wherein the animal was found at least five days before the date set for the sale. If the owner of the animal is known and can be located, a copy of the notice shall also be delivered to the brand owner's residence at least five days before the sale. The notice shall state the location where the stray animal will be held and the location where the animal will be sold.

C. The owner of a stray animal may take possession of the animal at any time prior to sale by proving ownership, paying the inspection fee, and all expenses incurred in keeping and caring for the animal. This will include trailer transportation plus pick up costs, mileage and Department personnel man hours used in seizing this stray animal and any other cost incurred in maintaining said livestock.

D. If the owner of the stray does not claim the animal before the day of sale, or if the owner is unknown or cannot be located, the livestock officer or deputy livestock inspector shall sell the animal pursuant to the notice, and shall deliver a bill of sale and a livestock inspection certificate to the purchaser. The owner of an animal sold may take possession of it at anytime before the purchaser thereof sells it by paying to the purchaser the purchase price paid at the sale, together with the expense of keeping and caring for the animal from the date of sale to the time the owner takes possession of the animal.

E. Livestock officer or deputy livestock inspector shall immediately after the sale is made remit the proceeds thereof to the Department, together with an itemized statement of the expenses of the seizure and sale, which shall be made as other claims. The amount received by the Department shall be remitted to the Controller of the Navajo Nation and deposited in a special fund entitled Livestock Custody Fund.

F. Livestock that are received at auction markets without proper documentation but with no evidence of criminal intent by the shipper may be sold, but the livestock officer or deputy livestock inspector shall impound the proceeds of the sale in the Livestock Custody Fund established by Section 1302. On presentation of proper documentation of ownership, the Department shall pay the proceeds, less any charges incurred, to the person who is entitled to the proceeds.

G. This Section shall also apply to cruelty, molested, neglect, abandonment and animal fight livestock or equine.

H. The Director may contract with any person to handle, feed and care for stray animals taken into custody under this Section. The Navajo Nation is not liable for the injury or death of any person or stray animal or damage to property due to performance of the contract.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Livestock brands generally, see §§ 2001, 2002 of this title.

Other offenses relating to livestock brands, see 17 N.N.C. § 461.

Penalty, see § 1356 of this title.

C.J.S. Animals §§ 264 to 270, 272 to 290, 309 to 314, 428, 434, 505.

§ 1309. Representation of livestock officer by Navajo Nation prosecutor

The Navajo Nation prosecutor of the district wherein the livestock is seized shall represent the livestock officer or deputy livestock inspector and the interests of the Navajo Nation in proceedings under this Act.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1310. Notification required on seizure by government agencies

All Navajo, federal, state and local governmental agencies shall notify the Department within two hours of any seizure of any livestock or property in or on which livestock is present or when a person responsible for the care of any livestock is taken into custody and the person from the tribal, federal, state or local governmental agency knows that the person taken into custody is responsible for the care of any livestock.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1311. Livestock or equine roundup procedures and requirements

A. Procedures:

1. District Grazing Committee members and Eastern Land Board members (hereinafter "members") must assess the livestock body condition, availability of forage, water and situation in their respective chapters and present their evaluation at the next chapter meeting.

2. By resolution, the chapter will identify a team to coordinate roundup activities to conduct the roundup and recommend said livestock to be sold. The chapter will designate a lead person for this team.

3. Upon receipt of chapter authorization, the chapter members shall identify all available resources including, but not limited to, funds, feed, water troughs, manpower, vehicles, and trailers. The chapter

official shall provide assistance on an as needed basis. The members shall also coordinate the roundup with the Resource Enforcement Department, livestock officer or local deputy livestock inspector, and the Department of Agriculture.

4. Chapter members and livestock owners shall be given 10 days notice of the dates, times, and location of the roundup. Such notice shall include posting of three written notices at public places within the communities. Public services announcements may be used for radio at the discretion of the chapter.

5. It is mandatory for a livestock officer or deputy livestock inspector to be present at all roundups and livestock sales to perform inspections and ensure compliance with the livestock laws of the Navajo Nation as codified at Sections 1201 through 1523.

6. Process for the disposition of livestock gathered during the roundup:

a. All unclaimed and unbranded livestock shall be hauled to designated holding pens.

b. Owners shall have five days to claim their stray animals which were impounded. Proof of ownership shall be required with original documents only.

c. After the five-day claim period, the Department of Resource Enforcement shall sell the remaining livestock.

d. The designated livestock officer or deputy livestock inspector shall be responsible for maintaining accurate records of the description, animal identification (when applicable) and type of livestock gathered during the roundup, the purchase price, date, and location of the sale. All records will be submitted to the Department at the end of the roundup.

e. All proceeds from the sale of the livestock or equine shall be placed in the Livestock Custody Fund account for 20 days. These funds shall be disbursed to persons having a rightful claim to any livestock sold. Expenses for the transportation, care, feeding and sale of the livestock shall be deducted from any payments due.

f. After the 20-day period, the remaining funds, less expenses for the transportation, care, feeding and sale of the livestock as submitted by the Department of Resource Enforcement, Navajo Nation Veterinary and Livestock Program, Department of Agriculture, and chapter, shall be deposited and maintained in the Livestock Custody Fund account to be used by Department of Resource Enforcement, Navajo Nation Veterinary and Livestock Program, Department of Agriculture and Grazing Management Program.

g. Claims are to be submitted within 20 days of the seizure.

B. Voluntary Sales.

1. Chapter member(s) who choose to sell excess livestock during a roundup shall be responsible for the transportation of their livestock to the sale site. Participants in the scheduled livestock sales shall abide by the sale procedures established by Navajo Nation Code and the Resource Enforcement Department.

2. It is recommended that all livestock owners evaluate their livestock and use the following factors in deciding to market any or all of their livestock:

a. Excess or unwanted animals.

b. Cull animals.

(1) Old or sick animals.

(2) Infertile or sterile animals.

(3) Undesirable breeding stock.

3. Any person refusing to cull animals as specified in this Section shall be sentenced to imprisonment for a term not to exceed 30 days, or be ordered to pay a fine not to exceed five hundred dollars ($500.00), or both.

4. Forfeiture. Any animal found to be cull will be forfeited to the Navajo Nation and destroyed upon order of a court of the Navajo Nation.

C. Emergency Conditions.

1. If the Navajo Nation President declares an emergency and the Navajo Nation is in the midst of a severe drought and immediate action must be taken to alleviate the emergency conditions.

2. All unbranded livestock rounded up will be sold immediately and branded livestock shall be sold within two days of the roundup.

3. It is also imperative that Navajo livestock owners voluntarily participate in these livestock sales by marketing excess or unwanted animals.

D. Interference with authorized roundups.

1. A person commits an offense pursuant to this Section if he or she interferes with or obstructs an authorized roundup which has for its purpose the removal of unowned horses or other livestock, or is for the purpose of determining ownership or is designed to protect Navajo Nation land from destruction or injury.

2. Any person found guilty of violating this Section shall be sentenced to imprisonment for a term not to exceed 30 days, or be ordered to pay a fine a minimum of five hundred dollars ($500.00) but not to exceed five thousand dollars ($5,000.00) or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1312. Report by livestock officer or inspector; preliminary disposition of proceeds of sale

A. Upon making the sale as provided by Sections 1306 and 1307, the livestock officer or inspector shall notify the Division of the name of the purchaser, the time and place of sale, the amount for which the animal was sold and a description of the animal showing the marks and brands, if any, or other identifying marks and brands, shall pay to the Department the net proceeds realized at the sale.

B. The Department shall place the amount realized from the sale of stray animals in the Livestock Custody Fund established by Section 1302.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1313. Payment of proceeds of sale to owner of stray

Upon making satisfactory proof of ownership of any animal sold as a stray within 20 days after the sale, the Department shall pay to the owner of the animal the net proceeds realized at the sale less any expenses incurred by the Navajo Nation and its entities.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Subchapter 7. Offenses; Penalties

Cross References

Animals; livestock, see 17 N.N.C. §§ 350, 460-466, and 524.

United States Code

Driving stock to feed on lands without consent of tribe, 25 U.S.C. § 179.

Injuries to stock by Indians, reparation, 25 U.S.C. § 229.

Code of Federal Regulations

Grazing permits, see 25 CFR § 166.1 *et seq*.

§ 1351. Gathering livestock or equine for tournament or contest without consent of owner

Any person who knowingly gathers range livestock or equine for the purpose of a tournament or contest for amusement or reward, or competition for prizes, or who engages in a steer tying contest or exhibition of steer-tying, or who casts, ropes or throws a horse, cow or other kind of animal without the written consent of the owner, except in the necessary work done on the range or elsewhere in handling such animals, is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Penalty, see § 1365 of this Title.

§ 1352. Driving livestock or equine from range without consent of owner; classification

When livestock of a resident of the Navajo Nation is driven off its range, without consent of the owner, by any person as a drover of any herd or drove knowingly, such drover of livestock or equine and every person engaged in the care or management of such herd or drove, is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Penalty, see § 1365 of this Title.

C.J.S. Animals §§ 237 to 243, 518.

§ 1353. Taking livestock or equine without consent of owner; classification

A person who knowingly takes from a range, ranch, farm, corral, yard or stable any livestock or equine and uses it without the consent of the owner or the person having the animal lawfully in charge is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1365 of this Title.

§ 1354. Branding or altering brand of livestock or equine of another; classification

A. The Navajo Nation requires every individual owning livestock and equine to adopt and record a brand and earmark with which to brand and mark such livestock; said brand can be obtained with a grazing permit or applied for from the state.

B. All Navajo-owned livestock and equine over six months of age grazing on the Navajo Nation must be branded and maintain individual animal identification.

C. State brands can be acquired only under the provisions herein.

D. The Navajo Nation adopts the individual district brands plus the -N, location left shoulder, as the official brand as assigned by Bureau of Indian Affairs and/or District Grazing Committee and will accept a state brand and the specified state brand location if obtained within the requirements of this Chapter.

E. Each Navajo livestock and equine owner who has or obtains a registered individual state brand shall report to his/her respective District Grazing Committee showing proof of such active state brand registration in order that said brand may be recorded on his/her grazing permit.

F. Any person(s) or agent(s) who brands or marks any livestock or equine with a brand other than the recorded brand of the owner, or who alters any brand or mark upon any livestock or equine, with intent to convert the ownership of the animal(s) to his/her own use, is guilty of an offense and is liable to the owner of the animal for three times (3x) the value there of.

G. A person who refuses to brand or mark his/her livestock or equine is guilty of an offense. Branding and/or marking are required to show proof of ownership.

H. A person who commits a false report of ownership and willfully makes a false report as to the total number of livestock and/or equine owned, or refused to make a true report of livestock and/or equine ownership is guilty of an offense and shall be fined a minimum of two hundred and fifty dollars ($250.00) but not to exceed five thousand dollars ($5,000.00).

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Note. Slightly reworded for statutory clarity.

Cross References

Livestock brands generally, see §§ 2001, 2002 of this title.

Other offenses relating to livestock brands, see 17 N.N.C. § 353.

Penalty, see § 1365 of this Title.

C.J.S. Animals §§ 6, 23 to 60, 382, 519 to 522.

§ 1355. Obliterating or changing brand, mark or ear mark

A person who intentionally obliterates, disfigures, extends or changes a recorded brand, or by other and additional marks, figures or characters converts a recorded brand into some other brand, is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Livestock brands generally, see §§ 2001, 2002 of this Title.

Other offenses in this Chapter, see §§ 1258, 1259, and 1260 of this title.

Other offenses relating to livestock brands, see 17 N.N.C. § 353.

Penalty, see § 1365 of this Title.

§ 1356. Prima facie guilt of owner of brand to which another brand is altered

When it is proved that a recorded brand has been converted or changed into another brand claimed or owned by any person, it shall be prima facie evidence in the courts and before the Department of the Navajo Nation that the claimant or owner of the latter brand obliterated, disfigured and changed the prior recorded brand.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Offenses relating to animals and livestock, see 17 N.N.C. §§ 350, 460-466, and 524.

Penalty, see § 1365 of this Title.

§ 1357. Unlawfully killing, selling or purchasing livestock or equine of another; classification; civil penalty; exception

A. Any person who knowingly kills or sells livestock or equine of another person, the ownership of which is known or unknown, or who willfully, knowingly purchases livestock or equine of another person, the ownership of which is known or unknown, from a person not having the lawful right to sell or dispose of such animals, is guilty of an offense.

B. A person who knowingly attempts to take or does take all or any part of a carcass of any such livestock or equine, pursuant to Subsection A, for such person's own use, the use of others or for sale is guilty of an offense.

C. In addition to any other penalty imposed by this Section, a person depriving the owner of the use of his/her livestock or equine under Subsection A or B of this Section shall be liable to the owner for damages equal to three times (3x) the value of such livestock or equine.

D. This Section shall not apply to animals under the stray laws or livestock roundups procedures.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Other offenses in this Chapter, see §§ 1258, 1259, and 1260 of this title.

Penalty, see § 1365 of this Title.

§ 1358. Possession of livestock or equine without bill of sale

The possession of livestock or equine without a written and bill of sale can be used as prima facie evidence for a charge of unlawful possession, handling, driving or killing of livestock or equine.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1359. Proof of branding with brand of accused as tending to show conversion by the accused

For violations of the livestock laws of the Navajo Nation, the prosecutor may prove, as tending to show a conversion by the accused, that the animals in question were branded into a brand or were marked into a mark claimed by the accused to be his brand or mark, although neither the brand nor the mark is recorded.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1360. Abandonment of livestock or equine and animals at boarding facility or veterinary facility

When livestock or equine or animal left at a boarding facility or any livestock, equine or animal left at a veterinary facility has not been reclaimed within the period of time previously agreed upon at the time of delivery of the livestock or animal to the boarding facility or veterinarian, the boarding facility or veterinarian may give written notice by certified mail to the last known address of the owner, possessor or custodian of the livestock, equine or animal, and if the livestock, equine or animal is not reclaimed within 14 days from the date of the mailing of the notice, the livestock, equine or animal shall become the property of the boarding facility or veterinary facility to dispose of as the boarding facility or veterinary facility sees fit.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1361. Dogs killing, injuring or chasing livestock or equine; liability of owner; classification

A. If any person discovers a dog killing, wounding or chasing livestock or equine, or discovers a dog under circumstances which show conclusively that it has recently killed or chased livestock or equine, he/she may pursue and kill the dog.

B. The owner of a dog is liable for all damages caused by the dog chasing, killing or wounding livestock or equine; provided that the livestock or equine is within an area of authorized use. In the case of a dog killing or wounding livestock or equine, the owner of the dog is liable for damages to the owner of the livestock or equine to three times (3x) the value of the livestock or equine killed or wounded including but not limited to veterinary expense and other fees associated with damages.

C. No person shall keep any dog after it is known that dog is liable to kill or injure livestock, and it shall be the duty of the owner to kill, or have killed, the dog upon order of the Navajo Nation Animal Control Program after a finding that the dog has killed or injured livestock; provided, however, that it shall be the right of any owner of livestock so killed or injured by the actions of any dog or any person witnessing, such actions to kill such animal while it is upon property controlled by the owner of the livestock. If a dog is observed attacking livestock and wildlife (game animals), individuals authorized by the Director can take appropriate action to prevent these actions.

D. An owner of a dog who recklessly allows or causes the dog to:

1. Wound or kill livestock or equine owned by another person is guilty of an offense.

2. Chase livestock or equine owned by another person, causing injury to the livestock or equine, is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1365 of this Title.

§ 1362. Person allowing livestock or equine to run at large within fence roadway or residential area or withdrawn area

The owner or person in charge of livestock or equine, who recklessly allows or permits livestock or equine to run at large within a fence roadway, or residential area, or withdrawn areas, is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1365 of this Title.

§ 1363. Failure to remove livestock or equine from fence roadway or residential area or withdrawn area

A. The owner or person in charge of livestock or equine, who fails to remove his/her livestock equine from fenced roadway, or residential area, or withdrawn areas, is guilty of an offense.

B. The owner or person in charge of livestock or equine who places, allows or enters a withdrawn forest land for the purpose of grazing is guilty of an offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1365 of this Title.

§ 1364. Failure to remove injured or dead livestock or equine

A. The owner or person in charge of livestock or equine, who fail to removed his/her injured or dead livestock or equine after being notified by an officer, is guilty of an offense.

B. If the livestock or equine owner fails to removed a dead or injured livestock or equine, they will be responsible for all removal cost, care and disposal fees.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Penalty, see § 1365 of this Title.

