

A manufacturer of computer chipsets for smartphones contracted to sell to a tech company 1 million chipsets each month for three years, payment for each installment to be made upon delivery. Before delivering the first installment, the manufacturer told the tech company, "Our manufacturing plant is undergoing renovations. This will likely have a temporary impact on the quantity, but not the quality, of chipsets in future installments." The manufacturer delivered the first three installments to the tech company in compliance with the contract. However, the fourth installment contained only 500,000 chipsets. The tech company accepted the installment on the manufacturer's assurance that the remaining 500,000 chipsets would be delivered in two weeks, which they were. Then the manufacturer communicated that the fifth installment likely would contain only 500,000 chipsets.

Which of the following statements best describes the tech company's rights after receiving the manufacturer's most recent communication regarding the fifth installment?

- A. It can demand adequate assurance that the fifth installment will conform to the contract and treat a failure to give immediate assurance as a repudiation.
- B. It can treat the manufacturer's communication as a repudiation and sue for breach of contract.
- C. It cannot demand adequate assurance that the fifth installment will comply with the contract because it accepted a nonconforming installment.
- D. It cannot sue for breach of contract if it demands, and the manufacturer gives, adequate assurance that the fifth installment will comply with the contract.

Explanation:

A party's statements or conduct may cast doubt on its ability or willingness to perform under the contract. This **prospective inability to perform** is *not* a breach of contract because—unlike anticipatory repudiation—the party has not clearly and unequivocally refused to perform. However, it **gives the other party the right to demand assurance of performance and suspend its own performance** until assurance is provided. **Failure to provide** such assurance within a reasonable time (not to exceed 30 days under the UCC) **constitutes a breach**.

Here, the manufacturer communicated that the fifth installment *likely* would contain only 500,000 chipsets. Although this cast doubt on the manufacturer's ability to deliver 1 million chipsets as promised (prospective inability to perform), it was not a clear and unequivocal refusal to do so (no anticipatory repudiation). Therefore, the tech company cannot sue for breach of contract if it demands, and the manufacturer gives, adequate assurance that the fifth installment will comply with the contract **(Choice B)**.

(Choice A) A party that receives a proper demand for assurance has a *reasonable* time to provide assurance (not to exceed 30 days under the UCC) before the other party can treat the failure to do so as a repudiation and sue for breach. As a result, the tech company cannot treat a failure to give *immediate* assurance as a repudiation.

(Choice C) In an installment contract, a party that accepts a nonconforming payment or delivery (eg, the fourth installment of 500,000 chipsets) does not forfeit the right to demand adequate assurance that future installments will comply with the contract.

Educational objective:

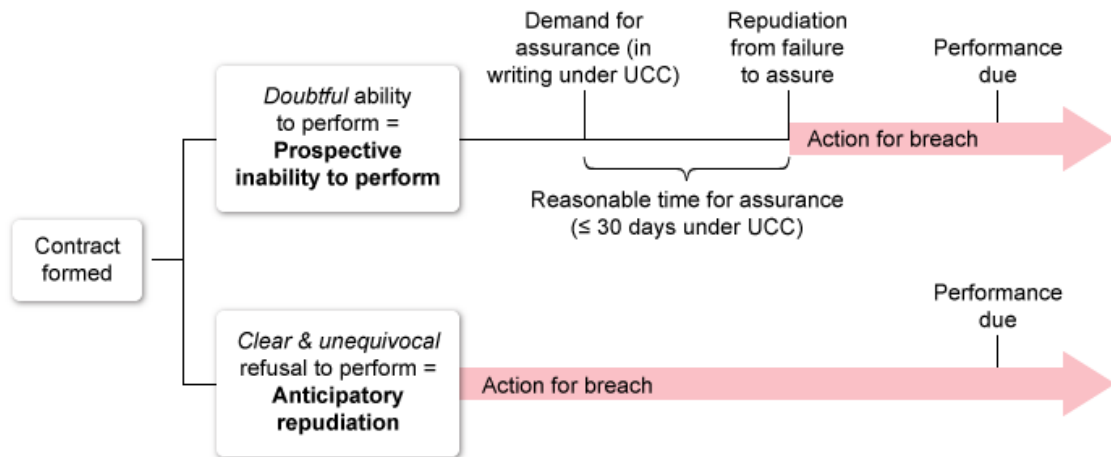
One party's prospective inability to perform under the contract gives the other party the right to demand assurance of performance and suspend its own performance until assurance is provided. Failure to provide assurance within a reasonable time (not to exceed 30 days under the UCC) constitutes a breach.

References

U.C.C. § 2-609 (Am. Law Inst. & Unif. Law Comm'n 2020) (right to adequate assurance of performance).

Restatement (Second) of Contracts § 251 (Am. Law Inst. 1981) (explaining when a party's failure to give adequate assurance may be treated as repudiation).

Prospective inability to perform v. Anticipatory repudiation



UCC = Uniform Commercial Code.

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