



## Remedies

A purchase agreement should have remedy provisions, which are triggered if a party fails to perform in accordance with the terms of the purchase agreement. Remedy provisions have two elements: (1) a description of the events that trigger a right to a remedy and (2) the remedies.

The purchase agreement represents the fundamental business deal between the parties; each party will want to have the ability to enforce the other side's performance by having the contractual right to enforce remedies in the event of nonperformance. For example, a purchase agreement in which one party agrees to pay cash to the other party in exchange for stock. The seller will want to have the right to terminate the contract if the buyer does not make the cash payment.

In addition, a party should have a right to remedies in a purchase agreement in the event there is a breach of a representation or covenant. Otherwise, there would not be an incentive for a party to make true and complete representations or perform covenants. A purchase agreement should describe exactly what will happen if a representation or covenant is breached. Remedy provisions are efficient because the non-breaching party is not forced to seek judicial enforcement of the breach by specific performance or a damage award.

The remedies that are made available under a contract vary based on the type of agreement, the nature of the event giving rise to the remedy and the objectives of the parties. The most common remedies in a purchase agreement termination and indemnification.

1. **Termination.** Termination of the contract is one of the most common remedies, and results in neither party's being required to continue performance under the contract (although in some cases the right of termination may be exercised together with other rights, such as the right to receive indemnification payments or liquidated damages). For this reason, termination is not a useful remedy where significant obligations under the contract have already been satisfied. Consider the situation where a purchaser of securities discovers after the closing that the seller breached its representations in the contract. At this point, the remedy of terminating the contract would be useless to the purchaser. On the other hand, if the purchaser discovered the breach of representations before the sale occurred, a right of termination would be very useful and entirely appropriate.
2. **Indemnification.** An agreement may provide that a party breaching its representations or covenants will be required to indemnify the other party for all costs, damages and losses incurred as a result of the breach. Indemnification would be an appropriate remedy for a purchaser of a manufacturing plant who discovers after the sale that the seller breached its representation that there was no hazardous waste contamination of the property. The seller would be required to reimburse the purchaser for remediation and related costs.

The concept of materiality is often used to prevent a remedy provision from having too harsh an effect. For example, a purchase agreement may provide the buyer with a right of termination if the seller materially breaches any of its representations or covenants. The inclusion of the word "materially" limits the breaches giving rise to the buyer's right to terminate the agreement to those that are material. Grace periods are also used to soften otherwise harsh remedy provisions: instead



of being immediately available upon the occurrence of a breach of covenant or other event, a remedy will be available only after a specified period of time (the grace or cure period) has elapsed following the event. If the act or condition at issue is cured during the grace period, the remedy is never triggered.