I. Nonconforming Goods

A. **General Rule:** Unless otherwise agreed, if the goods or tender of delivery fail to conform to the contract between the buyer and seller, the buyer may:

1. **reject** the goods in their entirety;
2. **accept** the goods in their entirety; or
3. accept any commercial unit(s) and reject the remaining goods. § 2-601.

B. **Perfect Tender Rule:** The seller must tender exactly what the buyer ordered. Any deviation permits the buyer to reject, **unless**

1. the parties have **limited remedies** in the contract;
2. the seller properly **cures** the nonconformity;
3. the buyer’s rejection is **ineffective**; or
4. some prior course of dealing, course of performance, or usage of trade negates effect of nonconforming delivery. § 2-501.

C. **Special Case: Installment Contracts**

1. **§ 2-612(2):** A buyer can only reject an **installment** if
   a. the nonconformity substantially impairs the value of that installment and
   b. the seller can’t cure the defect in a subsequent installment.

2. **§ 2-612(3):** A buyer can treat the entire contract as breached if the nonconformity substantially impairs the value of the entire contract, **unless**
   a. the buyer accepts a nonconforming installment without seasonably notifying the Seller of cancellation, or
b. the buyer brings suit only with respect to past defective installments, or
c. the buyer demands performance as to future installments.

D. **Right to Inspect:** The buyer has right to inspect goods before accepting them unless otherwise agreed. The buyer must inspect

1. within a **reasonable** time following receipt,
2. at a **reasonable place**,
3. by **reasonable means**,
4. with all expenses **borne by the buyer**. § 2-513(1).

E. **Acceptance:** A buyer accepts goods, following a reasonable opportunity to inspect, by

1. **affirmatively signifying** her acceptance;
2. **failing to reject**;
3. engaging in some act **inconsistent with the Seller’s ownership**. § 2-606.
   ♦ Acceptance of any part of a **commercial unit** = acceptance of the entire commercial unit.

F. **Rejection:** In order for a buyer to effectively reject goods,

1. the rejected goods must be **nonconforming**;
2. the buyer must reject nonconforming **within a reasonable time** following tender or delivery; and
3. the buyer must **seasonably notify** the seller of the rejection (even if the seller knows it shipped nonconforming goods). § 2-602.
4. **Particularity Requirement:** In addition, the rejecting buyer must state with particularity the reason for her rejection of the nonconforming goods
   a. if the seller could have seasonably cured; or
   b. between merchants, if the seller has, following rejection, made a written request for a full and final written statement of all defects. § 2-605(1).
5. **Buyer’s Duties \( \text{f} \text{i} \text{z}. \) Rejected Goods**

   a. **§ 2-602(2)(b):** A **non-merchant buyer** must hold the goods

      i. with **reasonable care**

      ii. for a **sufficient time** to permit the seller to retrieve them.

   b. **§ 2-603(1):** If the seller has no local agent, a **merchant buyer**

      i. must follow the seller’s reasonable instructions, if any, as
to resale, storage, return, etc.; and

      ii. if the goods are perishable or otherwise subject to a rapid
decline in value, must sell the goods on the seller’s behalf.

G. **Revocation:** A buyer who accepts goods loses the right to reject them. **§ 2-607(2).** However, under **§ 2-608,** an accepting buyer may revoke her acceptance

   1. within a **reasonable time** after actual or constructive discovery of non-
   conformity; and

   2. before the **condition** of goods changes substantially as a result of anything
   other than the defect on the basis of which Buyer wishes to revoke; and

   3. if the nonconformity **substantially impairs** the value of the good or
   commercial unit; provided that

      a. the buyer accepted the good or commercial unit, notwithstanding
      the nonconformity, reasonably assuming that the seller would cure
      the nonconformity and the seller has not seasonably cured; or

      b. the buyer accepted the good or unit without discovering the
      nonconformity due to

         i. the difficulty of discovering the nonconformity at the time
         of acceptance, or

         ii. reasonably relying on the seller’s assurances that there were
         no nonconformities.

   4. **Whether a nonconformity “substantial impairs” the value of the goods**
   is tested both subjectively and objectively:

      a. whether the nonconformity **impairs** the good’s value is based on
      the **buyer**’s expectations;
b. whether the impairment is **substantial** is based on a **reasonable person**’s evaluation of the extent of the impairment.

5. A buyer’s revocation is ineffective until the buyer **notifies** the seller.

H. **Seller’s Right to Cure**

1. A buyer who **rejects** must allow her seller an opportunity to cure any nonconformity if

   a. the seller’s **time for performance** has not yet expired, or

   b. the seller reasonably expected the buyer to accept the rejected goods. § 2-508.

2. A buyer who **revokes** may have to allow her seller an opportunity to cure.

   a. § 2-508 deals only with post-rejection cure – it says nothing about post-revocation cure. Therefore, some courts do not recognize a seller’s right to cure following a proper revocation.

   b. However, § 2-608(3) affords the same rights and imposes the same duties on a revoking buyer as on a rejecting buyer. Therefore, the recent trend among courts is to read § 2-608(3) to require the revoking buyer to give the seller the same opportunity to cure that the seller would be entitled to if the buyer had rejected.

