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Adequate Assurance: Potential Help in Uncertain Times

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With the constant barrage of news related to material shortages, workforce challenges and stoppages, shipping interruptions, and financial distress, purchasers of goods are faced with uncertainties related to agreements not yet performed and suppliers' general ability to perform. Purchasers should review purchase orders and supply agreements to confirm that a supplier's performance is not excused due to force majeure or excusable delay provisions. Unfortunately, such reviews may not provide comfort related to the future performance of suppliers.

If faced with such uncertainty, an option to consider is the generally unknown and rarely exercised right in commercial contracts to make demand for adequate assurance. Although adequate assurance rights are not typically included within most commercial contracts, it is an implied right in all contracts. For contracts involving the sale of goods between businesses, adequate assurance is a right that varies from state to state based upon the actual language of the applicable state statutory law adopting its version of Section 2-609 of the Uniform Commercial Code (in Florida, Section 672.609, Florida Statutes).

Contract for sale of goods imposes an obligation on each party that the other's expectation of receiving performance will not be impaired. If reasonable grounds for insecurity arise about either party's performance, the concerned party has the right by written demand to adequate assurance and may suspend performance, if commercially reasonable, until it is received. Where applicable, failure to provide adequate assurance within a reasonable period (not to exceed thirty days) constitutes a repudiation of the contract and serves as grounds for termination.

The availability of the right to demand adequate assurance in contracts involving matters other than the sale of goods varies from state to state, with some state courts applying the right of adequate assurance, others refusing to extend such a right, and many not having addressed the issue.

Since a demand for adequate assurance can be a precursor to contract termination, it should be carefully considered. However, with the proper approach and in the right circumstances, it can provide a concerned

purchaser with additional comfort regarding supplier performance and serve as a platform for increased communication between contracting parties.