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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 § 5.10

§ 5.10 Breach or Termination

The parties should determine the conditions that will allow them to terminate the agreement. It is often wise to insert a clause in a contract absolving a party from liability for nonperformance in the event of certain contingencies, such as fires, floods, and strikes. Such a clause affords better protection than the impossibility or impracticability doctrines contained in Code Section 2-615, because it is more definitive. n1

The parties may also provide for the contract to terminate upon conditions such as the following: bankruptcy of the buyer, n2 increased tariffs or duties in an international sale, resale of the goods by the buyer in violation of law, or inability of one of the parties to obtain a necessary license.

Similarly, the parties may insert their own conditions as to what constitutes a breach of contract. Or the parties may include provisions, which define Code terms according to their need in a particular situation. For example, the Code provides that where delivery of the goods is to be made in installments, the whole contract is breached if the non-conformity of one installment substantially impairs the value of the whole contract. n3 The parties can determine in their contract the type or percentage of non-conformity that constitutes substantial impairment. If payment is to be made in installments, the seller should provide in the contract that failure to make one payment will make due and payable all remaining installments at the seller's option. The buyer should request a provision that the "acceleration" clause is ineffective until he has been given written notice of the default and a specified number of days to cure it.

Section 2-510 sets out the effect of a breach on risk of loss. If the goods fail to conform to the contract such that the buyer has a right of rejection, the risk of loss remains on the seller until the defect is cured or the buyer accepts the goods in spite of the defect. n4 If the buyer rightfully revokes acceptance, the risk of loss is treated as having rested on the seller from the beginning but only to the extent of any deficiency in the buyer's insurance coverage. n5 Revocation of acceptance is rightful only if it occurs before there is a substantial change in the condition of the goods which is not caused by the defects. n6 Hence, acceptance cannot be revoked after the goods have suffered a casualty loss. Finally, if the buyer breaches the contract or repudiates the contract before the risk of loss has passed to him, the seller may treat the risk of loss as having rested on the buyer for a commercially reasonable time, to the extent of any deficiency in the seller's insurance coverage. n7

The Code provides a four-year statute of limitations for an action brought for the breach of a sales contract. n8 The time starts running "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." n9 An

action for breach of warranty accrues when tender of delivery is made, unless the warranty explicitly extends to the future performance of the goods and the breach cannot be discovered until such performance occurs. In such a case, the cause of action does not accrue until the breach is or should have been discovered. n10 The statute of limitations can be varied by the agreement of the parties within certain limits; its time cannot be extended, n11 but it can be reduced to as little as one year. n12 Also, § 1-103, which applies principles of equity (including fraud and estoppel) to U.C.C. claims can work to toll the statute of limitations in § 2-725. n13

FOOTNOTES:

(n1)Footnote 1. *See* Ch. 14 *infra*.

(n2)Footnote 2. Under the Bankruptcy Code, with limited exceptions, a provision in an executory contract requiring or permitting termination on account of a party's bankruptcy is unenforceable during the pendency of a Code case. *11 U.S.C. § 365(e)*. *See* the discussion of executory contracts and unexpired leases in Chapter 30 *infra* .

(n3)Footnote 3. *U.C.C. § 2-612(3)*.

(n4)Footnote 4. *U.C.C. § 2-510(1)*

(n5)Footnote 5. *U.C.C. § 2-510(2)*

(n6)Footnote 6. *U.C.C. § 2-608(2)*

(n7)Footnote 7. *U.C.C. § 2-510(3)*

(n8)Footnote 8. *U.C.C. § 2-725(1)*.

(n9)Footnote 9. *U.C.C. § 2-725(2)*.

(n10)Footnote 10. *Id.*

(n11)Footnote 11. *But see, Byron Community Unit School District v. Dunham-Bush, Inc.*, 215 Ill. App. 3d 343, 158 Ill. Dec. 990, 574 N.E.2d 1383 (1991) ; *Atlas Food Sys. & Servs. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556 (S.C., 1995) .

(n12)Footnote 12. *U.C.C. § 2-725(1)*.

(n13)Footnote 13. *See, e.g., Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 746 F. Supp. 1051 (D. Kan. 1990) ; *Executone Business Systems Corp. v. IPC Communications, Inc.*, 177 Mich. App. 660, 442 N.W.2d 755 (1989) ; *Weidensaul v. Greenhouse Restaurant of Lawrence, Inc.*, 13 Kan. App. 2d 95 (Kan. App., 1988) .

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