§ 1365. Penalties

Unless otherwise provided, any person who violates this Chapter and is convicted of such violation shall be subject to the following punishments:

A. For violation of Sections 1351 to 1364, he/she shall be sentenced for a period not to exceed 180 days jail or shall be fined a minimum of two hundred dollars ($200.00) not to exceed five thousand dollars ($5,000.00), or both.

B. In addition, damages resulting from grazing in withdrawn areas, the offender will be required to pay the Navajo Nation the fair market value of the damaged property and/or restoration costs.

C. Restitution of three times (3x) the value of the livestock, equine and ratite can be included to the owner of the livestock, equine and ratite.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

CJN-83-66, June 22, 1966.

Cross References

Offenses relating to animals and livestock, see 17 N.N.C. §§ 350, 460-466, and 524.

§ 1366. Lawful fence defined

A. A fence shall be deemed a lawful fence when it is constructed and maintained with good and substantial posts firmly placed in the ground at intervals of not more than 20 feet, upon which posts are strung and fastened at least four strands of barbed wire the usual type tightly stretched and secured to the posts and spaced so that the top wire is 50 inches above the ground and the other wires at intervals below the top wire of 12, 22, and 32 inches. If the posts are set more than 20 feet apart, the wires shall be supported by stays placed not more than seven to 10 feet from each other or from the posts, extending from the top wire of the fence to the ground, and each wire of the fence securely fastened thereto.

B. All fences constructed other than as provided in Subsection A, or of other materials equally as strong and otherwise effective to turn livestock as the fences described in Subsection A, shall also be deemed lawful fences within the meaning of this Section.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1367. Failure to close or maintain gates

A person violates this Section when he/she fails to close or maintain gates intended for the exclusive use of persons for convenience and the gates are left in such a condition which allows livestock to access roadways. The gates are to be maintained in such a manner as to preclude the possibility of livestock entering right-of-way areas and must be kept in a closed condition at all times. If he/she fails to comply with this Section, he/she is guilty of an offense and shall be fine of one hundred dollars ($100.00) not to exceed five hundred dollars ($500.00).

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1368. Resisting or obstructing a livestock officer or deputy livestock

inspector

If any person interferes with the duty and responsibility of a Navajo Nation bona fide commissioned livestock officer or deputy livestock inspector in the performance of his/her duties and responsibilities is guilty of an offense and shall be sentenced to 365 days in jail or a minimum fine of five hundred dollars ($500.00) not to exceed five thousand dollars ($5,000.00) or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1369. Failure to obtain premise identification

Any person within the Navajo Nation who fails to obtained premise identification from their respective Navajo Nation office is guilty of an offense and shall be fined a minimum of one hundred dollars ($100.00) not to exceed five hundred dollars ($500.00).

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1370. Failure to properly tag livestock with individual identification

A. Any person within the Navajo Nation who fails to tag their livestock with their individual RFID tag for cattle identification number is guilty of an offense and shall be fined a minimum of twenty-five dollars ($25.00) per head not to exceed one thousand, seven hundred and fifty dollars ($1,750.00).

B. Any person within the Navajo Nation who fails to properly tag their sheep and goats with the approved Navajo Nation Animal Identification System is guilty of an offense and shall be fined ten dollars ($10.00) per head and shall not exceed three thousand and five hundred dollars ($3,500.00).

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1371. Failure to comply with grazing requirements

Any person who fails to comply with grazing requirements of the Navajo Nation is guilty of an offense and shall be fined a minimum of two hundred and fifty dollars ($250.00) and not to exceed five thousand dollars ($5,000.00).

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1372. Unlawful introduction of livestock or equine on Navajo Nation land without a valid Navajo Nation or Eastern Land grazing permit

A. No person shall introduce or allow his or her livestock or equine to graze on Navajo Nation land without a valid Navajo Nation or Eastern Navajo grazing permit.

B. No person shall willfully graze livestock and equine in excess of the permitted number on Navajo Nation range, or refuse to graze his or her livestock and equine in accordance with range-management plans which have implemented deferred grazing, or have reserved specific areas for seasonal use.

C. Sentence. Any person found guilty of violating this Section shall be fined a minimum of two hundred dollars ($200.00) but not to exceed five thousand dollars ($5,000.00).

D. Restitution. The courts, in addition, may require the offender to pay the Navajo Nation the fair market value of the damaged property and/or restoration cost or any other cost associated with removal of said livestock or equine. In lieu of cash, a fine, if levied, may be collect in livestock.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1373. Use of undesirable sires; penalties

A. Bulls grazed on open range shall be of a uniform breed, preferably registered breeds, and limited to a 90-day breeding season, and the breed shall be determined by the permittee.

B. Ram shall be of the fine wool or meat type breed.

C. All stallions and studs must be maintained in an enclosed fence, and shall not be permitted to roam at large on open range.

D. Stallions that are not used for breeding shall be castrated.

E. Any person who fails to comply with requirements of this Section shall be guilty of an offense and fined a minimum of one hundred dollars ($100.00) and not to exceed five hundred dollars ($500.00) per offense.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Chapter 8. Navajo Stallion Service

§ 1401. Establishment

There is established the Navajo Nation Stallion Service under the auspices of the Navajo Nation, Division of Natural Resources, Agricultural Resources Department.

History

ACJA-6-83, January 5, 1983.

Note. Slightly reworded for purposes of statutory form.

§ 1402. Goals; objectives

A. The goals of the Navajo Stallion Service are to:

1. Improve the quality, usability and income potential of the horses produced on the Navajo Nation.

2. Offer training and education as to horse selection, breeding, herd health, and management programs to Navajo stockmen.

B. The objectives of the Navajo Stallion Service are to:

1. Offer a choice of quality stallions for breeding purposes to Navajo stockmen at the lowest possible cost.

2. Prepare and distribute information concerning stallions available, horse production management, horse education and selection, horse health programs and related subjects to any interested party.

3. Provide technical, veterinary, and management assistance to stockmen in an effort to further their livestock production both as to quality improvements and increased profitability.

4. Maintain the program as an on-going financially self-sufficient project of the Navajo Nation.

History

ACJA-6-83, January 5, 1983.

Note. Slightly reworded for purposes of statutory form.

§ 1403. Financial considerations

In an effort to make the program financially self-sufficient and to keep the total cost to the mare owner as low as possible so that the service is available to all Navajo stockpersons, the following will be done:

A. A revolving account will be set up. This account will be used to acquire feed, supplies, equipment, and cover other costs of operation. These expenditures will be used to expedite the operation of the project and all financial records and receipts are to be kept to provide accountability. The source of funds is to be all payments made by mare owners for mare care and operational expenses.

B. Mare owners will be charged a minimal amount to cover mare feed, routine breeding costs, cost of maintaining the stallions and other costs of operating the program. Initially this is projected to be fifty dollars ($50.00) for the first ten days the mare is at the facility and then two dollars ($2.00) per day thereafter. Since charges cover the care and feeding of the mares and operational expenses for the program, it will be non-refundable. The fee shall be adjusted annually by action of the Resources Committee on recommendation from the staff veterinarian through the Director of the Division of Natural Resources.

History

ACJA–6–88, January 5, 1983.

Note. Slightly reworded for purposes of statutory form.

§ 1404. Management

The Agricultural Resources Department, staff veterinarian, and Livestock Program Manager, shall share management responsibilities and duties as best suited to their talents and abilities.

History

ACJA–6–83, January 5, 1983.

§ 1405. Facilities

The program will utilize the facilities of the Navajo Nation Fairgrounds to operate the service and house the mares. These facilities have been examined and deemed appropriate by the Division of Natural Resources staff veterinarian.

History

ACJA–6–83, January 5, 1983.

Note. Slightly reworded for purposes of statutory form.

§ 1406. Operational procedures

A. Mares will be accepted for breeding from February 1 through June 1. All mares must be removed from the facility by June 30.

B. Mares will be booked to stallions on a first come, first serve basis. At the time of booking the mare owner will fill out and sign a breeding agreement and pay the non-refundable expense fee. The number of mares booked to each stallion will be limited to what is deemed acceptable to the staff veterinarian. Mares will be accepted as long as stallions are not overworked and facilities are not overcrowded. Bookings will be limited to three mares per breeding season, per individual. (The person doing the booking must have a valid Navajo census number and be at least 18 years of age.)

C. At the time of entry each mare will be given worming, vaccination, and dental care if needed. Each mare will also receive a uterine culture before breeding. These items will be covered by the expense fee paid at time of booking. Any additional veterinary services requiring use of drugs or supplies will be paid by the mare owner on an "at cost" basis.

D. Accurate records as to entry and release dates, breeding, and treatment will be kept on all mares.

E. Since the purpose of the program is to improve livestock quality, all mares must be of acceptable size, conformation, and disposition. All incoming mares will be screened by the staff veterinarian and the Livestock Program staff to determine eligibility. This will be done via an objective Mare Evaluation Form based on suitable criteria. Any mare with an infectious or communicable disease will be barred from the program to safeguard the well being of the other horses in the facility.

F. All mares will be provided with satisfactory means of identification such as numbered halters or neckbands which they will wear at an times while at the facility.

G. Any of the above conditions may be waived or modified by the Resources Committee to compensate for special situations or needs. The owner of a mare that has been rejected for breeding based on the Mare Evaluation Form may appeal the decision of the staff veterinarian to the Resources Committee through the Director, Division of Natural Resources.

H. It will be the mare owner's responsibility to maintain contact with the program and to remove the mare from the facility when the staff veterinarian so advises; any mare left for 30 days after the staff veterinarian has determined that she is ready to be dismissed becomes the property of the Stallion Service Program to be disposed of as the program director sees fit. No mare is to be released until all mare care, veterinary charges, and any other outstanding charges are paid in full.

History

ACJA-6-83, January 5, 1983.

Note. Slightly reworded for purposes of statutory form.

Chapter 9. Health Requirement Offenses; Control of Contagious Diseases; Penalties

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1501. Definitions

A. "Abandonment" means and includes the leaving of an animal by its owners or other person or persons responsible for its care or custody without making effective provisions for its proper care and control.

B. "Animals" means any animal mammal, other than human, and includes birds, reptiles, fish, wild and domesticated animals.

C. "Animal fights" means it is unlawful for any person to promote stage, hold, manage, conduct, or carry on any game, exhibition or contest in which one or more animal are engaged for the purpose of injuring, killing, maiming, or destroying themselves, or any other animals. This does not apply to rodeo events.

D. "Cruelty" means it is unlawful for any person to willfully or maliciously kill, maim, disfigure, torture, beat, mutilate, burn, scald, or otherwise conduct cruelly set upon an animal, except that reasonable force maybe used. Cruelty also includes every act or omission, which causes or unreasonably permits the continuation of unnecessary or unjustifiable pain and suffering.

E. "Department" means the Department of Resource Enforcement, Navajo Veterinary Livestock Program or the Department of Agriculture.

F. "Deputy Livestock Inspector" as used in this Act shall mean a non-commissioned officer who provides livestock inspection services only and duties shall also include the seizure of livestock under this Title.

G. "Director" means the Director of the Department of Resource Enforcement and the Director of Navajo Nation Department of Agriculture.

H. "Disposal" means the deposit or dumping of any animal (carcass) into or on any land or water so that such animal (carcass) or any constituent (animal parts) thereof may enter the environment or be emitted into the air or discharged into any water, including ground water.

I. "Division" means the Navajo Nation Division of Natural Resources.

J. "Division Director" means Executive Director of Division of Natural Resources.

K. "Equine" as used in this Chapter means horses, mules, burros and asses.

L. "Feral" means any un-owned or free ranging animal, livestock or equine not under control of an owner.

M. "Livestock" as used in this Chapter means cattle, dairy cattle, buffalo, sheep, goats, swine, and llamas, except feral pigs.

N. "Law Enforcement Officer" means any person who has successfully completed training at a recognized police training academy, has been commissioned by a designated Navajo Nation authority as a police officer, ranger, forestry officer, or resource enforcement officer, and is vested by law with a duty to maintain public order or make arrests, whether that duty extends to all offenses or is limited to specific areas of offenses or offenders. This term includes police officers, rangers, forestry officers and resource enforcement officers.

O. "Livestock Officer" means a commissioned Law Enforcement Officer who has the duties and responsibilities to enforce Title 3 and Title 17 related to livestock and who is also an authorized person to conduct livestock inspection service.

P. "Livestock Trader Permit" means a certification of a person, corporation or business who conducts business involving the sale, barter and trade of livestock, equine, hay and feed and other agricultural products.

Q. "Neglect" means failure to provide food, water and normal veterinary care for the animal(s) health and well being. During time of drought and severe weather conditions, the owner is responsible to ensure animal, livestock or equine are properly maintained and not in a state of neglect.

R. "Nuisance" means, but is not limited to defecation, urination, disturbing the peace by the presence of, sound or cry, emitting noxious or offensive odor, or otherwise endangering the well being of the inhabitants and other livestock, or equine of the community.

S. "NNERFAD" means the Navajo Nation Emergency Response to Foreign Animal Disease.

T. "NNVLP" means the Navajo Nation Veterinary Livestock Program who is responsible for the investigation, diagnosis and treatment of disease incidents and/or outbreak.

U. "Poultry" means any domesticated bird, whether live or dead, and includes chickens, turkeys, ducks, geese, guineas, ratites and squabs.

V. "Range" means every character of lands, enclosed or unenclosed, and not withdrawn from grazing, outside/inside of cities and towns, upon which livestock are permitted to graze with a valid Navajo Nation grazing permit and Eastern Navajo grazing permit.

W. "Range equine" means equine customarily permitted to roam upon the ranges of the Navajo Nation, and not in the immediate actual possession or control of the owner although occasionally placed in enclosures for temporary purposes.

X. "Range livestock" means livestock customarily permitted to roam upon the ranges of the Navajo Nation, and not in the immediate actual possession or control of the owner although occasionally placed in enclosures for temporary purposes.

Y. "Ratite" means ostriches, emus, rheas and cassowaries.

Z. "Stray animal" as used in this Chapter, means livestock, equine or ratites whose owner is unknown or cannot be located, or any animal whose owner is known but permits the animal to roam at large on the streets, alleys, fenced paved roads, fenced right of ways, range or premises of another without permission.

AA. "Veterinarian" means accredited Navajo Nation, state or federal veterinarian.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Cross References

Definitions under Chapter 7, Control and Inspection of Livestock, see § 1201 of this Title.

§ 1502. General powers and duties; civil penalties

A. The Director shall exercise general supervision over the livestock and equine interests of the Navajo Nation, protect the livestock and equine industry from contagious and infectious diseases and protect the public from diseased and unwholesome meat products.

B. The Director may, in with consultation with a Navajo Nation or federal veterinarian, approve rules to control and govern:

1. Importation of livestock, animals and poultry into the Navajo Nation, establishment of quarantine and its boundaries, notice of quarantine and accomplishment of all things necessary to affect the object of the quarantine and to protect the livestock and poultry industries from and prevent the spread of contagious or infectious diseases.

2. Dispatch of livestock, equine, animals and poultry affected with contagious or infectious diseases and disposition of carcasses of livestock, animals and poultry so destroyed, when the action appears necessary to prevent the spread of contagion or infection among livestock, equine, animal, and poultry.

C. The Director may:

1. Enter into agreements with neighboring states including agreements regarding the use of livestock officers or livestock inspectors or other agency resources for the purpose of enforcement of livestock laws within the Navajo Nation or within border areas of neighboring states.

2. Waive inspections, service charges or inspection fees under this Chapter in cases the Director deems advisable.

3. Direct employees or law enforcement officers (Livestock Officers) to execute the Director's orders under this Chapter.

D. The Director may establish a central investigation group to investigate reports of crimes related to violation(s) of the contagious and infectious diseases involving livestock, equine, ratite and poultry. Livestock officers and other employees of the Department shall report all cases of apparent crimes related to violation(s) of the contagious and infectious diseases involving livestock, equine, ratite and poultry to the Director. The investigation officer/group shall cooperate and coordinate its activities with appropriate federal, state and local law enforcement agencies in apprehending and prosecuting violators of livestock laws.

E. The Director may govern the importation of livestock, equine, ratite, animals and poultry into the Navajo Nation by carrier or rail to insure that the animals are free from infectious disease.

F. The Director may implement speedy and effective suppression and eradication of disease among livestock, equine, ratite and poultry.

G. To prevent spreading or contracting of infectious or contagious diseases among livestock, equine, ratite, and poultry including requirements for inspection of livestock, equine, ratite and poultry shipped or transported, or to be shipped or transported by common carrier, contract carrier, private carrier or in any other manner whatever, whether the shipping or transporting is in interstate or intrastate commerce, or both, and to require an owner, before moving livestock, equine, ratite and poultry in such manner, to furnish an inspection certificate in the form required by the Director.

