

ACT 39

H.B. NO. 3623

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

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

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

**“ARTICLE 5.
LETTERS OF CREDIT**

§490:5-101 Short title. This Article may be cited as Uniform Commercial Code—Letters of Credit.

§490:5-102 Definitions. (a) As used in this Article:

- (1) “Adviser” means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.
- (2) “Applicant” means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.
- (3) “Beneficiary” means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.
- (4) “Confirmer” means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.
- (5) “Dishonor” of a letter of credit means failure to timely honor or take an interim action, such as acceptance of a draft, that may be required by the letter of credit.
- (6) “Document” means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in section 490:5-108(e), and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.
- (7) “Good faith” means honesty in fact in the conduct or transaction concerned.
- (8) “Honor” of a letter of credit means performance of the issuer’s undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, “honor” occurs
 - (i) Upon payment;
 - (ii) If the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or
 - (iii) If the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

- (9) "Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.
- (10) "Letter of credit" means a definite undertaking that satisfies the requirements of section 490:5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.
- (11) "Nominated person" means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit, and (ii) undertakes by agreement or custom and practice to reimburse.
- (12) "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.
- (13) "Presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person.
- (14) "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (15) "Successor of a beneficiary" means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.

(b) Definitions in other articles applying to this Article and the sections in which they appear are:

"Accept" or "Acceptance". Section 490:3-409

"Value". Sections 490:3-303, 490:4-211

(c) Article 1 contains certain additional general definitions and principles of construction and interpretation applicable throughout this Article.

§490:5-103 Scope. (a) This Article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(b) The statement of a rule in this Article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this Article.

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

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

§490:5-104 Formal requirements. A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated (i) by a signature, or (ii) in accordance with the agreement of the parties or the standard practice referred to in section 490:5-108(e).

§490:5-105 Consideration. Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation.

§490:5-106 Issuance, amendment, cancellation, and duration. (a) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.

(b) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.

(c) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one year after its stated date of issuance or, if none is stated, after the date on which it is issued.

(d) A letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued.

§490:5-107 Confirmer, nominated person, and advisor. (a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

(b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(c) A person requested to advise may decline to act as an adviser. An adviser who is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.

(d) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice has the rights and obligations of an adviser under subsection (c). The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment, or advice received by the person who so notifies.

§490:5-108 Issuer's rights and obligations. (a) Except as otherwise provided in section 490:5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in section 490:5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day after the day of its receipt of documents:

- (1) To honor;
- (2) If the letter of credit provides for honor to be completed more than seven business days after presentation, to accept a draft, or incur a deferred obligation; or
- (3) To give notice to the presenter of discrepancies in the presentation.

(c) Except as otherwise provided in subsection (d), an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(d) Failure to give the notice specified in subsection (b) or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor, fraud, or forgery as described in section 490:5-109(a) or expiration of the letter of credit before presentation.

(e) An issuer shall observe the standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

- (1) The performance or nonperformance of the underlying contract, arrangement, or transaction;
- (2) An act or omission of others; or
- (3) Observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e).

(g) If an undertaking constituting a letter of credit contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.

(i) An issuer that has honored a presentation as permitted or required by this Article:

- (1) Is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;
- (2) Takes the documents free of claims of the beneficiary or presenter;
- (3) Is precluded from asserting a right of recourse on a draft under sections 490:3-414 and 490:3-415;
- (4) Except as otherwise provided in sections 490:5-110 and 490:5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender that are apparent on the face of the presentation; and
- (5) Is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

§490:5-109 Fraud and forgery. (a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

- (1) The issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and
- (2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the

beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

- (1) The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;
- (2) A beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;
- (3) All of the conditions to entitle a person to the relief under the law of this State have been met; and
- (4) On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1).

§490:5-110 Warranties. (a) If its presentation is honored, the beneficiary warrants:

- (1) To the issuer, any other person to whom presentation is made, and the applicant, that there is no fraud or forgery of the kind described in section 490:5-109(a); and
- (2) To the applicant, that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(b) The warranties in subsection (a) are in addition to warranties arising under Articles 3, 4, 7, and 8 because of the presentation or transfer of documents covered by any of those Articles.

§490:5-111 Remedies. (a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer shall be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(c) If an adviser or nominated person other than a confirmer breaches an obligation under this Article or an issuer breaches an obligation not covered in subsection (a) or (b), a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections (a) and (b).

(d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b), or (c) shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Reasonable attorneys' fees and other expenses of litigation shall be awarded to the prevailing party in an action in which a remedy is sought under this Article.

(f) Damages that would otherwise be payable by a party for breach of an obligation under this Article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

§490:5-112 Transfer of letter of credit. (a) Except as otherwise provided in section 490:5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

- (1) The transfer would violate applicable law; or
- (2) The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in section 490:5-108(e) or is otherwise reasonable under the circumstances.

§490:5-113 Transfer by operation of law. (a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e), an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in section 490:5-108(e) or, in the absence of this practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) has the consequences specified in section 490:5-108(i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of section 490:5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b).

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

§490:5-114 Assignment of proceeds. (a) In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or

delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by article 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Article 9 or other law.

§490:5-115 Statute of limitations. An action to enforce a right or obligation arising under this Article must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

§490:5-116 Choice of law and forum. (a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in section 490:5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.

(c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this Article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or

practice, and (iii) there is conflict between this Article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in section 490:5-103(c).

(d) If there is conflict between this Article and Article 3, 4, 4A, or 9, this Article governs.

