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Doing Business in the United States

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CHAPTER 5 Preparation of a Sales Contract *

1-5 Doing Business in the United States § 5.05

§ 5.05 Delivery

[1] Manner and Time

If the parties do not otherwise agree, Article 2 calls for delivery to be made in one lot with payment due upon such tender, unless the position of one of the parties makes this impractical, e.g. the buyer does not have sufficient storage space available at any time to hold all the goods. n1 In such a case, payment is due on the delivery of each lot if the price can be so apportioned. n2 Thus if several separate deliveries are contemplated, this should be specified in the agreement.

If the time for shipment or delivery is not specified in the contract, the Code allows the seller a "reasonable time" for shipment or delivery. n3 What constitutes reasonable time depends on what is considered acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken. n4 If it is important to the buyer to have the goods before a certain date, he should request a contract provision setting the date of delivery or shipment. n5 He may also want to include a liquidated damages clause that sets a dollar per day figure for damages in the event of late delivery. n6

Even if a date for delivery is not specified in the contract, agreement as to a definite time may be found in a term implied from the contractual circumstances, usage of trade, or course of dealing or performance. n7

In a proper tender of delivery, the seller must place the conforming goods at the buyer's disposition and hold them for a time that is sufficient to enable the buyer to take possession. n8 In addition, the seller is required to give the buyer notice reasonably necessary to enable the buyer to take possession of the goods. n9 But such requirement does not alter any contractually agreed upon time for delivery. n10

In a transaction where the buyer is to receive documents of title, and the seller has drawn a draft against those documents on the buyer, the buyer is to receive the documents "on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment." n11 The parties are free to replace this provision with their own agreement. For example, they might extend the time allowed between acceptance and payment.

[2] Place of Delivery

If the contract does not determine a place where delivery of the goods is to be made, the Uniform Commercial Code

will. n12 It is advisable that the parties make their own delivery terms, especially if the goods to be transferred are bulky or if they must be transported a long distance.

The simplest type of transfer is to have only the parties to the contract involved. Generally, in such cases, the place of delivery is the seller's place of business, or if he has none, his residence. n13 If, however, at the time the contract is entered into, both parties know that the goods are at some other place, that place is the place of delivery. n14 However, the parties are free to agree that either the buyer can pick up the goods at the seller's place of business or the seller can deliver them to the buyer's place of business.

In many instances though, a carrier is used to effect the delivery. If the parties agree on a shipment contract, i.e. a contract requiring or authorizing the seller to send the goods to the buyer but not requiring him to deliver them at a particular destination, unless the parties otherwise agree, the Code requires the seller to:

- "a. 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 goods and other circumstances of the case; and
- b. 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 usage of trade; and
- c. Promptly notify the buyer of shipment." n15

Thus if the buyer wants the delivery to be made in a certain manner, this must be specified in the contract. This is also true of a "destination" contract, i.e. a contract where the seller is required to deliver the goods to a particular destination. The Code will not specify the means of delivery to be used; it is up to the parties to do so. The Code does require a seller under a destination contract to tender the goods at a reasonable hour and to keep them available long enough for the buyer to take possession of them, as well as giving the buyer any notice of tender that is reasonably necessary and providing any documents of title necessary to obtain delivery. n16 The main difference between a destination contract and a shipment contract is where the risk of loss is placed during shipment. n17

Article 2 has a catchall provision to cover other gaps in the parties' agreement about performance of the contract. Failure to make a specification about performance at contract formation does not prevent the contract from being formed. If the parties are uncertain of what shipping arrangements to follow at the time the contract is made, they can agree to have them specified later by one of the parties. n18 If they do not so agree, the Code makes clear that "specifications or arrangements relating to shipment are at the seller's option. n19 This does not permit the seller to ship at any time he chooses; his choice must be in good faith and commercially reasonable. n20

[3] Related Obligations

There are a number of commonly used terms that relate to the shipping of goods, F.O.B., F.A.S., C.I.F., etc. Unless the parties agree otherwise, the Code establishes the obligations required by the use of those terms. Those requirements are explained in a later chapter in the text. n21 The parties may wish to alter, modify, or specify the nature of these requirements. For example, the term C.I.F. destination requires the seller to obtain and pay for insurance covering damage or loss of the goods while they are in transit. The insurance must be "of a kind and on terms then current at the point of shipment in the usual amount ..." n22 The parties may agree that the buyer is to pay for the insurance and that the policy is to be for a specified amount. In such a case, the parties should either make their obligations clear without the use of one of these specialized terms, or use the term that best describes their bargain and carefully note where their agreement departs from the language of the Code.