H. The Director may establish and declare any district to be an infected district wherein diseased or infected livestock, equine, ratite and poultry are found or have recently been grazed or driven. The Director may order livestock, equine, ratite and poultry in the infected district or which are exposed to be moved, treated, disinfected or cured under quarantine regulations provided for by this Title.

I. Subsections A to H shall be conducted in conjunction with the recommendations of Navajo Nation Veterinary and Livestock Program.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Note. Reworded for statutory consistency.

§ 1503. Control of animal diseases; violation; classification; penalties

A. Livestock and equine owners are responsible for the annual vaccinations and deworming of livestock and equine for the prevention of disease and the reduction of parasites.

B. The Navajo Nation or federal veterinarian may enter any place where a suspected livestock, equine, ratite or poultry may be and take custody of the animal or poultry for the purpose of determining the presence of a contagious, infectious or communicable disease.

C. When advised of the occurrence of a disease of livestock, equine, ratite or poultry, which constitutes a threat to the livestock, equine, ratite or poultry industries, the Director may issue lawful orders and adopt rules he deems necessary.

D. Should the disease mechanism involve a foreign animal disease, the NNERFAD plan will be activated.

E. The Director may request NNVLP veterinarian or federal veterinarian or Department of Resource Enforcement Rangers, or Navajo Nation Fish and Wildlife, Environmental Protection Agency Enforcement Officers or Navajo Department of Public Safety to:

1. Establish quarantines and define their boundaries.

2. Destroy livestock, equine, ratite, animals or poultry when necessary to prevent the spread of any infectious, contagious or communicable disease.

3. Appoint authorized appraisers for the purpose of indemnifying owners of livestock, equine, ratite or poultry destroyed.

4. Control the movement of livestock, equine, ratite, animals or poultry products and agricultural products, which may be directly related to dissemination of diseases affecting the livestock, equine, ratite, animals or poultry industries.

F. Any person who violates any lawful order or rule issued pursuant to the Act, or breaks any quarantine established by the NNVLP, or federal veterinarian for the prevention and control of disease among livestock, equine, animals, ratite, or poultry, is guilty of an offense and is subject to a minimum two hundred and fifty dollars ($250.00) fine not exceed five thousand dollars ($5,000.00) or 365 days jail or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1504. Cooperation with United States

In addition to other powers and duties conferred upon him by law, the Director may cooperate with the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture, or other agency of the United States vested with similar powers and duties, in the control of contagious or infectious diseases affecting livestock, equine, ratite and poultry.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1505. Diseases; inspection; quarantine.

A. The Navajo Nation shall activate the NNERFAD plan when a foreign animal disease is suspected.

B. The Navajo Nation may use all proper means to prevent the spread of dangerous and fatal diseases among livestock, equine, ratite and poultry and for the prevention of such diseases. If a disease breaks out in the Navajo Nation, it is the duty of all persons owning or having in their charge livestock, equine, ratite or poultry infected to immediately notify the Navajo Nation of the existence of such disease. The Navajo Nation shall cause proper examination to be made by a NNVLP or federal veterinarian and, if the disease is found to be a dangerously contagious or infectious malady, the Navajo Nation shall order the diseased livestock, equine, ratite or poultry that have been exposed to be strictly quarantined and shall order any premises or farms where such disease exists or has recently existed to be put in quarantine so that no livestock, equine, ratite or poultry subject to the disease is removed from or brought to the premises or places so quarantined. The Navajo Nation shall prescribe such rules as it deems necessary to prevent the disease from being communicated in any way from the premises so quarantined.

C. The Navajo Nation may expend funds to prevent, suppress, control or eradicate any disease or parasite of livestock that the Navajo Nation has been ruled and declared to be a disease or pest of significant economic impact to any segment of the livestock, equine, ratite and poultry industry. This power shall include the right to purchase and destroy or sell infected or exposed livestock.

D. Whenever the Navajo Nation finds any livestock, equine, ratite or poultry infested with a disease or pest declared by the Navajo Nation to be of significant economic impact, the Navajo Nation may request the President of the Navajo Nation to declare a state of emergency.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1506. Failure to report livestock, equine, ratite or poultry disease; offenses; penalty

A. Any person who has in his/her possession or under his/her care any livestock, equine, ratite or poultry that he/she knows or has reason to believe is affected with a disease shall without unnecessary delay notify the NNVLP or

District Grazing Committee member or Eastern Land Board member or the Department of Resource Enforcement in which the livestock, equine, ratite or poultry is situated.

B. All accredited veterinarians practicing within the Navajo Nation boundaries shall immediately notify the Navajo Nation Veterinary Livestock Program or the Department of Resource Enforcement of any reportable disease incidents.

C. A person who violates this Section is guilty of an offense and upon conviction shall be fined a minimum of one hundred dollars ($100.00) not to exceed five thousand dollars ($5,000.00) or 365 days in jail or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1507. Failure to comply with quarantine requirements; offense; penalty

A. A person shall not bring into Navajo Nation to sell or dispose of any livestock, equine, ratite or poultry known to be affected or exposed to disease or move diseased or exposed livestock, equine, ratite or poultry from quarantine area within the Navajo Nation declared to be infected with a disease.

B. A person shall not bring into Navajo Nation any diseased livestock, equine, ratite or poultry from an area outside the Navajo Nation that may at any time be legally declared to be infected with a disease without the consent of the Navajo Nation.

C. A person who violates this Section is guilty of an offense and upon conviction shall be fined a minimum of one hundred and fifty dollars ($150.00) not exceed to five thousand dollars ($5,000.00) or 365 days in jail or both.

D. Restitution: Any necessary expenses incurred in the quarantining of the livestock, equine, ratite or poultry shall be paid by the owner, and if the same is refused, after demand made by order of the Navajo Nation, an action may be brought to recover the same with costs of suit, which action may be brought in the name of the Navajo Nation.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1508. Dead animals; infectious animals; disposal

A. As provided by regulations of the Navajo Nation, all carcasses of dead animals shall be properly disposed of by the owners according to the approved or recommended method by the federal agencies.

1. Approved landfill or approved disposal site by Navajo Nation Environmental Protection Agency.

2. Disposal shall not create or endanger the public health, safety or welfare, or create a public nuisance.

B. A person commits an offense pursuant to this Section if he or she willfully refuses to dispose of animals found to be infectious by authorized agents of the Navajo Nation Veterinary and Livestock Program or federal veterinarian.

C. Any person found guilty of violating this Section shall be sentenced to imprisonment for a term not to exceed 30 days, or be ordered to pay a fine of five hundred dollars ($500.00) but not to exceed one thousand dollars ($1,000.00), or both.

D. It will be the responsibility of the owner for the euthanasia and disposal of any animal found to be infectious as determined by a Navajo Nation veterinarian or federal veterinarian.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1509. Infected pastures and buildings; notices

If a pasture, building, corral, yard or enclosure where livestock, equine, ratite, or poultry have been or may be pastured or confined is infected with or has become dangerous on account of a disease or poisonous weed or plant, the Navajo Nation may post danger or quarantine notices in not less than two conspicuous places in or upon such pasture, building, corral, yard or enclosure sufficient to warn all owners and others in charge of livestock, equine, ratite or poultry of the danger or quarantine. When the danger has passed or the quarantine is lifted, the NNERFAD task force shall require the posted notices to be removed.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1510. Unlawful removals of quarantine notice or sign

Any person who removes a posted notice of danger or quarantine is guilty of an offense and shall be fined a minimum of two hundred and fifty dollars ($250.00) not to exceed five thousand dollars ($5,000.00) or 365 days in jail or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1511. Destruction of diseased livestock, equine, ratite or poultry

In cases where the Navajo Nation deems it necessary to destroy any diseased, infected or exposed livestock, equine, ratite or poultry in order to prevent the spread of dangerous and fatal diseases, foreign, domestic or other, which according to the rules, regulations and standards recommended by the United States Department of Agriculture Animal and Plant Health Inspection Service (APHIS) cannot be prevented by means other than the destroying of the diseased, infected, or exposed livestock, equine, ratite, animal or poultry, the Navajo Nation may have the livestock, equine, ratite, animal, or poultry humanly euthanized and disposed of under such laws, orders and rules as mandated by the Navajo Nation.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1512. Acceptance of federal rules and regulations; cooperation

The President of the Navajo Nation may accept on behalf of the Navajo Nation, the rules and regulations prepared by the Secretary of the United States Department of Agriculture relating to the control of diseases of livestock, equine, ratite or poultry and to cooperate with the authorities of the United States in the enforcement of all applicable laws and regulations relating to diseased livestock, equine, ratite or poultry.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1513. Dangerous epidemics; emergency rules; imports prohibited; penalty

A. When the Navajo Nation finds that a disease, the nature of which is known to be fatal or highly injurious to livestock, equine, ratite, or poultry, has become epidemic or exists in a locality in a country, state or territory beyond the limits of the Navajo Nation, the Navajo Nation shall immediately adopt and promulgate emergency rules to prohibit the importation into the Navajo Nation of any animals, including livestock, equine, ratite, or poultry, subject to the disease that may be so reported.

B. The Navajo Nation shall specify such restrictions and safeguards as it deems proper and shall specify for the protection of livestock in the Navajo Nation and may also prohibit the importation into the Navajo Nation of any hoofs, hides, skins or meat of any animals or any hay, straw, fodder, cottonseed or other products or material determined to carry the infection of such disease.

C. Emergency rules may be adopted and promulgated without the notice and hearing required of other rules and shall take effect immediately. If the Navajo Nation contemplates that an emergency rule will be in effect for longer than 90 days, it shall give notice and hold a hearing to adopt the emergency rule as a rule.

D. Any person who violates this Section or an emergency rule or order issued in accordance with this Section is guilty of a offense and upon conviction shall be fined a minimum two hundred and fifty dollars ($250.00) fine not to exceed one thousand and five hundred dollars ($1,500.00) or sentenced to 180 days jail or both and is also liable in a civil action for any damages and loss sustained by reason of such importation of the livestock or of any of the products provided for in this Section.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1514. Health certificate requirements; inspection; permit; penalty

A. During the time covered by the emergency rule, it shall be unlawful for a person to drive or transport or cause to be driven or transported into or within the Navajo Nation any livestock that by any direct or circuitous route might have come from any place or district covered by the emergency rule without first having obtained a certificate of health from a veterinarian or a permit in writing from the Navajo Nation under such rules as the Navajo Nation prescribes.

B. A person failing to comply with this Section is guilty of an offense and upon conviction shall be fine a minimum of seventy-five dollars ($75.00) not to exceed two hundred dollars ($200.00) or sentenced to 90 days jail or both, and is also personally liable for all loss and damages sustained by any persons by reason of the introduction of a disease from the livestock unlawfully imported into the Navajo Nation.

C. During the time covered by the emergency rule, all livestock desiring to enter the Navajo Nation shall submit to an inspection and shall not be permitted to enter the Navajo Nation until a written permit is issued by the Navajo Nation. A Navajo Nation livestock officer or deputy livestock inspector or other agent of the Navajo Nation may require the person in charge of the livestock to produce the permit for his inspection, and any person refusing to produce the permit at any time within a year from the time the livestock were driven in is guilty of an offense and shall be fined a minimum of one hundred dollars ($100.00) not to exceed five hundred dollars ($500.00) or sentenced to 60 days jail or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1515. AGID test required (Agar Gel Immuno Diffusion Test)

The Navajo Nation prohibits the driving or transporting into the Navajo Nation of any equine or other equine that have not tested negative to the AGID, or Coggins test or a United States Department of Agriculture-approved equivalent test for equine infectious anemia within 12 months prior to the date of entry, the evidence of which test result shall be shown on a health certificate; excepting from regulation only those foals accompanied in shipment by a negative-tested dam, those horses or other equine consigned directly to slaughter.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1516. Equine infectious anemia

A. Any equine found to be positive to the immuno diffusion test or any other recognized test for equine infectious anemia shall be placed under quarantine by the Navajo Nation or federal veterinarian. Any such positive equine shall be identified with either a hot iron brand or a freeze iron brand on the neck. Such brand shall contain "84A", followed by the case number assigned by the Navajo Nation or federal veterinarian. Any equine placed under quarantine shall be pastured or stabled in a suitable place a minimum of 100 yards from any equine belonging to any other owner or shall be stabled in a screened enclosure which prevents insects from entering or leaving such enclosure.

B. Any equine placed under quarantine for equine infectious anemia may be moved only with a permit from the Navajo Nation or federal veterinarian.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1517. Investigation of suspected illegal imports; oaths; health certificate or permit

A. Whenever the Navajo Nation, during the continuance in force of any prohibition against the importation into the Navajo Nation of livestock, equine, ratite or poultry has good reason to believe or suspect that any such livestock, equine, ratite or poultry against the importation of which prohibition then exists have been or are about to be driven, conveyed or transported into the Navajo Nation in violation of any such prohibition then existing and then in force, it is the duty of the Navajo Nation, either by its own members or through a veterinarian or through one or more of such persons then in their employ as circumstances shall seem to require, to thoroughly investigate the same.

B. They may examine, under oath or affirmation, any person in charge of the livestock, equine, ratite or poultry or any person cognizant of any facts or circumstances material to the investigations and all facts connected with the driving or transportation of the livestock, equine, ratite or poultry, including the place or places from which the livestock, equine, ratite or poultry have been driven or transported; the places or districts through which they have been driven or transported; the length of time and where they have remained, fed or grazed at any designated place or district; what contagious or infectious disease of livestock, equine, ratite or poultry, if any, they have been exposed to and when and where; and any other facts or circumstances material to the investigation and reduce such testimony to writing in all cases where the certificate of health or the permit in writing provided for in this Section shall be refused.

C. The Navajo Nation, a NNVLP veterinarian and all other persons as aforementioned so in the employment of the Navajo Nation through whom any such investigation shall be made hereby are authorized to administer all oaths and affirmations required in any such investigation. If any such investigation is made by such veterinarian and he/she is satisfied that the livestock, equine, ratite or poultry are free from all contagious and infectious disease and will not communicate any disease to any livestock, equine, ratite or poultry in the Navajo Nation, he/she shall deliver to the person in charge of the livestock, equine, ratite or poultry a certificate of health to the effect that the livestock, equine, ratite or poultry are healthy and entitled to pass into the Navajo Nation, otherwise he/she shall refuse the same.

D. If such investigation is made by any other persons authorized as specified in this Section to make the investigation and they are satisfied that the livestock will not transmit to the livestock, equine, ratite or poultry in the Navajo Nation any livestock, equine, ratite or poultry disease and that the facts and circumstances attending their transportation warrant the presumption that such livestock, equine, ratite or poultry are not from any prohibited areas, a recommendation that the importation of the livestock, equine, ratite or poultry shall then be permitted, shall be communicated to the Navajo Nation and the Navajo Nation shall upon concurrence give the person in charge of the livestock, equine, ratite or poultry a written permit to pass the same into the Navajo Nation, otherwise such permit shall be refused.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Note. Slightly reworded for statutory clarity.

§ 1518. Quarantine; seizure of livestock, equine, ratite or poultry

A. Whenever any livestock, equine, ratite or poultry are driven or transported into the Navajo Nation without obtaining a certificate of health or permit by the person in charge thereof, in any case where a certificate or permit is required and if such livestock, equine, ratite or poultry have been inspected and an investigation had in relation thereto and the certificate or permit refused, then the livestock, equine, ratite or poultry may be seized and securely held in quarantine under such reasonable rules and regulations as shall be prescribed therein by the Navajo Nation and as they may deem necessary to guard against other livestock, equine, ratite or poultry becoming affected with any such livestock, equine, ratite or poultry diseases.

B. They shall be held in quarantine for such length of time as the Navajo Nation shall in their opinion deem necessary for the sanitary protection of livestock, equine, ratite or poultry in the Navajo Nation.

C. If such livestock, equine, ratite or poultry shall not have been so inspected and an investigation had, then the same shall take place wherever the livestock, equine, ratite or poultry may be found, and they may be seized and held for that purpose and a certificate of health or permit granted or refused, as the case may require. If refused, the livestock, equine, ratite or poultry may in like manner be held in quarantine.

