

## FORM B-5

# CHECKLIST TO ANSWER AND AFFIRMATIVE DEFENSES UNDER FEDERAL LAW

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**Practical Application:** Counsel should review the procedural rules applicable to the jurisdiction, including local rules. All answers should contain a reservation of right as follows:

Defendant hereby reserves the right to raise any additional defenses, cross-claims and third-party claims not asserted herein of which they may become aware through discovery or other investigation.

- Federal Rule of Civil Procedure 12(a) (1) (A) requires service of an answer within 20 days after being served with the Summons and Complaint.
- Review Federal Rule of Civil Procedure 12(b) for the defenses you can assert in a motion to dismiss. Those defenses include: (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, and (7) failure to join a party under Rule 19. If the complaint contains a fraud count, Federal Rules of Civil Procedure 9(b) and 12(b) (6) may permit you to file a motion to dismiss for failure to plead fraud with particularity as to that count.
- A motion to dismiss for forum non conveniens should be reviewed. See 28 U.S.C. 1404(a).
- If a motion to dismiss, a motion to strike or a motion for a more definite statement is not filed, an answer must be filed accordingly. Federal Rule of Civil Procedure 8(b) sets forth the contents of a proper answer. According to Rule 8(b), a party filing an answer must admit or deny each material allegation of the complaint.
- When Defendant files an answer they have three alternatives: 1) admit; 2) deny; 3) deny for lack of sufficient knowledge to form belief. Answers should be short and plain statement of defenses to each

claim asserted. Lack of knowledge should be stated if true, which has effect of denial; specific denials of particular averments or general denial—good faith required.

- Federal Rules of Civil Procedure 8(c) and 12 require you to raise all potentially applicable affirmative defenses in the Answer.

Common Contract Defenses Under the CISG:

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| <input type="checkbox"/> Statute of Limitations <sup>1</sup>                                   | <input type="checkbox"/> Frustration of Purpose                                       |
| <input type="checkbox"/> Failure to Give Notice for Avoidance within Reasonable Period of Time | <input type="checkbox"/> Setoff   |
| <input type="checkbox"/> Express Warranty; Breach of Implied Warranty                          | <input type="checkbox"/> Breach by Plaintiff  |
| <input type="checkbox"/> No Deficiency Judgment Permitted by Law                               | <input type="checkbox"/> Attorney's Fees Not Recoverable                              |
| <input type="checkbox"/> Accord and Satisfaction   | <input type="checkbox"/> Improper Notice of Avoidance                                 |
| <input type="checkbox"/> Improper Notice of Defect for Avoidance                               | <input type="checkbox"/> Waiver   |
| <input type="checkbox"/> Failure of Condition Precedent  | <input type="checkbox"/> Anticipatory Repudiation                                     |
| <input type="checkbox"/> Failure to Pursue ADR   | <input type="checkbox"/> Disclaimer   |
| <input type="checkbox"/> Lack of Privity   | <input type="checkbox"/> Knowledge of Defect by Seller <sup>2</sup>                   |
| <input type="checkbox"/> Comparative Fault   | <input type="checkbox"/> Other Jurisdictional Matter: Personal, Venue, Subject Matter |
| <input type="checkbox"/> Estoppel  | <input type="checkbox"/> Excuse for Lack of Notice <sup>3</sup>                       |
| <input type="checkbox"/> Failure to Join a Party Under Fed. R. Civ. P. 19                      | <input type="checkbox"/> Impossibility of Performance                                 |
| <input type="checkbox"/> Avoidance   | <input type="checkbox"/> Laches   |
| <input type="checkbox"/> Full Performance  | <input type="checkbox"/> Fraud and Misrepresentation <sup>4</sup>                     |
|  | <input type="checkbox"/> Equitable Doctrine of Bad Faith and Unclean Hands            |

**Practical Application:** Counsel should not restrict its reliance on the list of affirmative defenses contained in Rule 8(c) since an affirmative defense is any allegation upon which the defendant, rather than the plaintiff, bears the ultimate burden of proof. In many jurisdictions, an affirmative defense is waived if not asserted in the answer. Counter-claims may also be filed at time of filing Answer.

<sup>1</sup> Unless Contracting State of the United Nations Convention on the Limitation Period in the International Sale of Goods 1980 (New York, June 14, 1974/Vienna 11 April 1980), this defense is governed by domestic law.

<sup>2</sup> Article 40.

<sup>3</sup> Article 44.

<sup>4</sup> Depending on circumstances of pleading, defense may be outside scope of CISG.