I. Buyer’s Article 2 Remedies

A. Triggering Events [§ 2-711(1)]

1. Seller’s failure to deliver
2. Seller’s anticipatory repudiation
3. Buyer’s rightful rejection
4. Buyer’s rightful revocation of acceptance

B. Buyer’s Remedies – Accepted Goods: If the buyer has accepted the goods and the time for timely revocation has passed, the buyer, upon proper notice to the seller (per § 2-607(3)), may sue to recover

1. the difference at the time and place of acceptance between the value of the goods as promised and the value of the (non-conforming) goods accepted, plus

   ♦ The value of the non-conformity is often measured by what it costs the buyer to have the goods repaired so that they do conform.

2. any incidental damages recoverable under § 2-715(1), and
3. any consequential damages recoverable under § 2-715(2).
4. The buyer must notify the seller of the seller’s breach within a reasonable time after the buyer discovers or should have discovered it. § 2-607(3)(a).
5. If the buyer has not yet paid the seller for the non-conforming goods, the buyer may, again after notice to the seller of the defect, deduct from their price any damages the buyer suffers as a result of the seller’s breach. § 2-717.
C. **Buyer’s Remedies – Non-Accepted or Revoked Goods:** If the buyer has not yet accepted the goods, has justifiably rejected them, or timely and justifiably revoked acceptance of them, the buyer may

1. **cancel** the contract, § 2-711(1); and
2. recover the **purchase price** paid, § 2-711(1); and
3. “**cover**” under § 2-712; or
4. recover **contract-market damages** under § 2-713.

And, if the seller fails to deliver or repudiates, the buyer may also

5. recover any **identified goods** per § 2-502; or
6. sue for **specific performance** or **replevin** under § 2-716.

And, in any event, the buyer may also recover

7. **incidental** and **consequential** damages, as § 2-715 permits; and

And, if the buyer has paid for the goods – in part or in full – prior to rightfully rejecting or revoking,

8. the buyer may **hold** the goods as **security for repayment** of the purchase price paid plus any expenses the buyer incurs in holding the goods, § 2-711(3); and, in the event the seller does not repay the buyer, the buyer may sell the goods to a third party “in like manner as an aggrieved seller” (under § 2-706(1)) in order to recoup its damages.

D. **“Cover” Damages**

1. A buyer whose seller has breached or repudiated may purchase or contract to purchase replacement goods
   
   a. in **good faith**, and
   
   b. **without unreasonable delay**. § 2-712(1).

2. A buyer so doing may recover from the seller
   
   a. the difference between the **cover price** and the **contract price**,
   
   b. plus any **incidental** and **consequential damages** § 2-715 allows,
c. minus expenses saved by the buyer as a result of the seller’s breach. § 2-712(2).

3. A buyer who fails to cover is not barred from any other Article 2 remedy. § 2-712(3).

E. **Market Differential Damages**

1. A buyer whose seller has breached or repudiated may recover
   a. the difference between the market price at the time the buyer learned of the seller’s breach and the contract price,
   b. plus any purchase price already paid to the seller,
   c. plus any incidental and consequential damages permitted by § 2-715,
   d. minus expenses saved by the buyer as a result of the seller’s breach. § 2-713(1).

2. Market price is determined at the place for tender or, in the case of rejection or revocation after delivery, at the place of delivery. § 2-713(2).

F. **Incidental Damages:** A buyer whose seller has breached or repudiated may recover incidental damages resulting from the seller’s breach including, but not limited to, commercially reasonable charges, expenses, or commissions incurred

1. inspecting goods,
2. transporting goods,
3. caring for and taking custody of goods, or
4. purchasing substitute goods. § 2-715(1).

G. **Consequential Damages:** A buyer whose seller has breached or repudiated may recover consequential damages

1. including, but not limited to, purely economic loss,
2. of which the seller had reason to know or foresee at the time of contracting (ala Hadley v. Baxendale),
3. that the seller’s breach actually caused (not proximately caused), and
4. which the buyer could not have prevented or mitigated by “cover” or otherwise. § 2-715(2)(a).

5. Moreover, the buyer may recover any and all personal injury or property damage proximately caused by the seller’s breach of warranty, irrespective of its foreseeability or of the buyer’s failure to mitigate. § 2-715(2)(b).

II. **Buyer’s CISG Remedies:** The CISG gives an aggrieved buyer two options:

A. **“Avoid” the Contract,** per Art. 81(1), and recover
   1. **contract price** minus **resale price** (Art. 75) or
   2. **contract price** minus **market price** (Art. 76) **PLUS**
   3. **incidental damages** (net of expenses saved) (Art. 74) and
   4. reasonably foreseeable **consequential damages** *(id.)*

   ✦ Article 64(1)(a) permits a buyer to avoid a contract only if the seller’s breach is “fundamental” – that is, (1) the seller’s breach substantially deprives the buyer of what he is entitled to expect under the contract, unless (2) the seller did not foresee and a reasonable person in the seller’s circumstances could not have foreseen such a result. Art. 25.