D. The owners of the livestock shall pay all the necessary expenses of quarantine and inspection and disposal under this Section.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1519. Importation of livestock, equine, ratite or poultry

A. It is unlawful for any person, firm, or corporation to ship, transport or drive into the Navajo Nation any livestock, equine, ratite or poultry unless such livestock, equine, ratite or poultry are accompanied by an official health certificate, except livestock, equine, ratite or poultry going to immediate slaughter. Such health certificate shall show the names and addresses of the consignor and the consignee and the kinds of livestock, equine, ratite or poultry, with a description of each, including sex, breed, and age. Individual identification is required on any breeding cattle and on any swine and equine, except those going to immediate slaughter. Such health certificate shall show the permit number when a permit is required.

B. The information on such health certificate shall be legible, and a licensed accredited veterinarian of the state of origin shall sign such certificate.

C. One copy of such certificate shall accompany the livestock, equine, ratite or poultry.

D. Livestock, equine, ratite or poultry known to be infected with or known to be exposed to any infectious or contagious disease shall not be imported into Navajo Nation.

E. Livestock, equine, ratite or poultry shall also meet all federal interstate requirements.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Note. Slightly reworded at Subsection D.

§ 1520. Failure to comply with importation requirements; penalty

Any person, firm, or corporation who violates or disregards Section 1519 is guilty of an offense and/or, upon conviction thereof, shall be fined by a minimum of one hundred dollars ($100.00), not to exceed one thousand dollars ($1,000.00), for each offense or sentenced to six months in jail or both.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1521. Inspector in charge of premises

A. Whenever the Navajo Nation finds it necessary to quarantine any livestock, ranch, farm, premises, or any portion of the Navajo Nation because of contagious or infectious disease, said NNERFAD plan has the authority to hold in quarantine such ranch, farm, premises, or part of the Navajo Nation, the Navajo Nation may deem necessary after all animals have been removed there from, until such time as in the judgment of the Navajo Nation there is no further risk of exposing domestic animals to disease by permitting them to inhabit such quarantined area.

B. The Navajo Nation has the authority to employ special livestock officers whenever it deems it necessary to be in charge of such quarantined animals or quarantined premises, under the direction of the Navajo Nation Veterinary and Livestock Program.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Note. Slightly reworded for statutory clarity.

§ 1522. Slaughter for post-mortem examination

A. The Navajo Nation may order the humane euthanasia and post-mortem examination of any one or more diseased domestic animals if the exact nature of their disease is not readily ascertained through other means.

B. All livestock, equine, ratites, or poultry infected with a suspect foreign animal disease shall be forfeited to the Navajo Nation without compensation to the owner of said livestock, equine, ratites, or poultry.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

§ 1523. Quarantine responsibility; enforcement; authority

A. The Navajo Nation shall quarantine any infected domestic animal or area within the Navajo Nation to prevent the spread of infectious or contagious disease.

B. Livestock Officers are law enforcement officers and shall have the powers of law enforcement officers with respect to Title 3 and Title 17, relating to livestock, and shall cite, apprehend or arrest any person who violates the health and quarantine laws, and shall, upon reliable information that any person has violated such law, make the necessary affidavits for arrest and examination of the person and shall, upon warrants issued therefore, immediately arrest the person.

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006.

Chapter 11. Farm Enterprises

Subchapter 1. [Reserved]

Subchapter 3. Bull Herd

Cross References

Tribal Enterprises generally, see 5 N.N.C. § 1501 *et seq*.

§ 1851. Establishment; authority

The President of the Navajo Nation, with the assistance of the members of the Resources Committee, is authorized, empowered, and directed to establish a bull herd for the Bar-N Ranch.

History

CF-23-58, February 20, 1958.

§ 1852. Plan of operation; adoption

The Plan of Operation adopted July 17, 1958 by the Advisory committee shall govern the operations of the Tribal Bull Herd.

History

ACS-104-58, September 8, 1958.

Note. Slightly reworded for purposes of statutory form.

Chapter 13. Livestock Brands

§ 2001. [Reserved]

History

CMY-27-06, May 12, 2006. The Navajo Nation Livestock and Foreign Animal Disease Response Act of 2006. Deleted previous § 2001, Requirements.

ACS-327-71, September 29, 1971.

ACAU-1 17-59, August 18, 1959.

§ 2002. Inspection system; authority to institute

A. The Resources Committee of the Navajo Nation Council is authorized to institute a brand inspection system for the Navajo Nation and to cooperate and coordinate such system for the Arizona portion of the Navajo Nation with the Livestock Sanitary Board of Arizona.

B. The Resources Committee is further authorized to negotiate with the proper authorities of New Mexico and Utah in order to institute such a cooperative system for the portions of the Navajo Nation lying in those States.

History

ACAU-118-59, August 18, 1959.

Note. Slightly reworded for purposes of statutory form.

Cross References

Intergovernmental agreements with state, see 2 N.N.C. § 824(B)(6).

Chapter 15. Livestock Supplies and Services

§ 2201. Schedule of charges

[**Note.** The fee schedule for vaccinating, spraying, dusting, dipping, branding, dehorning and castrating has been deleted as the Resources Committee of the Navajo Nation Council, by regulation, may adopt such schedules from time to time. See 2 N.N.C. § 695(B).]

History

ACMY-54-61, May 1, 1961.

Note. Words "effective May 15, 1961" were omitted as executed.

Cross References

Rules and Regulations, see 2 N.N.C. § 695(A).

Chapter 17. Fences

§ 2401. Specifications; application of state statutes

The specifications for fences as provided in the Arizona and New Mexico state statutes, respectively, shall apply to the Navajo Nation insofar as they concern Navajo Nation lands located in the States of Arizona and New Mexico; provided however, that such specification shall apply to cultivated lands only, and provided further, that this Section shall not be construed to authorize the fencing of range lands.

History

Res. 1922-1951, p. 221, March 16, 1950.

Cross References

Fences on range lands, see § 713 of this title.

§ 2402. Damages for trespass

A. The occupant of enclosed land shall not be entitled to damages for trespass from cattle, horses, mules, or burros unless his land is enclosed with a fence in good repair equal to or better than the specifications adopted in accordance with 3 N.N.C. § 2401.

B. Since sheep and goats are presumed to be under the control of a herder at all times, the owner of such sheep and goats shall be liable for all damages caused by their trespass, regardless of the condition of the fence or the absence of same.

History

Res. 1922-1951, p. 221, March 16, 1950.

Cross References

Trespass generally, see § 710 of this title.

Criminal trespass, see 17 N.N.C. § 350.

Chapter 19. Navajo Wool Growers Marketing Program

§ 2601. Objectives

A. The objectives of the Navajo Wool Growers Marketing Program are:

1. To insure the receipt of fair market prices for wool and mohair produced by sheep and goat raisers of the Navajo Nation;

2. To produce sufficient revenue to the Navajo Nation to continue this program on a self-sustaining basis;

3. To establish a marketing apparatus for the future development of Navajo wool and mohair resources; and

4. To diversify into other profit-making industries that are feasible.

History

ACN-142-82, November, 1982.

ACMA-37-78, March 29, 1978.

CO-56-73, October 17, 1973.

§ 2602. Organization

A. The operating authority and responsibility for the Navajo Wool Growers Marketing Program is placed with the Director, Navajo Wool Growers Marketing Program. The director shall have full authority for supervision of daily operations of the program and authority to hire additional staff according to the program budget. Overall administrative authority for Navajo Wool Growers Marketing Program shall lie with the director.

B. A Management Board shall be established consisting of the following members:

1. Executive Director, Division of Economic Development, or his/her designee;

2. Director, Commercial, Industrial Development and Management Department (or its successor), or his/her designee; and,

3. A third member to be selected by the above two.

C. The Management Board shall advise, direct and establish policies regarding the actions of the Director, Navajo Wool Growers Marketing Program.

D. The Management Board shall meet once a month.

E. The Executive Director, Division of Economic Development or his/her designee shall be the chairperson of the Management Board. The Director, Commercial, Industrial Development and Management Department (or its successor) or his/her designee shall be the vice-chairman of the Management Board.

F. The chairman or vice-chairman shall preside at all meetings. The Director shall be responsible for maintaining accurate minutes of all meetings of the Management Board and shall assign a staff member to take the minutes at each meeting.

G. The Management Board shall be responsible for and have authority to administer the Navajo Wool Growers Marketing Program in accordance with the operating procedures of this Chapter. In addition, to fully carry out the objectives of this Chapter and to diversify the program, the Management Board shall have all authority necessary or incidental thereto, not inconsistent with law, including, but not limited to, the following:

1. To purchase, lease, contract or otherwise acquire and to hold, own, use, and equip buildings, stores, shops, offices or other facilities useful in the conduct of the business;

2. To enter into and carry out any arrangements with and to act in any and all parts of the world in the conduct of the business;

3. To enter into any agreements including, but not limited to, joint ventures, operating agreements or management agreements and to establish corporations under Navajo Nation, federal or state incorporation laws to carry out the goals of this Chapter;

4. To acquire by purchase, exchange, lease, devise or otherwise, and to hold, own, maintain, manage, equip, improve, repair, remodel, and operate, and to sell, transfer, mortgage, lease, assign, convey, exchange, or otherwise turn to account or dispose of, and generally to deal in and with real and personal property wheresoever situated;

5. To borrow money, guarantee loans, and/or use its assets as collateral for any of the purposes of the business from time to time but not in excess of the ability of the business to repay its debts;

6. To recommend to the Navajo Nation Council revisions or amendments to this Chapter whenever deemed appropriate to improve the operation and management of the business;

7. To establish separate operating procedures when necessary for the diversification of the program into other businesses in furtherance of the goals of this Chapter; and

8. In general, to do all and everything either within or without the Navajo Nation necessary or convenient to the accomplishment of any of the purposes stated herein.

History

CD-68-89, December 15, 1989.

ACN-142-82, November 9, 1982.

CMA-37-78, March 29, 1978.

CO-56-73, October 17, 1973.

Note. "Advisory Committee" changed to "Navajo Nation Council". See 2 N.N.C. § 724(E).

§ 2603. Duties and responsibilities of the director

A. The director shall report to and be administratively responsible to the Management Board in policy matters established by the Board pertaining to the Navajo Wool Growers Marketing Program.

B. The Management Board shall be authorized to purchase wool other than that produced by Navajo livestock raisers to augment employment for the Navajo People.

C. The director is authorized to utilize the commodities for all potential uses, including the making of yarns for Navajo weavers.

D. The director shall be responsible for buying wool ties, strings, burlaps, bailing wires, etc. The director shall also have available for the Navajo wool producers and weavers, ties, strings, burlaps, hand shears, wool cards, wool dyes, and other related supplies and items.

E. The director is authorized to use satellite stations for the purpose of storing, selling yarns, and other related supplies and items.

F. The director shall have the authority to utilize consultants for the purpose of selling wool off the Navajo Nation and to market the wool for the best prices.

History

ACN-142-82, November 9, 1982.

ACMA-37-78, March 29, 1978.

CO-56-73, October 17, 1973.

§ 2604. Operating procedures

A. Sale of wool and mohair.

1. The selling price shall be established by executed sales contracts. Prices may vary from contract to contract. Advance payments from customers shall be negotiated where possible.

2. Deliveries of wool and mohair shall be in truckload quantities against previously signed sales contracts.

3. An invoice shall be prepared on each truckload shipment. This invoice will contain the following information:

a. Sales contract number;

b. Purchaser (complete identity);

c. Net weight of wool and/or mohair by lot number sold and shipped;

d. Extension of weight of each lot by contracted unit price;

e. Total prices;

f. Terms of payment (could be credit against advance payment);

g. Proper weight sheets and Bills of Lading attached to all copies of the invoice.

4. Invoices shall be delivered to the Controller of the Navajo Nation weekly. All designated information shall be attached.

5. The Board is authorized to purchase wool and mohair from other than Navajo producers.

6. The director shall be responsible for collecting all accounts receivable and accounting for receipts.

B. Purchase of commodities shall be accomplished through a separate bank account for the Navajo Wool Growers Marketing Program. The Board will designate persons whose signatures are approved for checks written on this account. Copies of the authorization for approval signatures will be transmitted to the Controller, Navajo Nation.

C. Copies of check transactions of the Navajo Wool Growers Marketing Program will be transmitted to the Office of the Controller weekly. The Controller's office will establish and transmit to the director appropriate account numbers for transactions. All invoices, bills of sale, and checks will be numbered and accountability of all numbers will be made to the Controller's office with weekly transmittal of transaction documents.

D. The Office of the Controller will be responsible for supervision of proper accounting procedures and practices exercised in the operation of the Navajo Wool Growers Marketing Program. This responsibility shall not relieve the director or other Navajo Wool Growers Marketing Program employees of their financial, procedural, and accounting responsibilities as herein established.

E. Purchase prices of commodities shall be established by the director. The prices shall be reviewed for approval by the Management Board. Determination of purchase price shall be based upon existing market conditions and previously executed sales contracts, taking into consideration operating expenses and anticipated revenue needs of the program.

F. Purchases of wool and mohair shall be recorded incrementally by bills of sale and checks drawn on the Navajo Wool Growers Marketing Program Revolving Fund. Bills of sale shall contain the following information:

1. All information required by the producer for application for ASCS incentive payments, if applicable. Producer shall mean the individual producer and not a trader.

2. Weight by commodity description of wool and mohair purchased.

3. Seller (complete identity).

4. Extension of weight of each commodity description by unit price.

5. Total price.

G. The director shall be responsible for all disbursements and accountability of transaction documents.

H. The director will have the authority and responsibility for any encumbrance of funds for operating expenses (including salaries, supplies, equipment, etc.) in accordance with the program budget.

I. The Director of the Navajo Wool Growers Marketing Program shall submit a progress report monthly to the Management Board, on the financial status of the program. Copies of the report shall be delivered to the Controller of the Navajo Nation. The Director, in cooperation with the Board, shall submit quarterly reports to the Economic Development Committee of the Navajo Nation Council.

J. Upon completion of yearly operations, the Controller of the Navajo Nation shall reconcile the Navajo Wool Growers Marketing Program Revolving Fund and report the status of the funds to the Budget and Finance Committee of the Navajo Nation Council.

K. The Auditor General may, at any time, perform an operational audit to insure procedural compliance and integrity of assets.

L. Expenditures (commodity purchases and operating expenses) shall be limited to the balance of the Navajo Wool Growers Marketing Program Revolving Fund.

History

ACN-142-82, November 9, 1982.

ACMA-37-78, March 29, 1978.

CO-56-73, October 17, 1973.

Note. "Advisory Committee" changed to "Economic Development Committee". See 2 N.N.C. § 721 et. seq.

§ 2605. Contracts with traders

Any contract or agreement made with traders or organizations to act as purchasing agents for the Navajo Wool Growers Marketing Program shall contain the provision that Navajo wool/mohair producers shall receive the same price for commodities as offered to the Navajo wool/mohair producers by the Navajo Wool Growers Marketing Program.

History

ACMA-37-78, March 29, 1978.

CO-56-73, October 17, 1973.

§ 2606. Contracts for technical assistance

The Director, subject to the approval of the Management Board, is authorized to negotiate with members of the wool industry for the services and technical assistance needed to grade and bale the annual wool clip, and for the sale of wool accumulated or to be accumulated.

History

ACN-142-82, November 9, 1982.

ACMA-37-78, March 29, 1978.

CO-56-73, October 17, 1973.

§ 2607. Amendment of Chapter

This Chapter shall continue in force until cancelled or amended by the Navajo Nation Council.

History

CD-68-89, December 15, 1989.

ACMA-37-78, March 29, 1978.

CO-56-73, October 17, 1973.

Note. "Advisory Committee" changed to "Government Services Committee".

Cross References

Economic Development Committee authority, see 2 N.N.C. § 724(E)(1).

Chapter 21. Soil and Water Conservation Districts

Subchapter 1. General Provisions

§ 2801. Policy

It is the declared policy of the Navajo Nation to provide for the conservation and restoration of forest, range and watershed resources; for the control of erosion and sedimentation; for the control of floods and the beneficial use of flood waters; and to thereby preserve and enhance wildlife and vegetation and scenic and recreational resources and conserve natural resources, and in such a manner to promote the public health, safety and general well being of the Navajo People.

History

CF-11-80, February 7, 1980.

Cross References

Resources Committee, see § 852 of this title, and 2 N.N.C. § 691 *et seq.*

Water, see Title 22.

Subchapter 3. Responsibilities of the Resources Committee of the Navajo Nation Council

§ 2812. General authority

The Resources Committee of the Navajo Nation Council is authorized by 3 N.N.C. §§ 832 and 852 to coordinate federal and Navajo Nation Programs for natural resource utilization, conservation, restoration, and related educational programs.

History

CF-11-80, February 7, 1980.

