I. Doctrinal Basics

A. What is a Repudiation?: Despite the fact that his promisee has no right to expect him to perform until some future date, a promisor anticipatorily repudiates if,

1. at any time prior to the date he has promised to perform,
2. he definitely and unconditionally manifests to his promisee
3. his inability to, or his intent not to, perform as and when promised.

♦ Why? Because a promisor is required both to perform as and when promised and to refrain from repudiating his promise at any time prior to the date he has promised to perform.

B. Means of Repudiation: A promisor may repudiate either by word or by action.

1. If a promisor tells his promisee that he either cannot or will not perform the contract as and when promised, the promisor’s statement will generally operate as an anticipatory breach.
2. Likewise, a promisor may anticipatorily breach if he commits some voluntary act that makes it impossible for him to perform the contract when and as promised.
3. Absent a contractual or legal duty to speak or act, a promisor generally cannot anticipatorily repudiate by mere silence or inaction.

II. Anticipatory Repudiation Under Article 2

A. The text of current Article 2 neither defines repudiation nor describes how a party goes about repudiating a contractual duty prior to when he is obligated to perform it. However, Official Comment 1 to § 2-610 makes it clear that Article 2’s drafters had the foregoing concepts in mind, and courts routinely incorporate parts of the common law doctrine to resolve repudiation claims governed by Article 2.

B. **The Article 2 Promisee’s Options:** A promisee whose promisor repudiates “with respect to a performance not yet due the loss of which will substantially impair the value of the contract to” the promisee may

1. **do nothing**, subject to the promisee’s obligation to mitigate damages, and await the promisor’s performance at the appointed time, § 2-610(a),

2. **seek assurances** from the promisor that, his apparent repudiation notwithstanding, he will perform as and when promised, § 2-609(1),

3. **cancel** the contract, §§ 2-610(b), 2-703(f) & 2-711(1),

4. **sue** the promisor, §§ 2-610(b), 2-703(c)-(e) & 2-711(1)-(2), or

5. **otherwise act in reliance** on the repudiation.

C. **Urging Performance:** A promisee who chooses to bring suit, to seek assurances, or to do nothing and await the promisor’s performance may urge the promisor to **retract** his repudiation and perform as and when promised. § 2-610(b).

D. **Suspending the Promisee’s Duty to Tender or Perform:** In any event, the promisor’s repudiation relieves the promisee from any further tender or performance that would otherwise be due under the contract. § 2-610(c).

E. **The Repudiating Promisor’s Right to Retract:** If the promisee has not cancelled the contract, materially changed her position, brought suit upon the repudiation, or otherwise indicated that she considers the repudiation to be final, the promisor may retract or otherwise cure his repudiation, foreclosing the promisee’s ability to prevail on a claim for damages based on the promisor’s anticipatory breach. § 2-611(1).

F. **Seeking Assurances:** Section 2-609(1) provides that

[w]hen reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

1. **Degree of Certainty:** The promisee seeking assurances need only be **reasonably uncertain** that the promisor can perform, not absolutely certain that the promisor cannot perform.

2. Nor, for that matter, does the promisee have to be correct about the promisor’s apparent inability or unwillingness to perform, as long as the promisee’s suspicion was reasonable.
3. Unless otherwise agreed by the parties, between merchants the reasonableness of the promisee’s insecurity and the adequacy of the promisor’s offered assurances are determined “according to commercial standards,” including the obligation of good faith. In all other cases, unless otherwise agreed by the parties, reasonableness and adequacy are judged by an objective, “reasonable person” standard.

4. Once a party receives a “justifiable” written demand for adequate assurances, he must “provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case.” § 2-609(4).

5. **Failure to Respond:** A promisor failing to timely provide adequate assurances has, as a matter of law, anticipatorily repudiated, entitling the party who sought assurances to immediately bring suit.

### III. Anticipatory Repudiation Under the CISG

A. **Article 71** permits a party to **suspend** its performance of a contract if “it becomes apparent that the other party will not perform a substantial part of his obligations as a result of

   1. a **serious deficiency** in his ability to perform or in his creditworthiness; or
   2. his **conduct in preparing to perform or in performing** the contract.”

B. **Stopping Goods in Transit:** If a non-repudiating seller dispatched goods before its buyer repudiated, the CISG authorizes the seller to “prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them.”