3. **“Shaken Faith” Doctrine:** A buyer may not be required to accept its seller’s cure if the cure depends on the buyer’s ability to “trust” the seller and the nonconformity giving rise to the right to cure has reasonably affected the buyer’s ability to trust the seller.

I. **Nonconforming Goods in International Sales**

1. **Avoidance:** CISG Article 49 permits buyers to reject nonconforming goods in only two situations:

   a. **“Fundamental” Breach:** A breach that

      i. substantially deprives the buyer of what he is entitled to expect under the contract, unless

      ii. the seller did not foresee and a reasonable person in the seller’s circumstances could not have foreseen such a result. Art. 25.
♦ To avoid a contract based on fundamental breach, the buyer must notify the seller of the nonconformity “no later than a reasonable period following when the buyer knew or ought to have known of the defect.” Art. 49(2)(b)(i).

b. **Untimely Delivery:** The seller’s delivery is later than an agreed date plus any agreed extension of the delivery deadline.

2. **Effect of Avoidance:** If the buyer successfully “avoids” the contract, both parties are relieved of their obligations, but the buyer may sue for damages. Art. 81(1).

3. **Seller’s Right to Cure**
   a. The UCC permits the buyer to reject nonconforming goods for any reason; therefore, the UCC gives the seller the right to cure the alleged defect in order to bind the buyer to the contract.
   b. The CISG permits buyers to reject/revoke only in very limited circumstances; but CISG permits a buyer who is “stuck” with nonconforming goods to demand that the seller cure the defect.

II. **Risk of Loss**

A. **Basic Principle:** The UCC provides rules to determine which party is responsible if goods are damaged or destroyed between the time the parties enter into the contract and the time the buyer receives possession of the goods.

1. **Dramatis Personae**
   a. Typical case = Buyer and Seller
   b. “Bailee” case = Buyer, Seller, and third-party Bailee (warehouse operator, common carrier, etc.)

2. **“Unclean Hands” Rule:** A buyer or seller who causes the damage or destruction of the goods at issue is liable for their damage or loss, notwithstanding the various “default” rules for risk allocation to follow.

3. **Freedom of Contract:** The buyer and seller can agree *a priori* who will bear the risk for various kinds of losses, and thus “trump” the various “default” rules for risk allocation to follow. § 2-509(4).

4. **Insurance:** The buyer or seller may have insurance to cover some or all of the risk of a particular type of loss. Nonetheless, UCC risk of loss rules still apply.
B. **Shipment Contract:** The seller delivers or tenders goods to the buyer at the **seller’s place of business** or residence or at some other location designated by the seller (i.e., the buyer pays to have the goods delivered by a third-party carrier).

1. § 2-319(1)(a): Unless otherwise agreed, the seller is liable for any damage to or destruction of the goods until the carrier takes possession.

2. § 2-504: In order to pass the risk of loss to the buyer, the seller must
   a. make a “**reasonable**” **contract** with a third-party carrier;
   b. give possession of the goods to the **carrier**;
   c. provide the buyer with any **documents** necessary for the buyer to take possession of the goods from the carrier; and
   d. **promptly notify** the buyer that the goods have been shipped.

   ◊ The seller’s failure to make a reasonable contract or to properly notify the buyer will justify the buyer’s rejection “only if material delay or loss ensues.”

3. § 2-509(1)(a): Once the seller satisfies § 2-504, the buyer becomes liable for any damage to or destruction of the goods in transit.

4. **Burning Issue:** What is the meaning of “ensues” in the final sentence of § 2-504? Must the seller’s failure to make a reasonable contract or promptly notify the buyer **cause** the material delay or loss, or must it only **precede** the material delay or loss?

C. **Destination Contract:** The seller delivers or tenders goods to the buyer at the **buyer’s place of business** or residence or at some other location designated by the buyer (i.e., the seller delivers or pays a carrier to deliver the goods to the buyer)

1. § 2-319(1)(b): Unless otherwise agreed, the seller is liable for any damage to or destruction of the goods until the goods are tendered to the buyer at the stated destination.

2. § 2-503(1)-(3): In order to pass the risk of loss to the buyer, the seller must
   a. put and hold the goods at the buyer’s **disposition**
      i. at a **reasonable hour**, and
      ii. for the **time necessary** for the buyer to take possession;
   b. give the buyer **notice** of the tender; and
c. provide the buyer with any documents necessary for the buyer to take delivery of the goods.

3. § 2-509(1)(b): The buyer becomes liable for any damage to or destruction of the goods following a proper tender.