Cross References

Resources Committee, see § 852 of this title, and 2 N.N.C. § 691 *et seq.*

§ 2813. Coordination of operation of districts

The Resources Committee shall coordinate the organization and operation of Soil and Water Conservation Districts in the Navajo Nation, so as to enable the fullest possible participation by Navajo farmers, ranchers, and land users in federal programs of assistance in Soil and Water Conservation, watershed protection, flood control and prevention, farm forestry, and rural area development.

History

CF-11-80, February 7, 1980.

§ 2814. Determination on formation of districts

The Resources Committee shall hear petitions, hold public hearings, and establish Soil and Water Conservation Districts.

History

CF-11-80, February 7, 1980.

§ 2815. Assistance in plan implementation

The Resources Committee shall assist the Soil and Water District Boards of Directors in the implementation of Soil and Water Conservation programs, shall facilitate communication and coordination among Districts, shall prescribe uniform accounting and record keeping procedures for Districts, and shall require annual reports from each District, including a complete accounting of District funds.

History

CF-11-80, February 7, 1980.

Subchapter 5. Formation of Soil and Water Conservation Districts

§ 2826. Petition for the creation of a district

A. Twenty-five or more farmers, ranchers, and customary land users using lands within the boundaries of the proposed district, may petition the Resources Committee requesting that a Soil and Water Conservation District be formed. The petition shall contain:

1. The name of the proposed District;

2. A declaration of the need for the District;

3. A description of the boundaries of the District; and

4. A request that the Resources Committee determine that the District be created, set boundaries, and direct that a referendum be held.

B. Any proposed Soil and Water Conservation District shall conform to the existing boundaries of Navajo Nation grazing districts.

C. A Soil and Water Conservation District may include one or more Navajo Nation grazing districts in their entirety.

History

CF-11-80, February 7, 1980.

Cross References

Grazing, see §§ 701-950 of this title.

Farm Boards, see §§ 61-69 of this title.

Referendum, see 11 N.N.C. § 401 *et seq*.

§ 2827. Hearing on a petition for the creation of a Soil and Water Conservation District

Within 30 days after the Resources Committee receives a petition for the creation of a Soil and Water Conservation District, notice shall be given by publication in the Navajo Times for three weeks, by an announcement at a chapter meeting of each affected chapter at least one week in advance, and by the posting of notices for three weeks at all affected chapter houses, of a public hearing on:

A. The desirability and necessity of forming the proposed Soil and Water Conservation District;

B. The boundaries of the proposed District;

C. The propriety of the petition; and

D. All other related questions.

History

CF-11-80, February 7, 1980.

§ 2828. Determination by the Resources Committee

A. If the Resources Committee determines after a hearing that it is in the public interest and is administratively feasible to organize the proposed District, the Committee shall grant the petition, and shall set forth in a resolution the boundaries of the District, considering:

1. Topography;

2. Soils;

3. Erosion;

4. Flooding hazard;

6. Prevailing land use;

7. Desirability, necessity, and benefits of the District;

8. The relationship of the District to agricultural areas, watersheds, Navajo Nation grazing districts, and other Soil and Water Conservation Districts; and

9. Boundaries of existing grazing districts.

B. If the Resources Committee concludes that the proposed District is not in the public interest, it shall deny the petition and set forth in a resolution the reasons for its action.

C. If a petition for creation of a Soil and Water Conservation District is denied by the Resources Committee, the petitioners may resubmit the petition after six months have passed.

History

CF-11-80, February 7, 1980.

Cross References

Grazing, see §§ 701-950 of this title.

§ 2829. Referendum

A. Within 30 days after the Resources Committee has granted a petition for the creation of a Soil and Water Conservation District and following notice as described in § 2827(A) of this Chapter, the Resources Committee shall cause a referendum to be held in all chapters within the District boundaries to determine whether a majority of the voters approve the formation of the District.

B. The referendum shall be conducted and the results declared in accordance with applicable provisions of the Navajo Nation Election Code, under the authority of the Navajo Board of Election Supervisors.

History

CF-11-80, February 7, 1980.

Cross References

Navajo Nation Election Code, see 11 N.N.C. § 1 *et seq.*

Subchapter 7. Administration of the District

§ 2840. District Board of Directors

A. The governing body of each Soil and Water Conservation District shall be a Board of Directors. At an election which may be held on a separate ballot at the time of the referendum each chapter will elect one representative to serve on the Board of Directors. In the event that there are more than 11 chapters in the District, those elected shall select from among themselves those who are to serve on the Board. Procedures for such selection may be formulated by the Resources Committee. Those representatives not selected shall constitute an advisory panel from which vacancies in the Board may be filled pending the next Board member election.

B. The term of each member of the Board of Directors shall be four years, except that two members of the initial Board will be elected to serve two year terms. Board member elections will be held every two years, and terms will be staggered such that no more than two members shall be elected in any election year.

C. The Board of Directors of each District shall enact bylaws including procedures for the transaction of business, which bylaws must be approved by the Resources Committee.

D. The Board of Directors shall record all proceedings, resolutions, rules and regulations of the District, report at least annually to the Resources Committee of the Navajo Nation Council, and upon request, furnish to the Committee copies of all documents adopted or employed by the District in pursuance of its programs.

History

CF-11-80, February 7, 1980.

§ 2841. Powers of the Soil and Water Conservation District

A. Each Soil and Water Conservation District organized under the Navajo Nation Code shall be a political subdivision of the Navajo Nation and shall exercise the following functions, powers, and duties:

1. Employ, subject to available funds, administrative, clerical, and technical staff personnel;

2. Conduct surveys, investigation, and research relating to soil erosion, flood water, flood control, non-point water pollution, sediment control, watershed development, methods of cultivation, seeding and undesirable species eradication, and other measures as will aid farm and range operation, disseminate information, and carry on research programs in cooperation with Navajo Nation and federal agencies;

3. Conduct demonstration and training projects pertaining to all aspects of soil and water conservation, restoration, and utilization;

4. Cooperate and enter into agreements with customary land users, farmers, and ranchers, and agencies of the federal government, to carry on programs of soil erosion prevention, flood water control and utilization, methods of cultivation, cropping practices, landleveling, improvement of agricultural lands, methods of reseeding and vegetation enhancement on range lands;

5. Construct, improve, operate, and maintain any structure deemed necessary or convenient for the performance of any operation authorized by this Chapter;

6. To acquire and administer all supplies, tools, equipment, and other property necessary for the implementation of soil and water conservation programs;

7. Make available, on such terms as the Board of Directors may prescribe, agricultural and engineering machinery and equipment, fertilizer, seed and other plant materials and other equipment and supplies necessary to the implementation of soil and water conservation programs; and

8. Develop comprehensive long range district-wide plans for soil and water conservation programs, and annual work plans for the implementation of long range programs.

B. All participation in the District programs is voluntary.

History

CF-11-80, February 7, 1980.

§ 2842. Limitation of powers

A. All planning and implementation of water resource conservation, utilization, or development programs shall be conducted with the full understanding, consent, and participation of any Navajo Nation entities owning or operating water control structures within the District and of the Navajo Water Commission.

B. Soil and Water Conservation Districts shall have no control or authority whatsoever over the determination or assignment of water rights.

C. Soil and Water Conservation Districts shall be subject to all applicable Navajo Nation and federal laws and regulations.

D. In developing and implementing long range conservation programs and annual work plans, Soil and Water Conservation Districts shall consult and cooperate with other Navajo Nation departments and commissions.

History

CF-11-80, February 7, 1980.

§ 2843. Authority to promulgate regulations

The Resources Committee of the Navajo Nation Council shall have the authority to promulgate regulations necessary for the administration of this Chapter.

History

CF-11-80, February 7, 1980.

Title 4

Environment

History

Previous Title 4, "Ceremonies and Fairs," (ACA-51-58, April 21, 1958 and ACAU-1 53-68, August 16, 1968) has been removed and replaced by a new Title 4, "Environment"; prior §§ 1, 2, 101 and 102 were deleted pursuant Navajo Nation Attorney General's advice on plans of operation for Navajo Nation Divisions dated January 4, 1991.

Chapter 1. Navajo Nation Solid Waste Act

History

CJY-51-97, July 24, 1997, rescinded and repealed the previously codified "Navajo Nation Solid Waste Code" (CJY-51-93, July 22, 1993 and CO-58-90, October 18, 1990) in its entirety and replaced it with the newly codified "Navajo Nation Solid Waste Act".

United States Code

Navajo Nation Legislative Process Policy

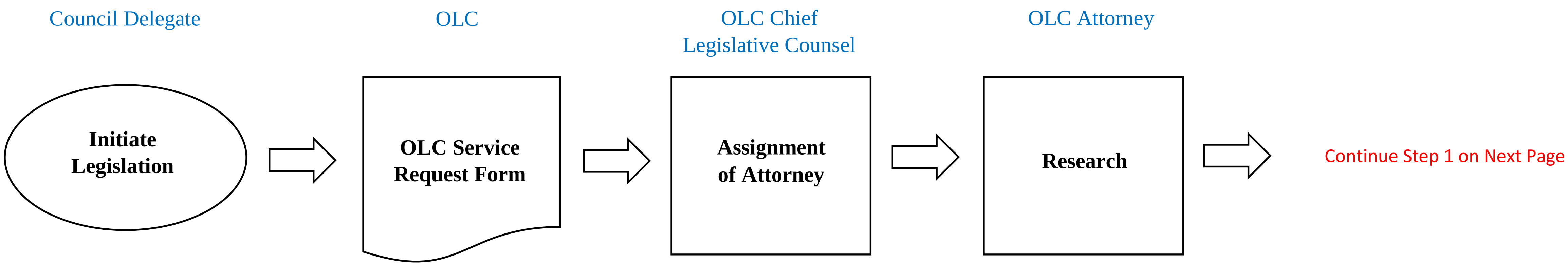
Adopted by: Naabik'íyáti' Resolution NABIMA-16-17

LEGISLATIVE PROCESS POLICY TABLE OF CONTENTS

STEP ONE: INITIATING / DRAFTING LEGISLATION

TASKS	RESPONSIBLE PARTY
Initiate legislation sponsorship.	COUNCIL DELEGATE
Delegate submits an Office of Legislative Counsel (OLC) Service Request Form to OLC to draft proposed legislation; form is provided by OLC.	COUNCIL DELEGATE
Research for legal sufficiency (federal, state, county, and tribal laws).	OFFICE OF LEGISLATIVE COUNSEL
Draft proposed legislation in a properly codified format.	OFFICE OF LEGISLATIVE COUNSEL
Reviews and accepts drafted proposed legislation.	COUNCIL DELEGATE
Delegate signs original proposed legislation.	COUNCIL DELEGATE

STEP ONE: INITIATING / DRAFTING LEGISLATION



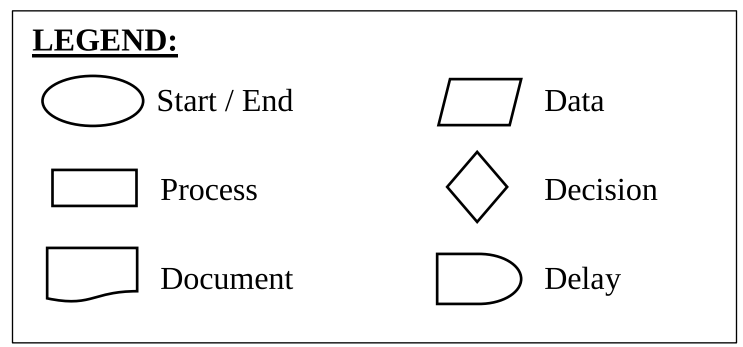
RESPONSIBLE PARTY:

Council Delegate

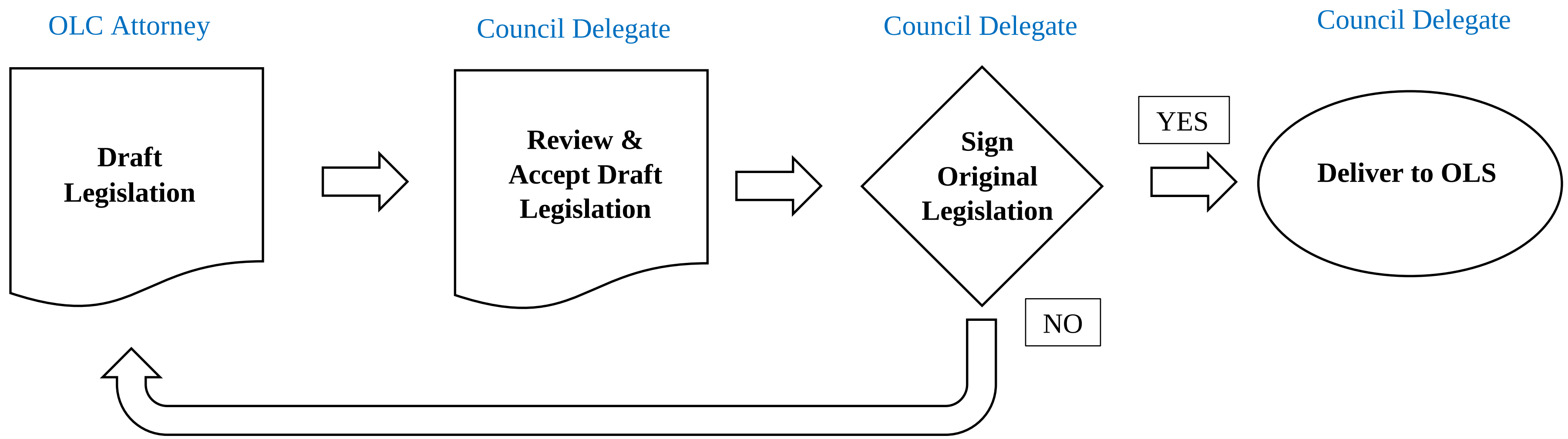
Office of Legislative Counsel (OLC)

OLC Chief Legislative Counsel

OLC Attorney



STEP ONE: INITIATING / DRAFTING LEGISLATION (CONT'D)



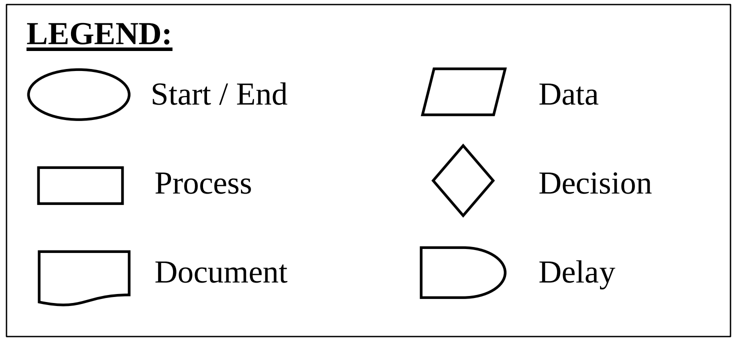
RESPONSIBLE PARTY:

Council Delegate

Office of Legislative Counsel (OLC)

OLC Chief Legislative Counsel

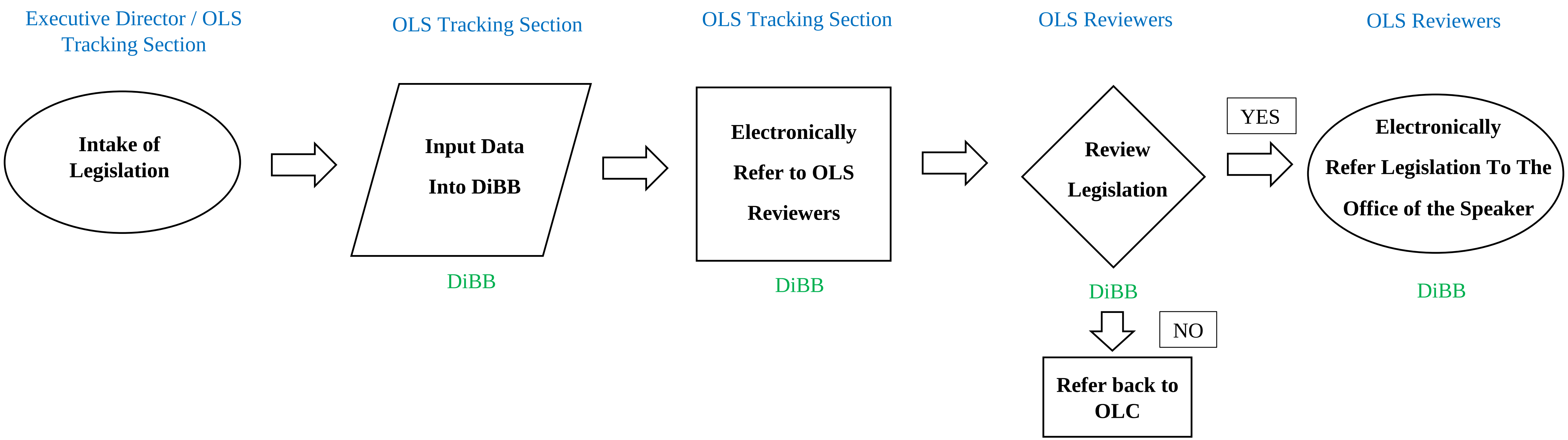
OLC Attorney



STEP TWO: OFFICE OF LEGISLATIVE SERVICES LEGISLATION INTAKE AND REVIEW

TASKS	RESPONSIBLE PARTY
Sponsoring Delegate submits proposed legislation, with original signature, to OLS Director or OLS Tracking Section (designee).	**OFFICE OF LEGISLATIVE SERVICES DIRECTOR or OLS TRACKING SECTION**
OLS Reviewers review legislation. Should document have discrepancies, legislation will be referred back to OLC.	**OLS REVIEWERS**
Electronically deliver legislation to Office of the Speaker	**OLS REVIEWERS**