C. **Notice Required:** A party electing to suspend its performance “must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.”

D. **Degree of Certainty:** As with Article 2, the non-repudiating promisee seeking to justify suspending its own performance under the CISG “need not establish a certainty of non-performance.”

   1. There must be objective grounds “showing a high degree of probability of non-performance.”
   2. “It is … not a condition that those reasons emerge only after the conclusion of the contract. It will suffice if they become **apparent** only **after the conclusion of the contract**.”
3. However, if the promisee knew, at the time the contract was formed, of reasons for which it could seek to suspend performance, the promisee could not suspend for those reasons.

E. **Suspending the Promisee’s Duty to Tender or Perform:** Once Article 71(1) is properly invoked, the promisee’s duty to perform is suspended until

1. the promisor performs his obligations or gives adequate assurances that he will perform his obligations,
2. the promisee declares the contract avoided, or
3. the applicable limitations period triggered by the promisor’s repudiation has expired.

F. **Promisee’s Options:**

1. Article 72 permits a promisee to declare a contract avoided if, prior to the date for performance, it is clear that the promisor will fundamentally breach the contract.

2. “If time allows, the party intending to declare a contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance,” unless the other party “has declared that he will not perform his obligations.”

3. An assurance is “adequate” if it “will give reasonable security to the first party either that the other party will perform in fact or that the first party will be compensated for all his losses from going forward with his own performance.”

4. Thus, Articles 71 and 72 of the CISG collectively establish a three-tiered scheme for a promisee faced with a promisor’s prospective repudiation.

   a. First, if it becomes apparent to the promisee that the promisor will not perform a substantial part of his obligations, the promisee may suspend her own performance, provided that the promisee
      i. immediately notifies the promisor after the fact that the promisee has suspended her performance, and
      ii. promptly resumes performance if and when the promisor provides adequate assurances that he will, in fact, substantially perform his contractual obligations.

   b. Second, if it becomes clear to the promisee that the promisor will fundamentally breach his obligations, the promisee may avoid her
own performance, provided that the promisee, if time allows, notifies the promisor \textit{before the fact} that she intends to forego her performance, “in order to permit [the promisor] to provide adequate assurance of his performance.”

c. Third, if it becomes \textit{clear} to the promisee that the promisor will \textit{fundamentally breach} his obligations because the promisor “has declared that he will not perform his obligations,” the promisee may \textit{avoid} her own performance without prior notice and forego the necessity of seeking assurances.

III. \textbf{Comparing the CISG and the UCC}

A. While the UCC authorizes a promisee whose promisor has repudiated to immediately bring an action for damages, the CISG only authorizes the promisee to

1. to suspend its own performance,
2. to stop goods in transit, or
3. under more restrictive circumstances, to declare the contract “avoided.”

B. The CISG circumscribes the sources of a promisee’s insecurity, providing that it may only suspend its performance if the promisor’s apparent inability to perform is caused by

1. a serious deficiency in the promisor’s ability to perform,
2. a serious deficiency in the promisor’s creditworthiness, or
3. the promisor’s conduct in preparing to perform or in performing the contract.

By contrast, the UCC authorizes a promisee to suspend its own performance on the basis of “reasonable grounds for insecurity.” The key under the UCC is the \textit{probability} that the promisor will not perform, not the \textit{inability} of the promisor to perform.

C. The CISG \textbf{mandates} that a promisee suspending performance under Article 71 give immediate notice of the suspension to the promisor. Likewise, a promisee declaring a contract avoided under Article 72 must, time permitting, give reasonable notice to the promisor, unless a prior declaration by the promisor makes it clear that such notice would be futile. The UCC does not require the promisee to give notice prior to suspending its own performance or bringing suit on the repudiation.
D. If, after receiving the required notice, a promisor gives the promisee adequate assurance that the promisor will perform, then the CISG requires the promisee to continue with its performance (and give the promisor the opportunity to render its performance). The UCC does not require a promisee to accept an unsolicited assurance of performance; rather, an assurance of performance from the promisor will only obligate the promisee to further perform if the promisee asked for such assurance.

E. Finally, the UCC treats a promisor’s failure to timely provide adequate assurance as a repudiation entitling the promisee to immediately bring suit for damages. The CISG, on the other hand, does not spell out the promisee’s options if the promisor refuses to provide adequate assurance.