B. **Specific Performance** (Art. 46), subject to
   1. the buyer’s **duty to mitigate** damages (Art. 77),
   2. the buyer’s **duty to sell** on behalf of the breaching seller if the goods are subject to rapid deterioration in value (Art. 88(2)), and
   3. the proviso in Art. 28 that specific performance is unavailable under the CISG unless the forum court’s domestic law would require the seller to specifically perform under the same circumstances.
III. Seller’s Article 2 Remedies

A. Types of Breach by Buyer

1. Wrongful rejection of conforming goods
2. Wrongful revocation of acceptance
3. Failure to pay when payment is due
4. Anticipatory repudiation

B. Seller’s Remedies

1. Withhold delivery, § 2-703(a);
2. Stop delivery by a bailee or carrier under § 2-705;
3. Identify goods to the repudiated contract and proceed under § 2-704;
4. Resell and recover damages under § 2-706;
5. Recover contract-market damages or lost profits under § 2-708;
6. Sue for price under § 2-709; and/or
7. Cancel the contract, § 2-703(f).

C. § 2-706: Resale Damages

1. Seller may resell the goods or the undelivered balance thereof
   a. in good faith, and
   b. in a commercially reasonable manner.
2. A seller so doing may recover from the buyer
   a. the difference between the contract price and the resale price,
   b. plus any incidental damages permitted by § 2-710,
   c. minus expenses saved by the seller as a result of the buyer’s nonperformance.
3. Seller is not accountable to the buyer for any profit made on the resale.
4. Seller must notify the buyer of the seller’s intent to resell the goods, if the seller plans to do so in a private sale, § 2-706(3); alternatively, if the seller intends to resell through a public sale, the seller must comply with the requirements of § 2-706(4).

5. A seller who fails to satisfy the requirements of § 2-706 may not recover the contract-resale differential, but may recover under § 2-708(1).

D. § 2-708: Market Differential/Lost Profit Damages

1. Where the buyer repudiates or wrongfully refuses to accept conforming goods, the seller may recover
   a. the difference between the contract price and the market price at the time and place for tender,
   b. plus any incidental damages permitted by § 2-710,
   c. minus expenses saved by the seller as a result of the buyer’s nonperformance.

2. If the recovery permitted under § 2-708(1) is inadequate to put the aggrieved seller in as good a position as it would have been absent the buyer’s breach, the seller may recover, in the alternative,
   a. any profits (including reasonable overhead) which the seller would have realized had the buyer performed,
   b. plus any incidental damages permitted by § 2-710,
   c. minus expenses saved by the seller as a result of the buyer’s nonperformance,
   d. minus any credit due the buyer for partial payment, and
   e. minus the proceeds from any resale (to a replacement buyer to whom the seller could not have otherwise sold).

3. The prototypical “lost profits” seller is one who could have sold to both the buyer and to the replacement buyer (if any) – in other words, a seller with excess supply or excess capacity.

E. § 2-709: Action for Price (i.e., specific performance)

1. If the buyer fails to pay when due, the seller may recover
   a. any incidental damages permitted by § 2-710, plus
b. the price of
   i. accepted goods;
   
   ii. conforming goods lost or damaged within a commercially reasonable time after risk of their loss passed to the buyer; and
   
   iii. goods identified to the contract,
      
   a). if the seller is unable after reasonable effort to resell them at a reasonable price, or
   
   b). circumstances reasonably indicate that such effort will be unavailing.

2. A seller suing under § 2-709 must hold for the buyer any goods identified to the contract and still in the seller’s control, unless the seller has an opportunity to resell them prior to the collection of judgment.

3. If the seller resells, the proceeds must be credited against any judgment against the buyer under this Section.

4. A seller not entitled to recover under § 2-709 may be awarded damages under § 2-708.

F. § 2-710: Incidental Damages – All three of the foregoing remedies permit the seller to recover incidental damages incurred as a result of the buyer’s breach including, but not limited to, commercially reasonable charges, expenses, or commissions incurred in

1. stopping delivery,
2. transporting goods,
3. care and custody of goods,
4. returning goods, or
5. reselling goods.

Article 2 does not permit a seller to recover consequential damages unless the parties’ contract provides for them.

G. Cumulative Remedies: Seller’s pursuit of one remedy should foreclose pursuing another only when “one remedy bars another,” which “depends entirely on the facts of the individual case.” § 2-703 cmt. 1.
IV. **Seller’s CISG Remedies**: The CISG gives an aggrieved seller two options:

A. **“Avoid” the Contract** – same as “II.A.” above.

B. **Sue for Price** (Art. 62), subject to

   1. the seller’s **duty to mitigate** damages (Art. 77),

   2. the seller’s **duty to sell** on behalf of the breaching buyer if the goods are subject to rapid deterioration in value (Art. 88(2)), and

   3. the proviso in Art. 28 that specific performance is unavailable under the CISG unless the forum court’s domestic law would require the buyer to specifically perform under the same circumstances.