STEP TWO: OFFICE OF LEGISLATIVE SERVICES LEGISLATION INTAKE AND REVIEW

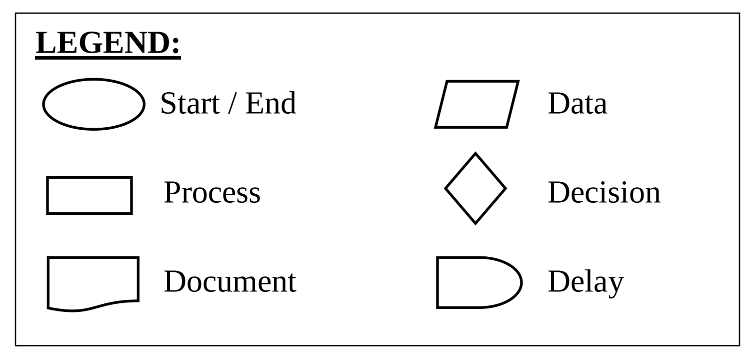


RESPONSIBLE PARTY:

Executive Director

OLS Tracking Section

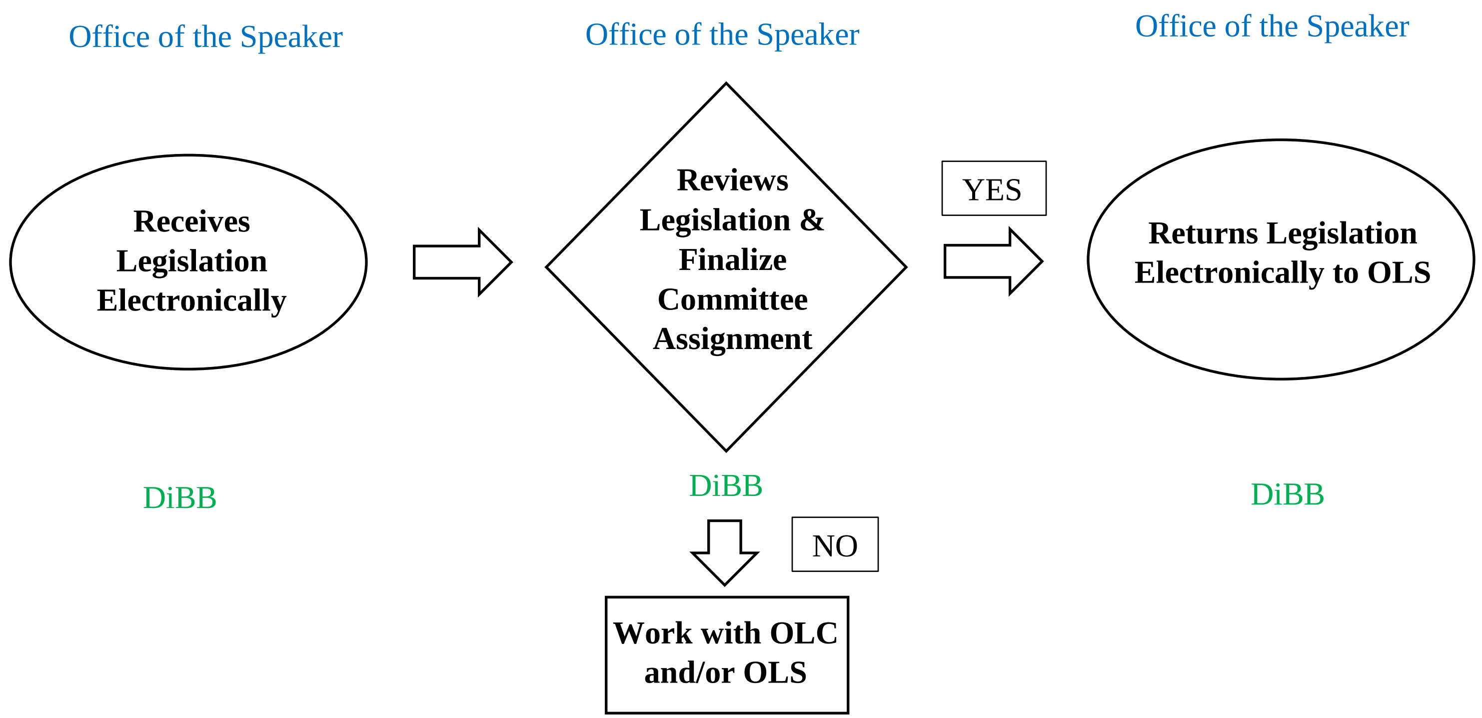
OLS Reviewers



STEP THREE: OFFICE OF THE SPEAKER REVIEW

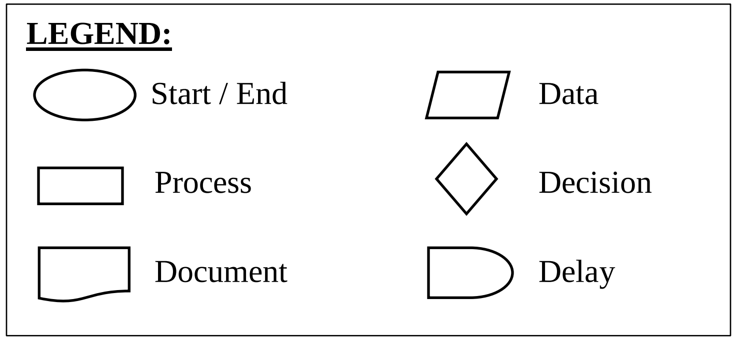
TASKS	RESPONSIBLE PARTY
Office of the Speaker receives legislation electronically.	OFFICE OF THE SPEAKER
Speaker or designee reviews legislation and finalize committee assignment.	OFFICE OF THE SPEAKER
Return legislation electronically to OLS.	OFFICE OF THE SPEAKER

STEP THREE: OFFICE OF THE SPEAKER REVIEW



RESPONSIBLE PARTY:

Office of the Speaker

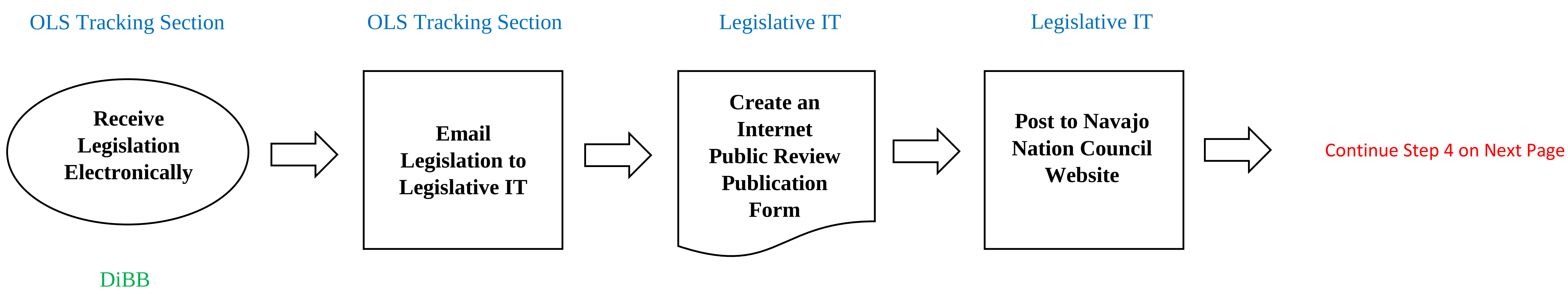


STEP FOUR: INITIATE LEGISLATION PUBLIC COMMENT

TASKS	RESPONSIBLE PARTY
OLS Tracking Section emails Legislative Information Technology for posting of legislation to website.	**OLS TRACKING SECTION**
Legislative Information Technology creates Internet Public Review Publication form.	**LEGISLATIVE INFORMATION TECHNOLOGY**
Legislative Information Technology posts legislation to website: www.navajonationcouncil.org.	**LEGISLATIVE INFORMATION TECHNOLOGY**
Legislative Information Technology sends confirmation email to OLS and Office of the Speaker reviewers.	**LEGISLATIVE INFORMATION TECHNOLOGY**
LEGISLATION ON FIVE DAY HOLD*	

*Five day hold period begins the day after posting legislation on the website.

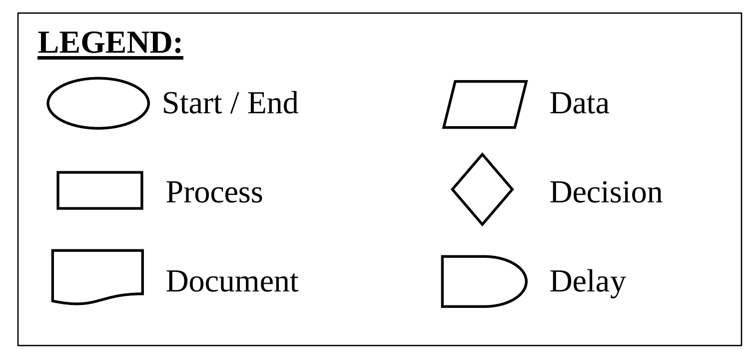
STEP FOUR: **INITIATE LEGISLATION PUBLIC COMMENT**



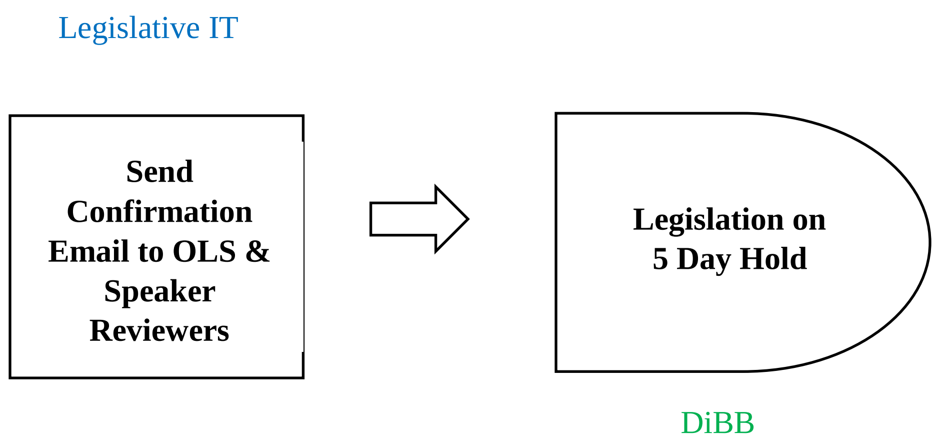
RESPONSIBLE PARTY:

OLS Tracking Section

Legislative IT



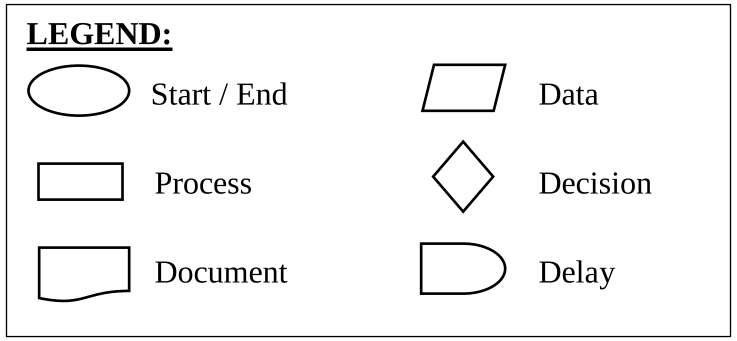
STEP FOUR: INITIATE LEGISLATION PUBLIC COMMENT (CONT'D)



RESPONSIBLE PARTY:

OLS Tracking Section

Legislative IT

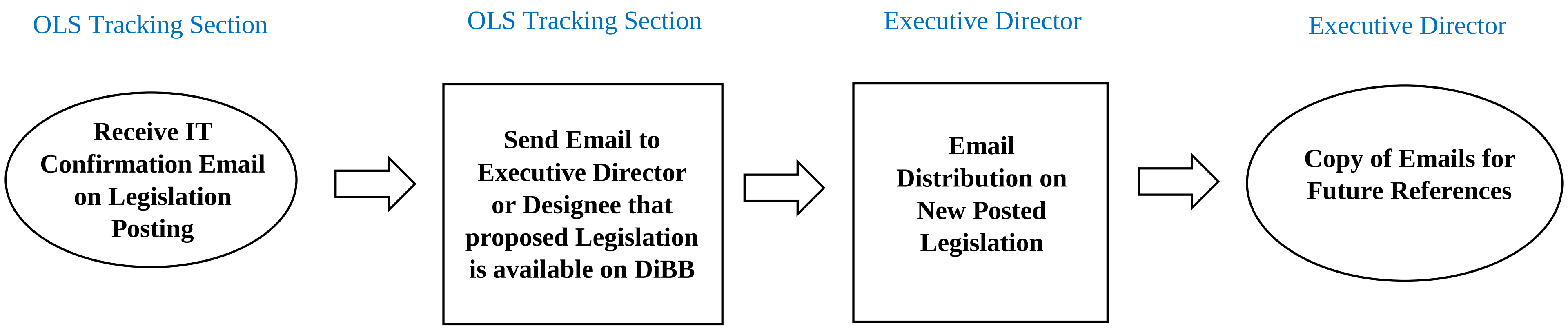


STEP FIVE: DIGITAL DISTRIBUTION OF LEGISLATION

TASKS	RESPONSIBLE PARTY
OLS Tracking Section, by email, confirms to Executive Director or designee the posting of the complete legislation onto DIBB.	**OLS TRACKING SECTION**
OLS Director or Designee sends email informing the Office of the President, Office of the Attorney General, Office of the Controller, Office of Management and Budget and all Executive Branch Directors of newly introduced legislations.*	**OFFICE OF LEGISLATIVE SERVICES DIRECTOR or DESIGNEE**
Any exhibits or materials determined by the Navajo Nation Department of Justice to be confidential shall be properly marked "confidential" and shall not be placed on the website or otherwise released.	