(e) The forum for settling disputes arising out of an undertaking within this Article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a).

§490:5-117 Subrogation of issuer, applicant, and nominated person.

(a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a).

(c) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:

- (1) The issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;
- (2) The beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and
- (3) The applicant to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

(d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection (c) do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person, and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense, or excuse."

SECTION 2. Section 490:1-105, Hawaii Revised Statutes, is amended by amending subsection (2) to read as follows:

"(2) Where one of the following provisions of this chapter 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 490:2-402.

Applicability of the Article on Leases. Sections 490:2A-105 and 490:2A-106.

Applicability of the Article on Bank Deposits and Collections. Section 490:4-102.

Governing law in the Article on Funds Transfers. Section 490:4A-507.

Letters of Credit. Section 490:5-116.

Bulk sales subject to the Article on Bulk Sales. Section 490:6-103.

Applicability of the Article on Investment Securities. Section 490:8-106.

Perfection provisions of the Article on Secured Transactions. Section 490:9-103."

SECTION 3. Section 490:2-512, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

- “(1) Where the contract requires payment before inspection nonconformity of the goods does not excuse the buyer from so making payment unless
- (a) The nonconformity appears without inspection; or
 - (b) Despite tender of the required documents the circumstances would justify injunction against honor under [the provisions of] this chapter (section [490:5-114).] 490:5-109(b)).”

SECTION 4. Section 490:9-103, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

- “(1) Documents, instruments, letters of credit, and ordinary goods.
- (a) This subsection applies to documents [and], instruments, rights to proceeds of written letters of credit, and [to] goods other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3), and minerals described in subsection (5).
 - (b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection 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.
 - (c) 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 nonperfection of the security interest from the time it attaches until thirty 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 thirty-day period.
 - (d) When collateral is brought into and kept in this State 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,
 - (i) 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 this State, 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;
 - (ii) If the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter;
 - (iii) For the purpose of priority over a buyer of consumer goods (subsection (2) of section 490:9-307), 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 (i) and (ii).”

SECTION 5. Section 490:9-104, Hawaii Revised Statutes, is amended to read as follows:

“§490:9-104 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 section 490:9-310 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 government or governmental subdivision or agency; 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 or claim in or under any policy of insurance, except as provided with respect to proceeds (section 490:9-306) and priorities in proceeds (section 490:9-312); 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 section 490:9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; [or]
- (k) To a transfer in whole or in part of any claim arising out of tort[.];
- (l) To a transfer of an interest in any deposit account (subsection (1) of section 490:9-105), except as provided with respect to proceeds (section 490:9-306) and priorities in proceeds (section 490:9-312); or
- (m) To a transfer of an interest in a letter of credit other than the rights to proceeds of a written letter of credit.”

SECTION 6. Section 490:9-105, Hawaii Revised Statutes, is amended by amending subsection (3) to read as follows:

- “(3) The following definitions in other Articles apply to this Article:
- “Check”. Section 490:3-104.
- “Contract for sale”. Section 490:2-106.
- “Holder in due course”. Section 490:3-302.
- “Letter of credit”. Section 490:5-102.
- “Note”. Section 490:3-104.
- “Proceeds of a letter of credit”. Section 490:5-114(a).
- “Sale”. Section 490:2-106.”

SECTION 7. Section 490:9-106, Hawaii Revised Statutes, is amended to read as follows:

“§490:9-106 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 things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, 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.”

SECTION 8. Section 490:9-304, Hawaii Revised Statutes, is amended to read as follows:

“§490:9-304 Perfection of security interest in instruments, documents, proceeds of a written letter of credit, and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession. (1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in the rights to proceeds of a written letter of credit can be perfected only by the secured party’s taking possession of the letter of credit. A security interest in money or instruments (other than certificated securities or instruments which constitute part of chattel paper) can be perfected only by the secured party’s taking possession, except as provided in subsections (4) and (5) of this section and subsections (2) and (3) of section 490:9-306 on proceeds.

(2) During the period that goods are in 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.

(3) 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.

(4) A security interest in instruments (other than certified¹ securities) or negotiable documents is perfected without filing or the taking of possession for a period of twenty-one days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of twenty-one days without filing where a secured party having a perfected security interest in an instrument (other than a certificated security), a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor:

- (a) 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 section 490:9-312(3); or
- (b) Delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal, or registration of transfer.

(6) After the twenty-one day period in subsections (4) and (5) perfection depends upon compliance with applicable provisions of this Article.”

SECTION 9. Section 490:9-305, Hawaii Revised Statutes, is amended to read as follows:

“§490:9-305 When possession by secured party perfects security interest without filing. A security interest in [letters of credit and advices of credit (subsection (2)(a) of section 490:5-116),] goods, instruments (other than certificated securities), money, negotiable documents, or chattel paper may be perfected by the secured party’s taking possession of the collateral. A security interest in the right to proceeds of a written letter of credit may be perfected by the secured party’s taking possession of the letter of credit. 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 relation back and continues only so long as possession is retained, unless otherwise specified in this Article. The security interest may be otherwise perfected as provided in this Article before or after the period of possession by the secured party."

SECTION 10. Article 5 of chapter 490, Hawaii Revised Statutes, is repealed.

SECTION 11. This Act applies to a letter of credit issued on or after the effective date of this Act. This Act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this Act.

SECTION 12. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this Act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this Act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.

SECTION 13. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 14. This Act shall take effect on July 1, 1996.

(Approved April 22, 1996.)

Note

1. Prior to amendment "certificated" appeared here.