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1 Formation of Contract of Sale

1.1 What are the formalities for the formation of a contract of sale under the laws of your country? Can a contract be made by exchange of emails/faxes? Is a signed or sealed contract needed? Can a contract made orally be enforced?

There are two legal regimes governing sale-of-goods contracts in the US. The Vienna Convention on Contracts for the International Sale of Goods (“CISG”) applies to international contracts between parties of member States unless the parties have chosen a law other than CISG to govern the contract. The Uniform Commercial Code (“UCC”) generally applies to all other sale-of-goods contracts. The UCC is a uniform set of laws adopted with little variation in each of the fifty States save for Louisiana, which has not adopted the sale-of-goods provisions of UCC Article 2. Parties to international contracts frequently opt out of CISG and for purposes of the following answers we assume that the contract is governed by the UCC rather than CISG.

There are few formalities necessary to form a sale-of-goods contract. Article 2 of the UCC -the Article that governs sale-of-goods contracts- states that a contract worth more than \$500 must be evidenced by 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.” § 2-201(1). This general rule, known as the “statute of frauds,” is not difficult to satisfy. For example, contracts may be formed by exchange of emails/faxes. A contract for the sale of goods is also valid if, within a reasonable time following the agreement, one of the parties sends a written confirmation of the contract to the other party and the other party does not send a written objection within ten (10) days of receiving the confirmation. § 2-201(2). There is no requirement that contracts be formally signed or sealed (§ 2-203) and an oral contract can still be enforced if acknowledged or ratified by conduct or admissions.

1.2 Are there any limitations on the capacity of a party to enter into a contract of sale as seller or buyer? Are there any special limitations for signing a contract? Is the position different if the contract incorporates an arbitration agreement?

Yes. A party must have legal “capacity” to enter into a valid

contract. A natural person generally has capacity to enter into a legally-binding contract unless he or she is under guardianship or of unsound mind or faculties. For companies, under general agency principles contracts on behalf of entities other than natural persons can be agreed by officers or agents having actual or apparent authority to do so. The capacity requirements do not change if the contract incorporates an arbitration agreement.

1.3 Are there any sources that a party is advised to check to ensure that a contract of sale is authorised by the company?

No, there are no definitive sources for a party to consult to ensure that a contract is authorised by a company. It is infrequently the case that all persons authorised to enter into contracts on a company’s behalf will be identified in public filings. Generally speaking, common law principles of agency govern who is authorised to execute a contract on a company’s behalf. This includes a person acting within the scope of the apparent authority conferred on him by the corporation.

1.4 How far are the principles of “freedom of contract” applicable? Should the parties to a contract of sale check restrictions under local law? Should they do so even if the sale contract is expressly subject to another legal system?

Parties are generally free to contract as long as agreed terms are not illegal or contrary to public policy and the parties’ consent to contract is not the result of fraud, mistake or duress. Freedom of contract is a principle of the UCC and parties may vary UCC provisions by agreement except as otherwise provided in the UCC.

Yes, the parties should check to see whether a contract will violate local law or policy, particularly if the contract is to be enforced in the forum. General choice of law rules are subject to the principle that no State will enforce a contract, even though valid where made and performed, if enforcing an alleged contractual right would be contrary to a strong public policy of the forum’s public policy.

It follows that parties should check to see whether a contract will violate local law even where the contract is expressly subject to the law of another jurisdiction, and particularly if the contract will be performed in whole or in part in the local jurisdiction.

2 Classification of Terms

2.1 How are the sale contract terms classified (i.e. important/less important terms) and what is the consequence of such classification?

Sale terms are not classified in any particular manner, but can be subject to a materiality standard. For example, whether a term is material may affect whether or not it forms part of a contract when parties propose different terms.

Examples of clauses that would normally “materially alter” the contract and so result in surprise or hardship if incorporated without express awareness by the other party are those negating standard warranties such as merchantability or fitness for a particular purpose, or requiring that complaints be made in a time materially shorter than customary or reasonable. Materiality also affects remedies in the event of breach. While a non-performing party is liable for any breach of contract, the other party is discharged from further performance only when there is a material breach.