*Function delegated to Office of Legislative Services by Office of the Speaker

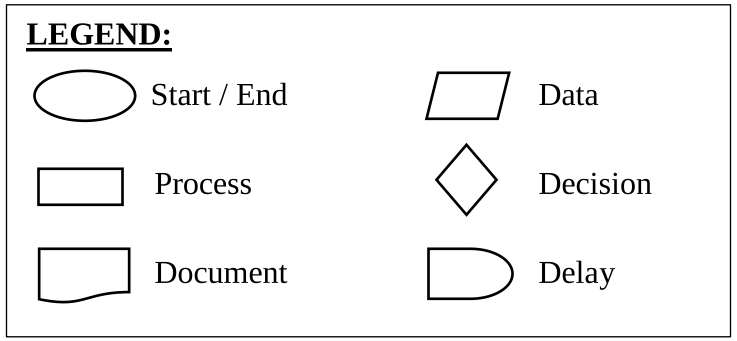
STEP FIVE: DIGITAL DISTRIBUTION OF LEGISLATION



RESPONSIBLE PARTY:

OLS Tracking Section

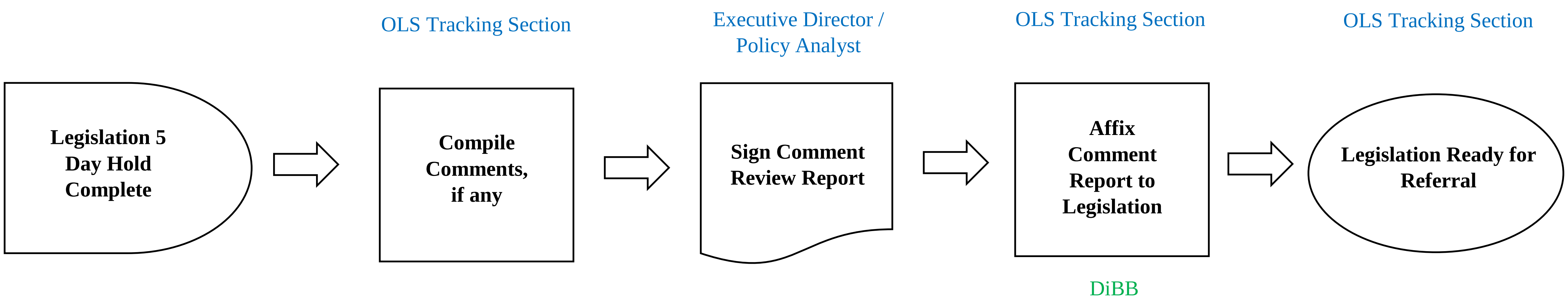
Executive Director



STEP SIX: PUBLIC COMMENT REVIEW

TASKS	RESPONSIBLE PARTY
Digital comments may be e-mailed to comments@navajo-nsn.gov Written comments may be mailed to: Executive Director, Office of Legislative Services, P.O. Box 3390, Window Rock, AZ 86515 Fax #: (928) 871-7259	
At the conclusion of the five (5) day comment period, OLS will compile comments submitted and prepare comment review sheet.	**OLS TRACKING SECTION**
OLS Executive Director or Policy Analyst signs the comment review report.	**OFFICE OF LEGISLATIVE EXECUTIVE DIRECTOR or OLS TRACKING SECTION**
Tracking Section attaches the Internet Public Review Publication & Summary to the legislation.	**OLS TRACKING SECTION**

STEP SIX: PUBLIC COMMENT REVIEW

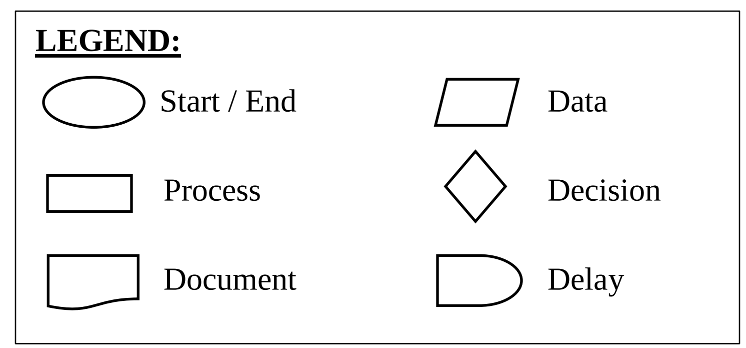


RESPONSIBLE PARTY:

OLS Tracking Section

Executive Director

Policy Analyst

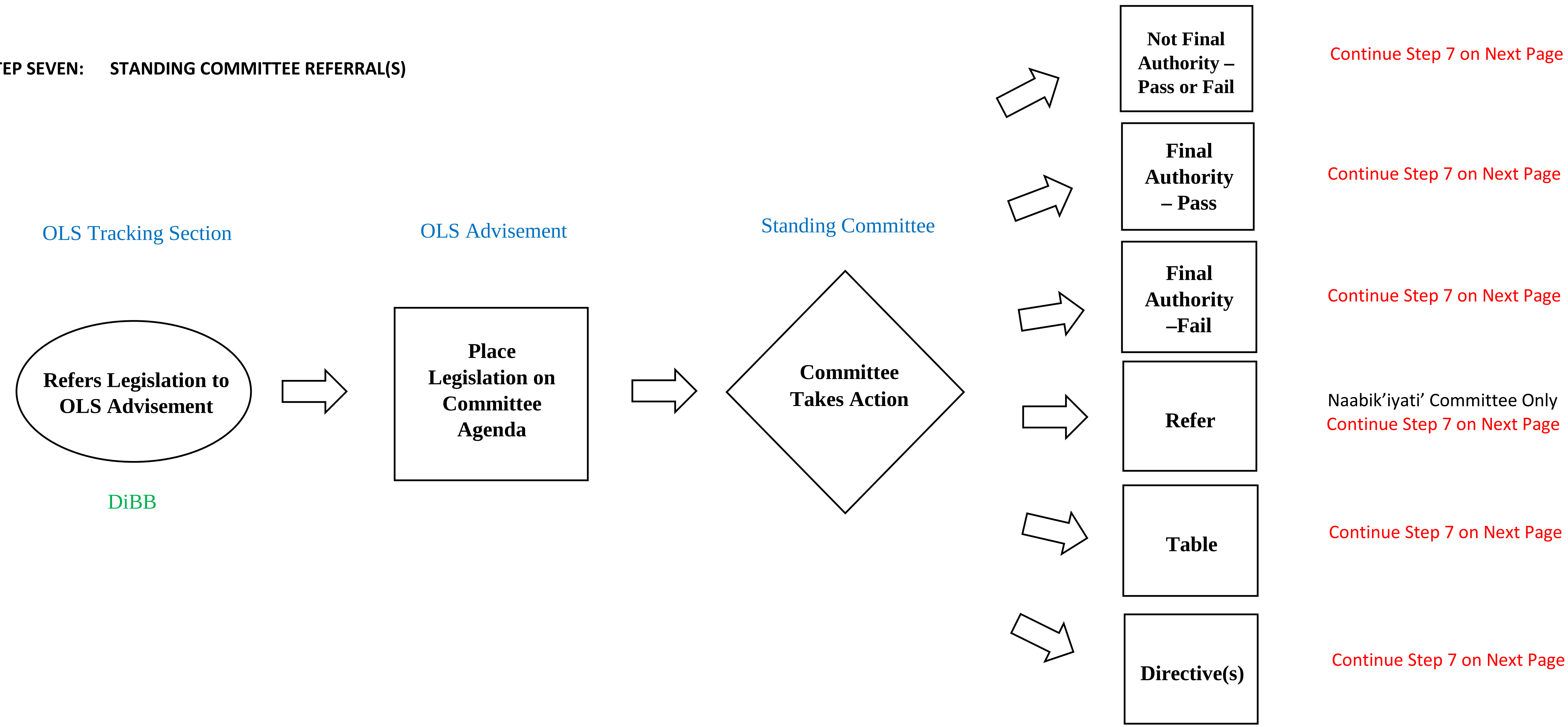


STEP SEVEN: STANDING COMMITTEE REFERRAL(S)

TASKS	RESPONSIBLE PARTY
OLS Tracking Section refers legislation to Legislative Advisement, Legislative Reporter, Committee Chairperson, and Sponsor. *	**OLS TRACKING SECTION**
Legislative Advisor, in consultation with Committee Chairperson and Sponsor, places legislation on the committee agenda.	**OLS LEGISLATIVE ADVISEMENT**
Standing Committee convenes and takes action on legislation.	**STANDING COMMITTEE**
Upon committee action, *if not final authority*, Legislative Reporter drafts Committee Report with approved amendments and/or failed amendments. Legislative Advisor reviews Committee Report. Documentation shall be completed within five (5) calendar days. OR Upon committee action, *if final authority,* Legislative Reporter drafts Resolution incorporating amendment(s) or if legislation fails, Legislative Reporter drafts Committee Report documenting amendment(s). Legislative Advisor reviews and finalizes Resolution or Committee Report. Documentation shall be completed within five (5) calendar days. Note: If any, directives are issued, directive(s) shall be memorialized in writing to Office of the President and the appropriate Division Director within three (3) calendar days.	**LEGISLATIVE REPORTER and LEGISLATIVE ADVISOR**
Committee Report(s), resolution(s), and directive(s) are finalized with Committee Chairperson signature.	**STANDING COMMITTEE CHAIRPERSON**

*DEPENDING ON LEGISLATION, ASSIGNMENT MAY BE MADE TO THE FOLLOWING STANDING COMMITTEES (Budget and Finance; Health, Education and Human Services; Law and Order; Naabik'íyáti'; Resources and Development).

STEP SEVEN: STANDING COMMITTEE REFERRAL(S)

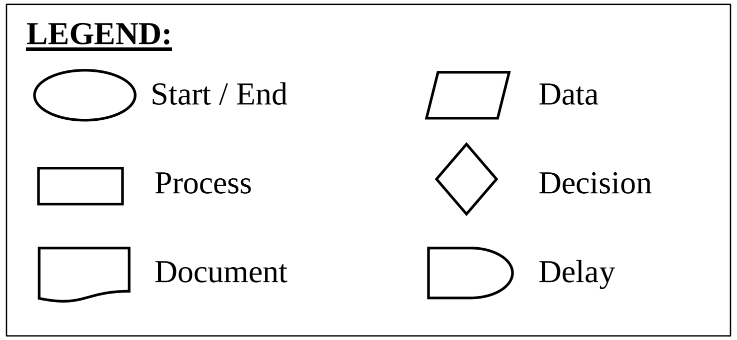


RESPONSIBLE PARTY:

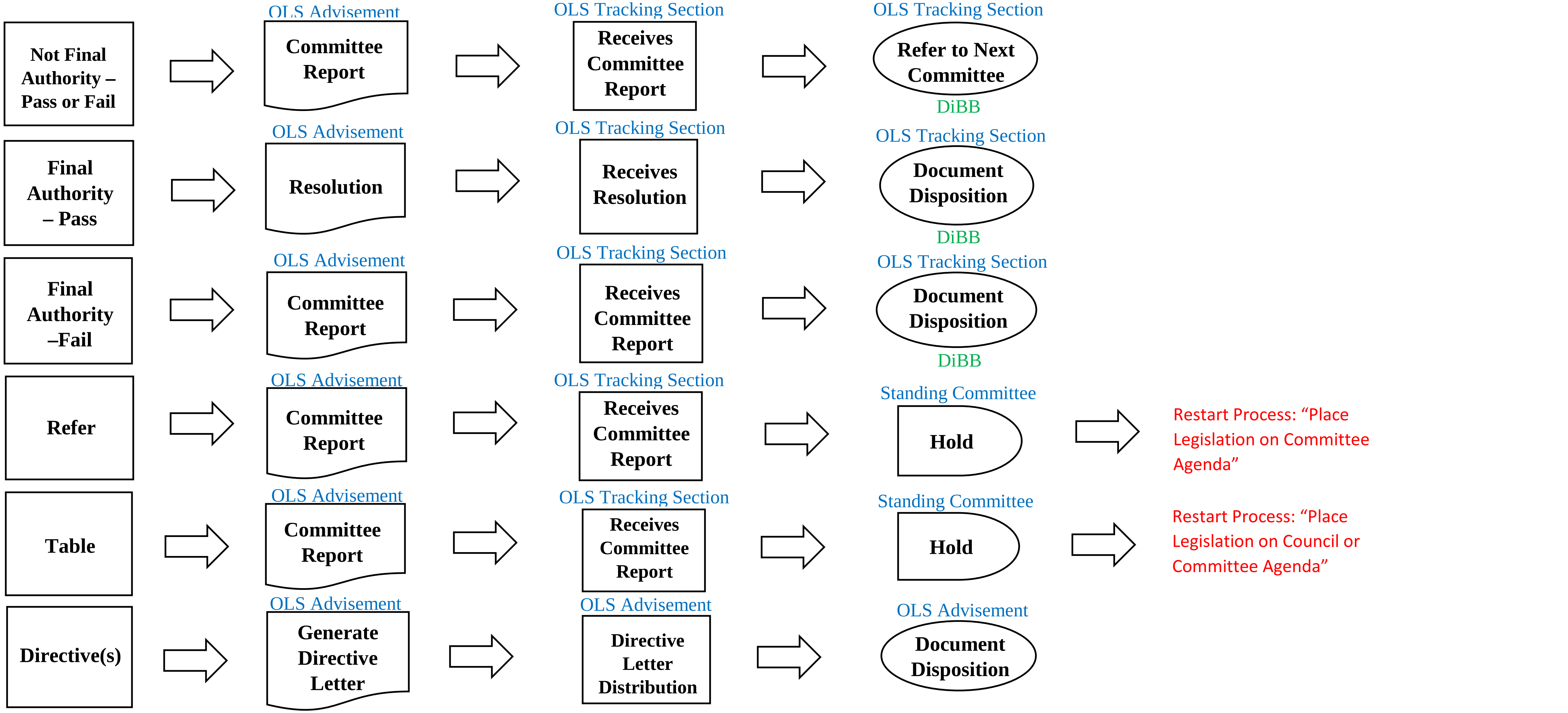
OLS Tracking Section

OLS Advisement

Standing Committee



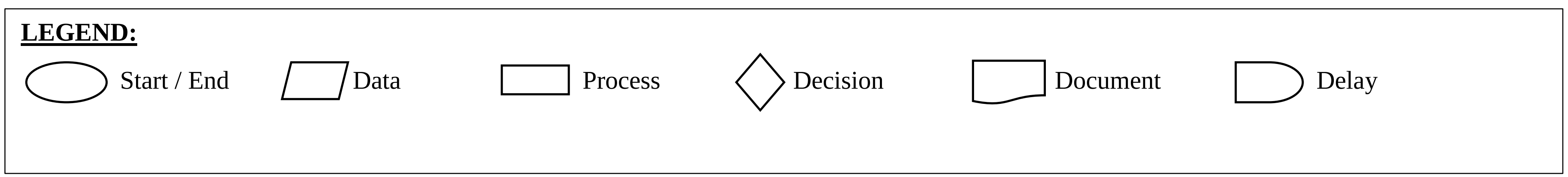
STEP SEVEN: STANDING COMMITTEE REFERRAL(S) (CONT'D)



RESPONSIBLE PARTY:

OLS Tracking Section

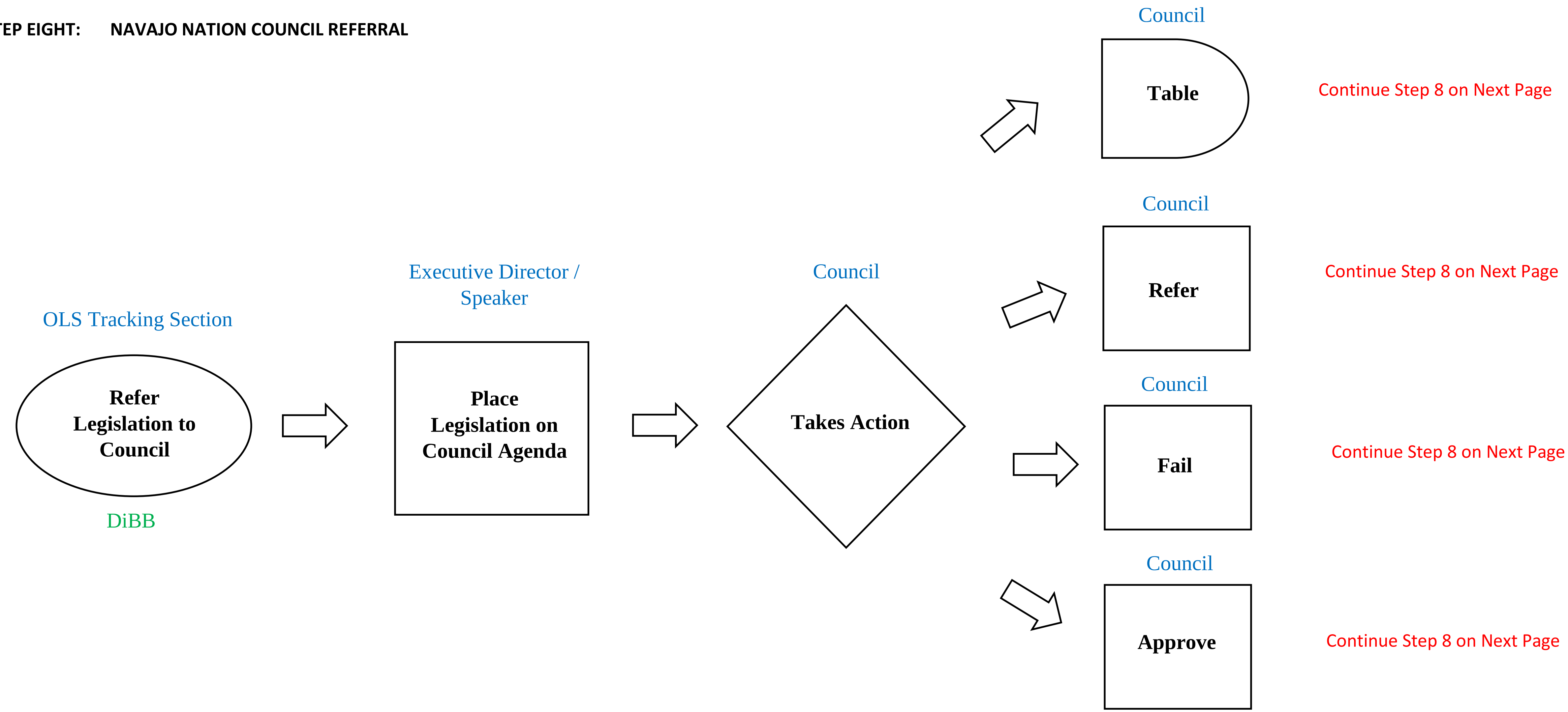
OLS Advisement



STEP EIGHT: NAVAJO NATION COUNCIL REFERRAL

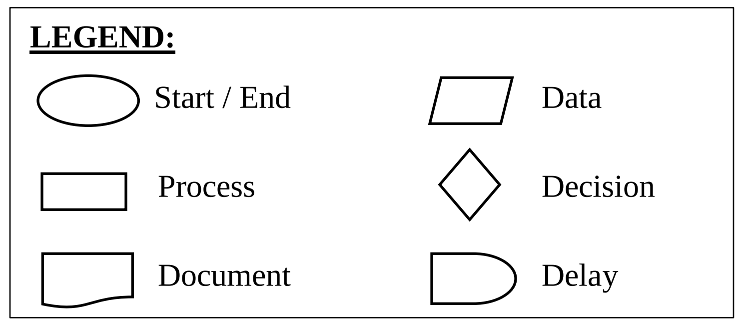
TASKS	RESPONSIBLE PARTY
OLS Tracking Section refers legislation to Navajo Nation Council.	**OLS TRACKING SECTION**
Navajo Nation Council convenes and takes action on legislation.	**NAVAJO NATION COUNCIL**
If legislation does not receive sufficient votes for passage, legislation shall be deemed permanently eliminated. OR If legislation passes, resolution will be signed by the Speaker or referred to the President of the Navajo Nation.	**NAVAJO NATION COUNCIL**

