Seller’s & Buyer’s Remedies

I. Seller’s Article 2 Remedies

A. § R1-305(a): “Spirit” of Article 2 Remedies

1. **Goal of UCC Remedies** = to put the aggrieved party “in as good a position as if the other party had fully performed”

2. **No Consequential Damages** unless specifically provided for in an applicable section

   ✷ **Incidental damages** under § 2-710 appear to include consequential damages, although most courts don’t read § 2-710 to include consequentials.

B. **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** = repudiation of contract prior to time for performance

C. **Seller’s Remedies – Generally**

1. **Withhold delivery**, [§ 2-703(a)];

2. **Stop delivery** by a bailee or carrier, per § 2-705 [§ 2-703(b)];

3. **Identify goods** to the repudiated contract and proceed under § 2-704 [§ 2-703(c)];

4. **Resell** and recover **damages** under § 2-706 [§ 2-703(d)];
5. Recover **contract-market damages** or **lost profits** under § 2-708 [§ 2-703(e)];

6. **Sue for price** under § 2-709 [§ 2-703(e)]; and/or

7. **Cancel** the contract [§ 2-703(f)].

D. **Cumulative Remedies:** Seller’s Article 2 remedies are cumulative, not mutually exclusive, and the pursuit of one remedy should foreclose another only when “the pursuit of one remedy bars another,” which “depends entirely on the facts of the individual case” [§ 2-703 cmt. 1]

E. **Resale Damages** [§ 2-706]

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 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 Buyer’s nonperformance.

3. Seller **is not** accountable to Buyer for any profit made on the resale.

4. Seller must notify Buyer of Seller’s intent to resell the goods, if Seller plans to do so in a private sale, § 2-706(3); alternatively, if Seller intends to resell through a public sale, 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).

F. **Market Differential/Lost Profit Damages** [§ 2-708]

1. Where the Buyer repudiates or wrongfully refuses to accept conforming goods, 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 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 Buyer’s breach, Seller may recover, in the alternative,
   a. any profits (including reasonable overhead) which Seller would have realized had Buyer performed,
   b. plus any incidental damages permitted by § 2-710,
   c. minus expenses saved by the Seller as a result of 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 both to the Buyer and to the replacement Buyer (if any) – in other words, a Seller with excess supply or excess capacity.

G. Action for Price [§ 2-709] – i.e., specific performance

1. If Buyer fails to pay when due, 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 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 Seller has an opportunity to resell them prior to the collection of judgment.

3. If 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.

H. **Incidental Damages [§ 2-710]** – All three of the foregoing remedies permit the recovery of incidental damages; these include commercially reasonable charges, expenses, or commissions

1. incurred as a result of Buyer’s breach in
   a. stopping delivery,
   b. transporting goods,
   c. care and custody of goods,
   d. return of goods,
   e. resale of goods, or

2. otherwise resulting from the Buyer’s breach.

II. **Seller’s Remedies Under the CISG**: The CISG gives an aggrieved seller 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 seller to avoid a contract only if the buyer’s breach is “fundamental” – that is, (1) the buyer’s breach substantially deprives the seller of what he is entitled to expect under the contract, unless (2) the buyer did not foresee and a reasonable person in the buyer’s circumstances could not have foreseen such a result. [Art. 25]
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.

III. **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 may, upon proper notice to the Seller (per § 2-607(3)), 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, or has justifiably rejected them, or timely and justifiably revoked acceptance of them, the Buyer may

1. **Cancel** contract [§ 2-711(1)]; and
2. Recover **purchase price** paid [§ 2-711(1)]; and
3. **“Cover”** under § 2-712 [§ 2-711(1)(a)]; or
4. Recover **contract-market damages** under § 2-713 [§ 2-711(1)(b)].

And, if the Seller fails to deliver or repudiates, the Buyer may also

5. Recover any **identified goods** per § 2-502 [§ 2-711(2)(a)]; or
6. Sue for **specific performance** or **replevin** under § 2-716 [§ 2-711(2)(b)].

And, in any event, the Buyer may also recover

7. **Incidental** and **consequential** damages, as permitted by § 2-715.

8. Also, if the Buyer has paid for the goods – in part or in full – prior to rejecting or revoking, 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 [§ 2-712]**

1. Buyer may purchase or contract to purchase replacement goods
   a. in **good faith**, and
   b. **without unreasonable delay**.

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

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

E. Market Differential Damages [§ 2-713]

1. Buyer 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 Seller’s breach.

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.

F. Incidental Damages [§ 2-715(1)]: Commercially reasonable charges, expenses, or commissions

1. incurred as a result of Seller’s breach in
   a. inspecting goods,
   b. transporting goods,
   c. care and custody of goods, or
   d. effective “cover”, or

2. otherwise resulting from the Seller’s breach.

G. Consequential Damages [§ 2-715(2)]: Buyer may recover consequential damages

1. including, but not limited to, purely economic loss,

2. of which Seller had reason to know or foresee at the time of contracting (ala Hadley v. Baxendale),
3. which were “caused in fact” (not proximately caused) by Seller’s breach, and

4. which could not have been prevented or mitigated by “cover” or otherwise.

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

IV. **Buyer’s Remedies Under the CISG:** The CISG gives an aggrieved Buyer two options:

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

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.