3 Validity of a Contract of Sale

3.1 Can misrepresentation affect the validity of a contract of sale?

Yes, a material misrepresentation may affect the validity of a contract. Generally a misrepresentation is material if it concerns a matter to which a reasonable person would attach importance in determining his or her choice of action with respect to the particular transaction. Specifically, a party’s misrepresentation will be deemed material if it induced another party to enter into a contract, or caused the other party to act in a manner that it otherwise would not have acted. When the misrepresentation is material the contract is voidable at the option of the aggrieved party.

3.2 Can illegality affect the validity of a contract of sale in your country?

Yes, illegality can affect the validity of a contract of sale. A court’s preference to enforce an agreement is often overridden when a contract is either illegal or contemplates a violation of law. A court may still enforce an illegal contract, however, when the illegality is relatively minor and not enforcing the contract would cause a greater injustice than enforcing the contract (for example, by causing an undeserved forfeiture or windfall).

3.3 What is the effect of bankruptcy or insolvency of a party on the validity of a contract of sale? Does a liquidator or other duly appointed insolvency officer have the power to set aside the contract?

A seller may stop delivery or only deliver against payment in cash if the seller discovers the buyer is insolvent. § 2-702(1). If the seller learns that the buyer received goods on credit while insolvent the seller may reclaim the goods upon demand made within ten (10) days after the receipt. § 2-702(2). If, however, the buyer has misrepresented its solvency in writing within three months of delivery, a

seller’s right to reclaim the goods is not limited by the ten-day rule. § 2-702(2). These rules are subject to the rights of a good faith purchaser for value in the event of resale. § 2-702(3).

Yes, bankruptcy trustees generally have broad powers whether to accept or reject a debtor’s executory contracts.

4 Passing of Property and Risk

4.1 What are the factors that determine whether and when title in goods passes from the seller to the buyer?

Generally, title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed by the parties, provided that the goods have been identified in the contract.

Where there is no provision providing for passing of title, and

- the seller is to physically deliver the goods, title passes to the buyer at the time and place at which the seller completes delivery.
- the seller is required to send the goods to the buyer but is not required to deliver them at destination, title passes to the buyer at the time and place of shipment.
- the seller is required to deliver the goods at destination, title passes to the buyer at the time and place of shipment.
- the goods will not be moved, title passes when the seller delivers a document of title.
- there is no document of title, title passes at the time of contracting,

4.2 Will the courts in your country apply local law or the law of the contract of sale to determine the issue as to which party has property over goods? Does the answer change if third parties (i.e. not parties to the contract of sale) are involved?

No courts will generally apply the law chosen by the parties between the parties. But certain rights -for example the rights of creditors against sold goods- will be governed by local law despite the parties’ chosen law.

4.3 What are the factors that determine whether and when risk in respect of goods passes from the seller to the buyer? What (if any) is the relationship between the passing of risk of loss/damage in the goods and the passing of property?

Whether and when risk passes from the seller to the buyer depends on the agreement of the parties. In the absence of agreement the manner in which the seller delivers the goods to the buyer determines when risk shifts from the buyer to the seller. For example:

- When the seller ships goods by carrier but not to a specific destination, the risk of loss passes to the buyer when the seller delivers the goods to the carrier. § 2-509(1)(a).
- Where a bailee holds goods that will not be moved, the risk of loss passes to the buyer (a) when the buyer

receives a negotiable document of title, (b) when the bailee acknowledges the buyer's right to possession of the goods, or (c) when the buyer receives a non-negotiable document of title or other written direction to deliver. § 2-509(2).

- For any other case, 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. § 2-509(3).

4.4 In what circumstances will the courts in your country give effect to a provision in the contract of sale that reserves or purports to reserve title or other rights over goods once the seller has parted with possession of the goods?

Any attempted 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. § 2-401(1).

4.5 Is a provision that reserves title over the goods sufficient for legal title to the goods to remain vested in the seller notwithstanding the passing of risk on shipment?

Yes, creation of a security interest is sufficient to reserve title over the goods. See the answer to question 4.4 above.

4.6 In contracts for the sale of goods that form part of an identified bulk, can property be passed before the goods are separated from the bulk?

Yes. Where a buyer purchases an agreed undivided share of an identified bulk of fungible goods, the buyer to the extent of the seller's interest in the bulk becomes an owner in common. § 2-105(4).