D. Other Contracts

1. Contract to Transfer Title to Goods in the Possession of a Bailee

a. Constructive delivery: The seller tenders goods already in possession of a third-party bailee to the buyer, who will take title to the goods while keeping them in the possession of the same third-party bailee (i.e., the bailee makes a bookkeeping notation).

b. § 2-503(4): In order to pass the risk of loss to the buyer, the seller must either tender to the buyer a negotiable document of title or get the bailee to acknowledge that the buyer is entitled to take possession of the goods.

c. § 2-509(2): The seller remains liable for any damage to or destruction of the goods until

i. the buyer receives a document of title covering the goods,

ii. the bailee acknowledges the buyer’s right to possess, or

♦ Another Burning Issue: § 2-509(2) does not clarify to whom the bailee must acknowledge the buyer’s right to take possession, and it has been the subject of litigation.

iii. the buyer receives the seller’s direction to the bailee to deliver, at which time risk of loss passes to the buyer.

2. Contract Not Specifying Place of Tender or Delivery: If a contract is not a Shipment, Destination, or Bailee contract (including cases where the Buyer is to pick the goods up from the Seller’s place of business), § 2-509(3) provides:

a. If the seller is a merchant, the risk of loss passes to the buyer when the buyer receives the goods; but

b. If the seller is not a merchant, the risk of loss passes to the buyer when the seller tenders delivery to the buyer.
E. **Effect of Buyer’s or Seller’s Breach on Risk of Loss:** All of the foregoing discussion covers risk of loss in cases where neither party has breached its contractual obligations (distinguish b/w breach and cause of loss). What happens to the default risk of loss rules if one of the parties has breached?

1. § 2-510(1): If the seller’s tender or delivery of goods “so fails to conform to the contract as to give a right of rejection” by the buyer, “the risk of their loss remains on the seller until cure or acceptance.”

2. § 2-510(2): If the buyer rightfully revokes acceptance (after first having received and accepted the goods), any loss in excess of the buyer’s insurance coverage rests on the seller.

3. § 2-510(3): As to conforming goods, if the buyer repudiates or otherwise breaches (while the seller is still in possession of the goods), any loss in excess of the seller’s insurance rests on the buyer.

4. **Key Considerations:**
   a. Which party has control of the goods?
   b. § 2-510 *does not* affect the subrogation rights of the aggrieved party’s insurer.

F. **Risk of Loss Under the CISG**

1. **Shipment Contract:** When the contract does not specify a place of delivery, the risk of loss to identified goods passes to the buyer when the seller hands over the goods to the first carrier. Art. 67(1) & (2).

2. **Destination Contract:** When the contract does specify a place of delivery, the risk of loss to identified goods passes to the buyer when the seller hands over the goods at the place of delivery. Art. 67(1) & (2).

3. **Goods Sold in Transit**
   a. **General Rule:** The risk of loss to identified goods sold in transit passes to the buyer at the conclusion of the contract. Art. 68.
   b. **Assumed Risk:** If the circumstances so indicate, the buyer assumes the risk of loss to identified goods when the seller handed them over to the carrier. *Id.*
   c. **Undisclosed Loss:** If the seller knew that the goods had been lost or damaged at the conclusion of the contract, and did not disclose that fact to the buyer, the seller is responsible for the damage or loss.
4. **Contract Not Specifying Place of Tender or Delivery:** If the contract does not fall within the scope of Article 67 or 68,

   a. **General Rule:** the risk of loss passes to the buyer when the buyer takes possession of the goods or, if the buyer fails to timely take possession, when the seller or carrier places the goods at the buyer’s disposal and the buyer breaches the contract by failing to take delivery, Art. 69(1).

   b. **Exception:** However, if the buyer is obliged to take possession at some place other than the seller’s place of business, the risk of loss passes to the buyer when delivery is due and the buyer is aware that the goods are at the buyer’s disposal at the designated locale.

III. **Insecurity, Adequate Assurances, and Anticipatory Repudiation**

   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 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**.

   C. **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.

D. **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).

E. **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).

F. **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).

G. **Seeking Assurances**: Section 2-609(1) permits a promisee with “reasonable grounds for insecurity” to “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.

H. **Anticipatory Repudiation Under the CISG**

1. **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

   a. a **serious deficiency** in his ability to perform or in his creditworthiness; or

   b. his **conduct in preparing to perform or in performing** the contract.”

2. **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.”

3. **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.”

4. **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.”

   a. There must be objective grounds “showing a high degree of probability of non-performance.”

   b. “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.”

   c. 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.
5. **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

a. the promisor performs his obligations or gives adequate assurances that he will perform his obligations,

b. the promisee declares the contract avoided, or

c. the applicable limitations period triggered by the promisor’s repudiation has expired.

6. **Promisee’s Options:**

a. 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.

b. “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.”

c. 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.”

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

i. 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

   a). immediately notifies the promisor after the fact that the promisee has suspended her performance, and

   b). promptly resumes performance if and when the promisor provides adequate assurances that he will, in fact, substantially perform his contractual obligations.

ii. 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 before the fact that she intends to forego her performance, “in order to permit [the promisor] to provide adequate assurance of his performance.”

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

7. Comparing the CISG’s and the UCC’s Approaches

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

i. to suspend its own performance,

ii. to stop goods in transit, or

iii. 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

i. a serious deficiency in the promisor’s ability to perform,

ii. a serious deficiency in the promisor’s creditworthiness, or

iii. 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 probability that the promisor will not perform, not the inability of the promisor to perform.

c. The CISG 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.