[4] Substituted Performance

If the agreed manner of delivery becomes commercially impractical because of the unavailability of a carrier or

otherwise, the Code requires the seller to use any commercially reasonable substitute that is available. n23 The buyer is required to accept such a substituted means of delivery. n24 This substituted performance is not a breach of contract. The buyer may want to specify a secondary means of transportation should the primary means fail. Since the secondary mode of transportation is part of the agreement which must fail before commercially reasonable substitutes are allowed, it too would have to fail before another means of substituted delivery is allowed. Section 2-614(2) allows substitution of means and manner of payment if the agreed means or manner fail because of domestic or foreign government regulation.

FOOTNOTES:

(n1)Footnote 1. *U.C.C. § 2-307.*

(n2)Footnote 2. *Id.*

(n3)Footnote 3. *U.C.C. § 2-309(1).*

(n4)Footnote 4. *U.C.C. § 2-309, Official Comment 1; See, e.g., Alliance Wall Corp. v. Ampat Midwest Corp., 17 Ohio App. 3d 59, 477 N.E.2d 1206, 41 U.C.C. Rep. Serv. 377 (1984) ; Mayflower Farms v. Tech-Mark, Inc., 64 Or. App. 121, 666 P.2d 1384, 37 U.C.C. Rep. Serv. 25 (1983) ; Luedtke Engineering Co., Inc. v. Indiana Limestone Co., Inc., 740 F.2d 598, 39 U.C.C. Rep. Serv. 400 (7th Cir. 1984) .*

(n5)Footnote 5. When a time is specified, it has been customary to include a provision that "time is of the essence of this contract," since "[w]here a time of delivery is specified without being made of the essence, it is contemplated that there shall be *reasonable* compliance therewith in accordance with the standards of the industry [emphasis supplied]." *J.A. Jones Construction Co. v. City of Dover, 372 A.2d 540 (Del. Superior Ct. 1977) . See also, Val Decker Packing Company v. Armour & Company, 177 N.E.2d 401 (Ohio Ct. App. 1961) .*

(n6)Footnote 6. *See § 4.05 supra* for a discussion of the validity of liquidated damages clauses. *See also § 5.11 infra.*

(n7)Footnote 7. *U.C.C. § 2-309, Official Comment 1*

(n8)Footnote 8. *U.C.C. § 2-503*

(n9)Footnote 9. *Id.*

(n10)Footnote 10. *See, e.g., Hunt-Wesson Foods, Inc. v. Marubeni Alaska Seafoods, Inc., 23 Wn. App. 193, 596 P.2d 666, 26 U.C.C. Rep. Serv. 704 (1979) .*

(n11)Footnote 11. *U.C.C. § 2-514.*

(n12)Footnote 12. *U.C.C. § 2-308.*

(n13)Footnote 13. *U.C.C. § 2-308(a); See also, Baker v. Compton, 455 N.E.2d 382, 38 U.C.C. Rep. Serv. 10 (Ind. App. 1983) ; Uchitel v. F.R. Tripler & Co., 107 Misc. 2d 310, 434 N.Y.S.2d 77, 30 U.C.C. Rep. Serv. 933 (1980) .*

(n14)Footnote 14. *U.C.C. § 2-308(b).*

(n15)Footnote 15. *U.C.C. § 2-504.*

(n16)Footnote 16. *U.C.C. § 2-503(1)(a), (3).*

(n17)Footnote 17. *See § 5.06[2] infra.*

(n18)Footnote 18. *U.C.C. § 2-311(1), (2).*

(n19)Footnote 19. *U.C.C. § 2-311(2)*

(n20)Footnote 20. *U.C.C. § 2-311(1)*

(n21)Footnote 21. *See § 14.05 [4] infra.*

(n22)Footnote 22. *U.C.C. § 2-320(2)(c).*

(n23)Footnote 23. *U.C.C. § 2-614(1).*

(n24)Footnote 24. *Id .*

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