5 Performance of the Contract of Sale

5.1 What is the place of delivery of the goods in the absence of any agreement, express or implied, between the parties?

In the absence of any agreement the place of delivery is the seller's place of business. If, however, the goods are located in some other place, and the parties knew of the goods' location at the time of contracting, that place is the place of delivery. In the latter situation documents of title may be delivered through customary banking channels. § 2-308.

5.2 What is the time of delivery of the goods in the absence of any agreement, express or implied, between the parties?

When time of delivery is not specified in the contract, the seller must deliver the goods to the buyer within a reasonable time. § 2-309(1). A reasonable time depends on the nature, purpose and circumstances of the action in question. § 1-204(2). Where the contract is to be delivered in instalments of indefinite duration, the seller must also deliver in a reasonable time. § 2-309(2).

5.3 What is the place of payment of the price for the goods where no place of payment is specified in the contract?

Tender of payment and delivery should occur at the same place when the contract does not specify place of payment.

5.4 If no time of payment is specified in the contract of sale, what is the time at which payment is to be made?

Where the contract does not provide for the time of payment, the buyer must pay the seller at the time and place at which the buyer is to receive the goods. § 2-310(a). If the seller is to deliver the goods by documents of title, the buyer must pay the seller when he receives the documents of title irrespective of when the buyer obtains the goods. § 2-310(c).

5.5 In determining the duties of the parties in C&F, FOB, CPT and similar contracts, will the "INCOTERMS" publication by ICC be followed in determining which party does what?

No, unless the contract expressly incorporates INCOTERMS. Otherwise the UCC terms -such as C&F, CIF, FOB- govern. § 2-319 *et seq.*

6 Frustration of the Contract of Sale / Force Majeure

6.1 Is there a doctrine of force majeure or a similar doctrine under local law? In what circumstances may a contract of sale be frustrated or be subject to force majeure?

Yes. The circumstances that will trigger *force majeure* depend on the wording of the clause. For example, a *force majeure* clause could include war, government regulation, terrorism, disaster, civil disorder, etc. Economic hardship, however, is not sufficient to excuse non-performance under a *force majeure* clause. See §§ 2-615 and 2-616.

6.2 What are the consequences of frustration or force majeure on a contract of sale?

A *force majeure* clause will relieve a performing party of liability only when one of the named events proximately causes the party's non-performance. Performance will not be excused if the party would have been able to perform despite the event had it made a good faith effort to do so.

7 Remedies of the Parties

7.1 What are the remedies of the buyer against the seller in respect of goods delivered in breach of a contractual term as to (a) quality (b) condition (c) quantity or (d) description?

Where the goods or the tender of delivery fails in any respect to conform to the contract, the buyer may (a) reject the whole, (b) accept the whole, or (c) accept any commercial

unit or units and reject the rest. § 2-601. Rejection of goods must be within a reasonable time after their delivery or tender and is ineffective unless the buyer seasonably notifies the seller that the goods have been rejected.

7.2 What remedies does the buyer have against the seller for non-delivery of the goods?

The buyer may cancel the contract and recover all moneys paid if the seller fails to deliver the goods. In addition, the buyer may recover damages for non-delivery, including costs for covering the seller's default together with any incidental and consequential damages (unless excluded by contract). § 2-711 *et seq.* In certain exceptional cases the buyer may have a right to specific performance. § 2-711(2).

7.3 Does the buyer have any remedies against the seller for delay in delivery of the goods?

Yes, the buyer does have remedies against the seller for delay assuming the delay is not due to the buyer's breach. If the seller notifies the buyer that there will be a delay in delivery of the goods and that delay substantially impairs the value of the contract as a whole, the buyer may send written notice terminating the contract. § 2-616(1).

7.4 What are the main remedies of an unpaid seller against the buyer? Does the unpaid seller have any rights over the goods themselves?

Where the buyer fails to pay the seller in part or whole the seller may (a) withhold delivery of the goods, (b) stop delivery, (c) resell the goods, (d) cancel the contract, and/or (e) recover damages. § 2-703. In certain circumstances the seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent. § 2-705. See also the answer to question 3.3 above concerning a seller's right to reclaim goods received by the buyer while insolvent.

8 Assessment of Damages

8.1 Are there any general rules which are used to decide what types of losses caused by a breach of contract may be recovered by the innocent party by way of damages?

