

Memorandum to Students

# Study Guide for Sales Topics 14-21

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University of North Dakota School of Law

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## II. TERMS (continued)

### Topic 14: Commercial Impracticability

Reading:

- Keating, Assignment No. 14 (in part), pp. 232-237
- Hull, Ch. 6.E., pp. 129-131

Problems:

- None

Key code sections:

- 2-615
  - excuse by failure of presupposed conditions
  - i.e., commercial impracticability (more general provision)
- 2-613
  - casualty to identified goods
  - i.e., commercial impracticability (more specific provision)

Key learning objectives:

- understand that the general rule is that parties made worse off by a bargain – even much worse off – are generally stuck with their bad deal
  - commercial impracticability is meant to be rare
- be able to apply the general commercial impracticability provision of 2-615
  - as a general matter there must be an unforeseen contingency
  - understand that 2-615 is the default analog to force majeure clauses
  - note that increased cost – without more – is not a basis for excuse
  - note that failure of supply can be a basis for excuse, but failure of a particular supplier source usually is not
  - note that a change in regulations is recognized as a situation where commercial impracticability may apply
- be able to apply the specific commercial impracticability provision of 2-613
  - applies when particular goods identified to the contract are damaged before risk of loss passes to buyer
  - if total, seller avoids the contract

- if partial, buyer has the option to taking the goods at a discount to account for the damage
- understand that this does not award a windfall to the seller, who still absorbs the loss
  - but the seller avoids some harsher possible remedies, such as consequential damages

## Topic 15: Unconscionability

Reading:

- Keating, Assignment No. 15 (in part), pp. 254-258
- Hull, Ch. 5.E. thru end, pp. 97-103

Problems:

- 15.1 on p. 261

Key code sections:

- 2-302
  - unconscionability

Key learning objectives:

- understand that unconscionability is meant to be rare
  - nonetheless, it forms an important outer bound to oppressive behavior – particularly by merchants toward consumers
- parties to a contract who have made a bad bargain are, as a general matter, bound regardless
- understand that the appropriate point in time for deciding whether a contract is unconscionable is the time when the bargain is made – not some time later when circumstances change that end up making the deal a bad one
- understand that a determination of unconscionability is highly context dependent
  - in this vein, note that 2-302(2) specifically requires a court to give parties “a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”
- understand that a finding of unconscionability sufficient to avoid a contract generally requires both
  - procedural unconscionability
    - unfairness or oppression in the making of the deal
    - “an absence of meaningful choice”
  - substantive unconscionability
    - oppressive, harsh terms in the substance of the deal
    - “unreasonably favorable terms” (i.e., to the party wanting to enforce the deal)
- understand the three remedial paths (three options) a court can take subsequent to a finding of unconscionability:
  - refusal to enforce the contract
  - excise the unconscionable provision and enforce the rest of the contract

- limit the application of the unconscionable provision so as to avoid an unconscionable result

## **Topic 16: Title with Sales of Goods**

Reading:

- Keating, Assignment No. 16, pp. 263-278
- Hull, Ch. 4.A.1., pp. 51-53

Problems:

- 16.1 & 16.2 (a & b only) on pp. 279

Key code sections:

- 2-312
  - warranty of title
  - concerns seller liability with regard to title
- 2-403
  - power to transfer, entrusting, good-faith purchasing
  - concerns buyer liability with regard to title
- 1-201(b)(20)
  - definition of “good faith”
- 1-204
  - what constitutes “value”

Key learning objectives:

- understand the basics of warranty of title, what is warranted and when the warranty arises, 2-312(1)
- be able to determine whether warranty of title has been validly disclaimed, 2-312(2)
- understand the indemnification liability provisions of 2-312(3)
  - of sellers for claims against buyer from third parties
  - of buyer for claims against seller where the seller was acting according to buyer specifications
- be able to determine when a buyer will gain title to a good despite the owner of that good not selling it under 2-403
- be able to apply 2-403, 1-201(b)(20), and 1-204 in problems similar to 16.1 a & b

## **Topic 17: Title with Leases, International Sales, and Real Estate**

Reading:

- No Keating reading (i.e., skip Assignment No. 17 in the book)
- Hull, Ch. 4.A.2., pp. 53-54

Problems:

- None

Key code sections:

- CISG Article 4
- CISG Article 41

Key learning objectives:

- understand the key aspects of title with leases as presented in the slideshow
- understand the key aspects of title with international sales as presented in the slideshow
- understand the key aspects of real-estate title as presented in the slideshow

## **Topic 18: Closing the Sale with Sales of Goods**

Reading:

- Keating, Assignment No. 18 (in part), pp. 295-303
- Hull, Ch. 6.A.-6.C., pp. 105-125

Problems:

- 18.1 on pp. 310-311

Key code sections:

- 2-508
  - cure by seller after buyer's rejection
- 2-606
  - what constitutes acceptance of goods
- 2-607
  - effect of acceptance
    - preclusion of rejection
    - preclusion of revocation if acceptance is with knowledge of non-conformity
      - unless on reasonable assumption of seasonable curing
    - requirement of making notice of breach within reasonable time after it was or should have been discovered
      - without which any remedy is barred
- 2-608
  - revocation of acceptance
  - available if
    - buyer reasonably assumed non-conformity would be cured
    - non-conformity was undiscovered and acceptance was reasonably induced by
      - difficulty of discovery or
      - seller's assurances
  - requires under 2-608(2)
    - occurrence within a reasonable time after buyer should have discovered
    - notice to seller
- 2-612
  - breach of installment contract

Key learning objectives:

- understand under what circumstances a buyer can reject (refuse to accept goods)
  - any time they don't conform (a/k/a not perfect)
  - this is known as the perfect-tender rule
- understand under what circumstances a buyer can revoke (after acceptance) (K 298)
  - non-conformity must substantially impair the value of the contract
  - there must be some good reason for the buyer waiting
    - the buyer reasonably believed acceptance would be cured, or
    - the buyer was strung along by the seller's assurances, or
    - the problem was too difficult to discover before acceptance
  - revocation must be timely
- understand that the perfect-tender rule does not apply to installment contracts

## **Topic 19: Closing the Sale with Leases, International Sales, and Real Estate**

Reading:

- No Keating reading (i.e., skip Assignment No. 19 in the book)
- Hull, Ch. 6.D., pp. 125-129

Problems:

- None

Key code sections:

- None

Key learning objectives:

- understand the key aspects of closing-the-sale issues with leases as presented in the slideshow
- understand the key aspects of closing-the-sale issues with international sales as presented in the slideshow
- understand the key aspects of closing-the-sale issues with real estate as presented in the slideshow

## **Topic 20: Risk of Loss with Sales of Goods**

Reading:

- None
  - No Keating reading (i.e., skip Assignment No. 20 in the book)
  - No Hull reading

Problems:

- None

Key code sections:

- None

Key learning objectives:

- understand the key aspects of risk of loss with sales of goods as presented in the slideshow

## **Topic 21: Risk of Loss with Leases, International Sales, and Real Estate**

Reading:

- None
  - No Keating reading (i.e., skip Assignment No. 21 in the book)
  - No Hull reading

Problems:

- None

Key code sections:

- 2A-219

Key learning objectives:

- understand the key aspects of risk of loss with leases as presented in the slideshow
- understand the key aspects of risk of loss with international sales as presented in the slideshow
- understand the key aspects of risk of loss with real estate as presented in the slideshow