STEP EIGHT: NAVAJO NATION COUNCIL REFERRAL

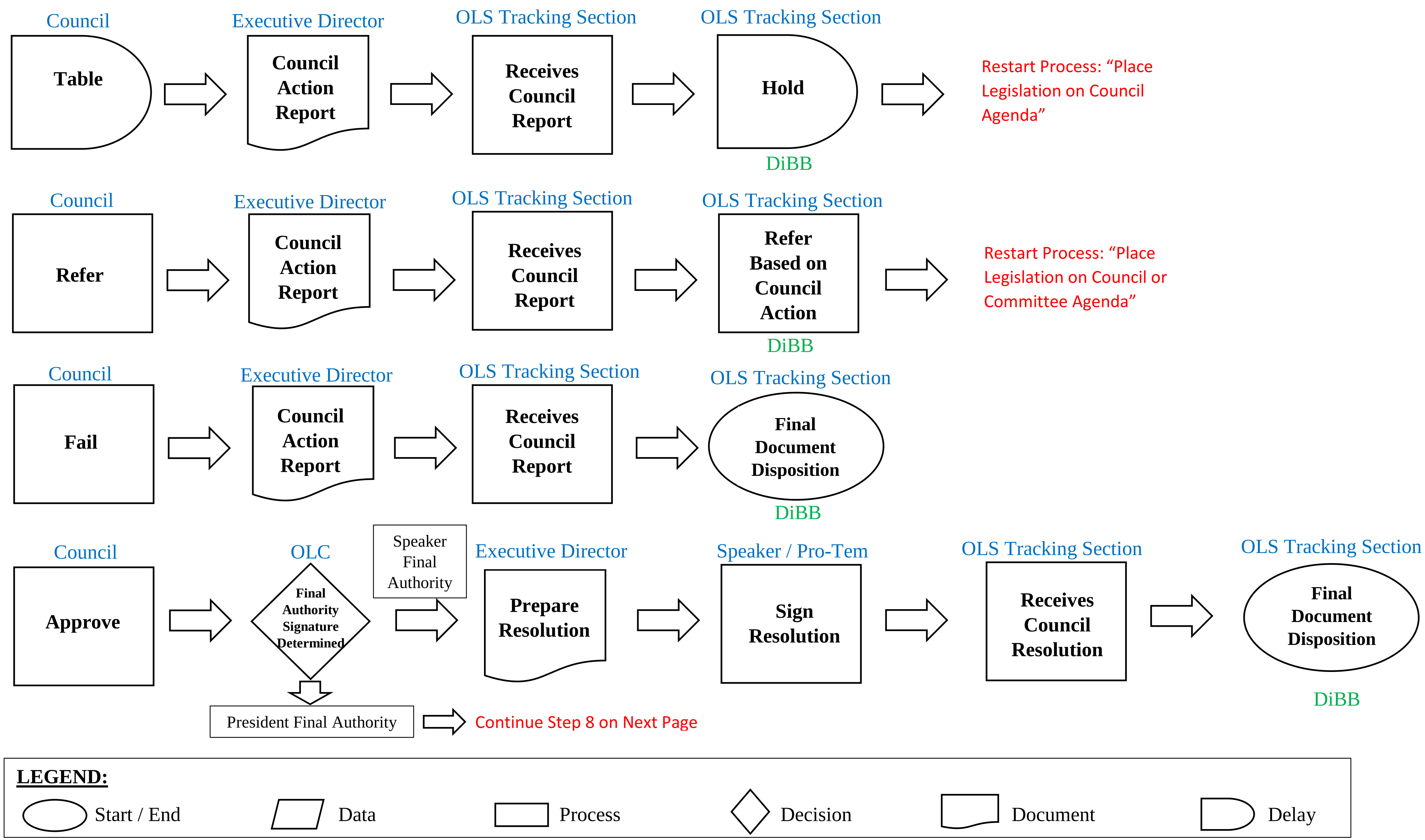


RESPONSIBLE PARTY:

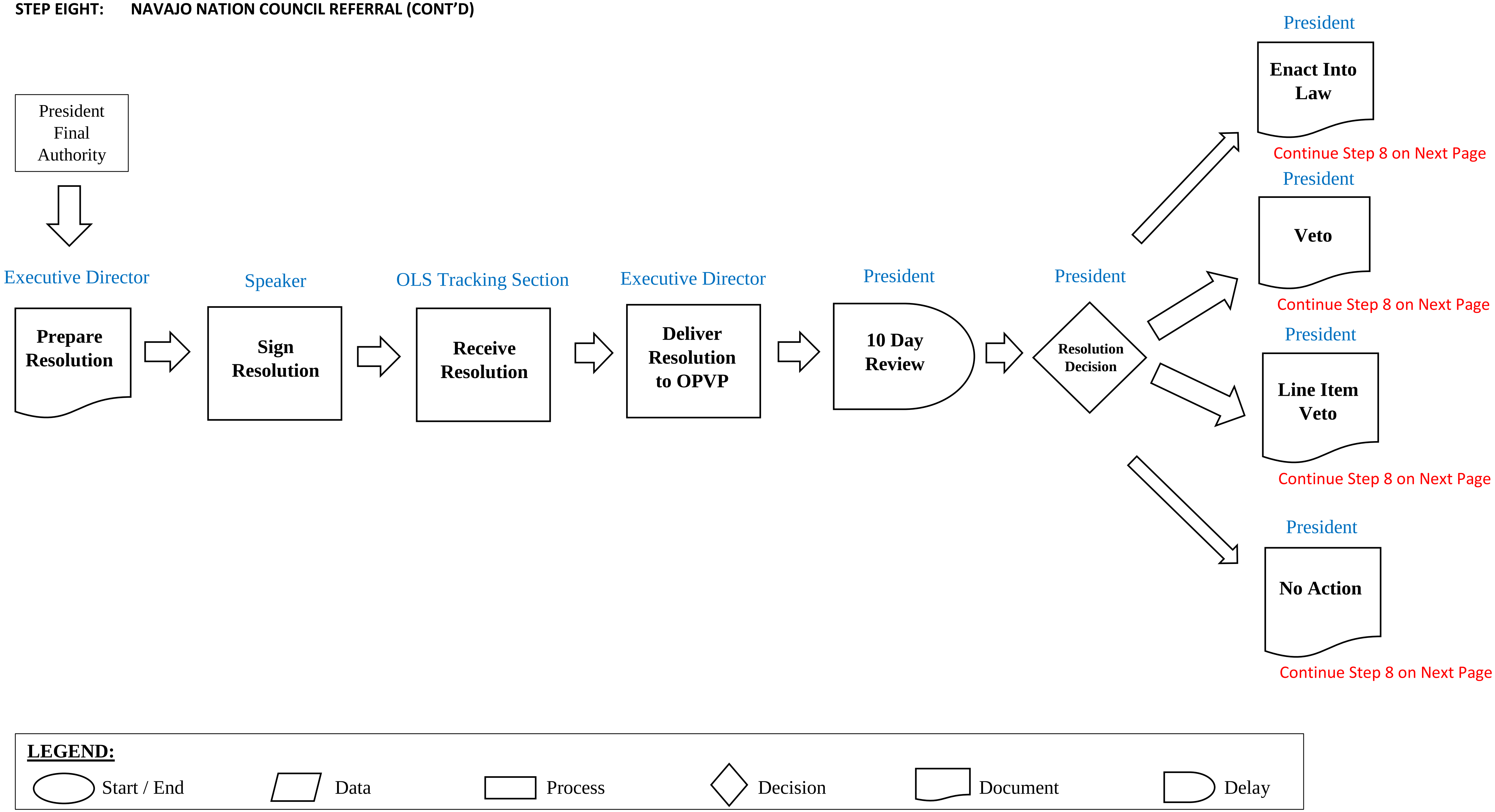
OLS Tracking Section
Executive Director
Speaker
Council
OLC Legislative Counsel
President
Office Legislative Counsel (OLC)



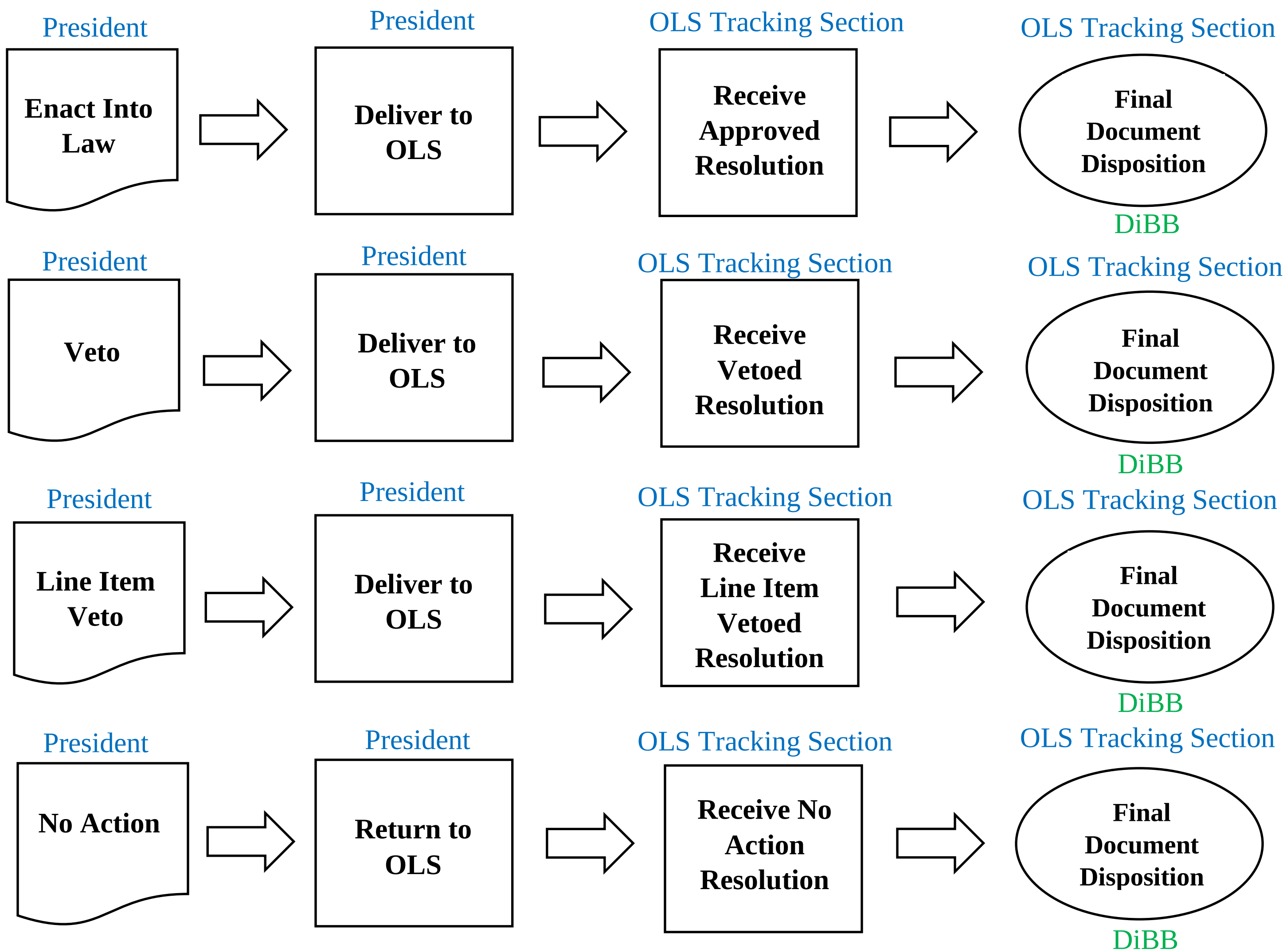
STEP EIGHT: NAVAJO NATION COUNCIL REFERRAL (CONT'D)

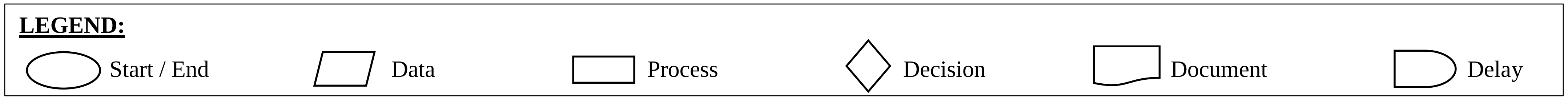


STEP EIGHT: NAVAJO NATION COUNCIL REFERRAL (CONT'D)



STEP EIGHT: NAVAJO NATION COUNCIL REFERRAL (CONT'D)





LEGISLATIVE BRANCH CONTACT INFORMATION

OFFICE OF THE SPEAKER

P. O. Box 3390
Window Rock, AZ 86515
Main Line: (928) 871-7160
Fax Line: (928) 871-7255
www.navajonationcouncil.org

OFFICE OF THE LEGISLATIVE COUNSEL

Main Line: (928) 871-7166
Fax Line: (928) 871-7576

OFFICE OF LEGISLATIVE SERVICES

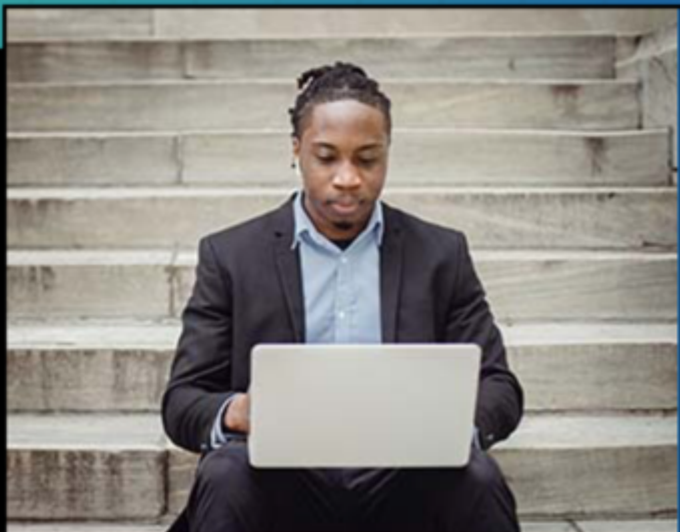
Main Line: (928) 871-7254
Fax Line: (928) 871-7259
www.nnols.org

LEGISLATIVE INFORMATION TECHNOLOGY

Main Line: (928) 871-7877

Realistic Picture Of Business On The Navajo Nation

1. Capital
2. Real Estate
3. Business Longevity
4. Available resources of the community
5. Success is in your Behavior and Attitude



Nahata Foundation, Inc.