Yes, there are general rules stating what types of losses may be recovered by way of damages for both the seller and the buyer.

The measure for a seller's damages for non-acceptance or repudiation is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages, less any expenses saved in consequence of the buyer's breach. § 2-708(1).

If that measure of damages 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. § 2-708(2). Incidental damages include any commercially reasonable charges, expenses or commissions

incurred in connection with return or resale of the goods or otherwise resulting from the breach. § 2-710.

When the seller fails to make delivery or repudiates or the buyer rightfully rejects the goods, the buyer may cancel the contract and claim damages. The measure of the buyer's damages is the difference between the market price and contract price together with any incidental and consequential damages (unless excluded by contract). § 2-711 *et seq.*

8.2 What is the relevant date for the assessment of damages?

Generally, the relevant date for the assessment of both buyer's and seller's damages is the date of tender. § 2-708, 2-713.

8.3 Is the innocent party under any duty to mitigate its losses consequent on a breach of the contract of sale? If so, what is the extent of that duty?

No. The buyer has the right but not the obligation to cover the seller's default by purchasing substitute goods. Any failure by the buyer to effect cover does not bar him from seeking remedies for damages. § 2-712. Failure to mitigate damages, however, may affect a buyer's right to recover consequential damages.

Likewise, the seller does not have an obligation to mitigate damages, and any expenses saved in consequence of the buyer's breach are discountable from recoverable damages. § 2-708.

9 Instalment Contracts

9.1 Can a breach of one or more instalments entitle the innocent party to terminate the balance of the contract of sale?

Yes, an innocent party may terminate an instalment contract where a breach of one or more instalments substantially impairs the value of the whole contract. § 2-612(3).

9.2 Can the innocent party legitimately demand some guarantee of future correct performance?

Yes. As with all sale contracts, an instalment contract for the sale of goods 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. Until he receives such assurance the party may if commercially reasonable suspend any performance for which he has not already received the agreed return. § 2-609(1). Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered are determined according to commercial standards.

10 Assignment

10.1 Can a contract of sale be assigned by one party without the permission of the other? If so, is notice required?

Yes, a contract of sale may be assigned by one party without the permission of the other except where (a) the assignment would materially change the duty of the other party, (b) increase materially the burden or risk imposed on him by his contract, or (c) impair materially his chance of obtaining return performance. § 2-210(2).

11 Sources of Law Relating to Sale of Goods

11.1 What is the main source of the law relating to the sale of goods?

See the answer to question 1.1 above.

11.2 Is the Vienna Convention on Contracts for International Sale of Goods applicable in your country?

Yes. The US ratified the CISG in the late 1980's. The US made one declaration, stating that it will not be bound by Article 1(b). As a result unless the parties agree otherwise CISG does not apply to contracts between a US party and a party with a place of business in a non-member State.

11.3 Are clauses exempting or excluding liability of a party to a contract of sale effective?

Whether a clause exempting a party of liability is effective depends on the facts of each case.

- To exclude or modify the implied warranty of merchantability the contract wording must mention merchantability and in case of writing must be conspicuous.
- To exclude or modify any implied warranty of fitness, the exclusion must be in writing and conspicuous. Wording 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. § 2-316(2).
- All implied warranties are excluded by expressions like "as is", "with all faults" or other wording which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. An implied warranty can also be excluded or modified by course of dealing, course of performance, or usage of trade.

Remedies may also be limited by agreement. For example, a seller can limit or exclude consequential damages if the loss is commercial in nature. § 2-719(3).

12 Conflict of Laws

12.1 What are the rules relating to the law application to the contract of sale in your legal system?

The law of the forum generally determines whether a transaction is one relating to goods governed by Article 2, unless the contract specifies otherwise. Courts will generally enforce a consensual choice-of-law clause provided there is a reasonable relation between the chosen law and the underlying transaction.

12.2 If the parties to an international contract of sale have not expressly chosen the law which will govern the contract, what factors will determine which law is applied?

The so-called autonomy doctrine generally gives effect to the law intended by the parties, as evidenced by their express or implied agreement, provided that law has some reasonable relationship to the parties and the underlying transaction. If the court is unable by construction of the contract to find this intention from the words used and the surrounding circumstances, then the law of the place of contracting or the place of performance will generally govern the contract.

