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## Doing Business in the United States

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### CHAPTER 5 Preparation of a Sales Contract \*

#### *I-5 Doing Business in the United States § 5.04*

##### **§ 5.04 Price and Payment**

A contract for the sale of goods should set the amount of the purchase price or state a means by which the price can be determined, e.g. later agreement by the parties or a third party, or the market price in a specific geographic area at a specified time. However, the contract will still be valid if no purchase price is set; the Code sets a "reasonable price" at the time of delivery if no price is contained in the contract. n1

A price to be fixed by one of the parties means a good faith price. n2 If the party who is given the right to fix the price does not do so in good faith, the other party may either cancel the contract or fix a reasonable price himself. n3 Where the parties did not intend to form a binding contract unless a price term could ultimately be agreed to, and no agreement is reached, there is no contract, and the buyer must return the goods received. If he cannot return the goods, the buyer must pay the goods reasonable value at the time of delivery, and if the buyer returns the goods, the seller must return any portion of the price that was paid. n4

The parties should also determine when payment is due, e.g. before shipment, upon delivery, or after inspection. Payment by installment, either because delivery is to be made that way, or because the seller is extending credit, may be provided for. In a case where the goods are not going to be shipped by carrier, unless the contract provides otherwise, payment is to be made in cash and is due at the time of delivery. If the goods are to be shipped by carrier, unless otherwise agreed, § 2-310(a) provides that 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. ... " n5 This gives the buyer an opportunity to inspect the goods before paying for them even though the risk of loss may already have passed to him. n6

The means n7 of payment to be used should also be specified. Otherwise, payment may be 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 necessary to procure it." n8

Payments on account or advance payments that are not secured by collateral should be approached with caution since the buyer is really acting as a lender of funds and may, therefore, lose everything in the event of the seller's bankruptcy or other inability to perform. n9

If government regulation makes the means or manner of payment called for in the contract impossible, Section 2-614(2) of the Code permits the buyer to tender payment by a commercially equivalent method. The seller may wish to specify

in the contract what methods of payment are or are not commercially acceptable substitutes to him. Considering the language of Section 2-614, it is questionable if a court would allow a commercially reasonable substitute to be ruled out by a clause that prohibits the use of any substituted manner of payment.

**FOOTNOTES:**

(n1)Footnote 1. *U.C.C. § 2-305(1)(a) & (b).*

(n2)Footnote 2. *U.C.C. § 2-305(2)*

(n3)Footnote 3. *U.C.C. § 2-305(3)*

(n4)Footnote 4. *U.C.C. § 2-305(4)*

(n5)Footnote 5. *U.C.C. § 2-310(a).*

(n6)Footnote 6. *U.C.C. § 2-310*, Official Comment 1

(n7)Footnote 7. *See Ch 34 infra* for a discussion of the different methods of payment that may be used in an international sales transaction.

(n8)Footnote 8. *U.C.C. § 2-511(2).*

(n9)Footnote 9. *See, e.g., In re CSY Yacht Corp.*, 42 B.R. 619, 39 U.C.C. Rep. Serv. 879 (MD. Fla. 1984) (buyer who had paid \$40,000 on account for yacht construction was unable to recover anything from bankrupt seller who had not begun construction). *See also U.C.C. § 2-502* for possible amelioration of such a result.

\* Chapter rewritten in 2004 by Michael Rosenberg Esq., a member of the New York Bar.