12.3 Are any limitations imposed on the freedom of the parties to choose the law governing a contract of sale?

Generally, the transaction should have a reasonable relationship to the chosen State. Ordinarily a reasonable relationship exists where a significant portion of the making or performance of the contract occurs. Under New York law, parties to contracts imposing obligations in excess of \$250,000 may choose New York law to govern the contract whether or not the contract bears a reasonable relationship to the State. GOL § 5-1401. In addition, any person may maintain an action in New York courts against a foreign corporation when the contract contains a New York choice of law, imposes obligations in excess of \$1 million, and the parties have consented to the jurisdiction of the New York courts. GOL § 5-1402.

13 Warehousing and Storage

13.1 What is the legal effect, if any, of a warehouse receipt or a warrant under the laws of your country? Are they documents of title?

Warehouse receipts are evidence of a possessory interest in goods. Under UCC Article 7, which governs warehouse receipts, bills of lading and other documents of title, a warehouse receipt can be a document of title if either (a) by its terms the goods are to be delivered to the bearer or to the order of a named person, or (b) where recognised in overseas trade, if it runs to a named person or assigns. § 7-104(1). Any other document is non-negotiable. § 7-104(2).

13.2 If not, how is title over goods held in storage transferred and proven?

In the absence of title documents an ownership interest in goods could be transferred by any other instrument executed for that purpose and would have to be proven by other supporting evidence.

13.3 Is it necessary to register an interest in goods in order to protect such interest against third party claims or interests?

Yes, it is necessary to register a security interest in goods to protect that interest against third party claims or interests. Generally, a security interest is enforceable against the debtor and third parties with respect to the collateral if (1) value has been given, (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and (3) the security interest has been registered in the required manner.

13.4 Are there any other interests over movable goods that the laws of your country will recognise? For example, a pledge or a charge?

Yes. Rights of pledge can be exercised in respect of goods including movable goods. For example, goods covered by a bill of lading could be pledged by delivery of the bill of lading to a pledgee during shipment.

13.5 If so, how are such interests created? Is it necessary to protect them by registration?

Security rights require perfection including registration in accordance with the requirements of UCC Article 9. In addition, pledges of physical property generally require transfer of possession of relevant documents such as a warehouse receipt or bill of lading.

13.6 In relation to all of the questions at paragraphs 13.1 to 13.5 what if anything is the effect upon title or other security interests of co-mingling the relevant goods with other goods?

By definition, the identity of original collateral cannot be determined once the original collateral becomes co-mingled with other goods. Consequently, the security interest in the

specific original collateral is lost once the collateral is co-mingled with other goods, and no security interest in the original collateral can be created thereafter except as a part of the resulting product or mass. § 9-336(b) cmt. 3. Once collateral is co-mingled, the secured party's security interest is transferred from the original collateral to the product or mass. § 9-336(c) cmt. 3. If the security interest in the original collateral was perfected, the security interest in the product or mass is a perfected security interest. § 9-336(d) cmt. 3.

14 Enforcement of Awards

14.1 Are Awards of arbitration in respect of contracts for the sale of goods recognised under the laws of your country?

Yes, arbitration awards in respect of sale-of-goods contracts are recognised in the US under both Federal and State law. The Federal Arbitration Act ("FAA") -chapter two of which codifies the Convention on the Recognition and Enforcement of Foreign Arbitral Awards- allows any party to seek enforcement of an arbitral award falling under the Convention in Federal district courts having jurisdiction over the matter and the parties. The States have adopted laws that mirror the FAA and thus allow for entry of judgment of arbitral awards in State courts.

14.2 If so, what is the process for enforcement and approximate time scale?

To enforce an arbitral award, a party submits a formal request for entry of judgment in a Federal or State court. The contents of the formal request vary from jurisdiction to jurisdiction, but generally include an identification of the parties, a description of the agreement to arbitrate, the arbitration award, and a statement of the applicable law that empowers the court to enforce the judgment. Unless a party requests a hearing, most courts will not require one. Once the court has determined that the arbitral award should be converted into a court judgment, the court clerk will enter judgment on the award.

The time scale varies widely, ranging anywhere from several months to several years depending on the court's docket and the extent to which a party opposes confirmation of the award.

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