

FORM B-2

BUYER'S COMPLAINT FOR BREACH

Practical Application: This form is a generic template. Counsel should seek to modify to facts of case and include additional counts when warranted.¹ Two possible factual scenarios are presented in order for counsel to grasp general concept of pleading. One scholar noted that "a practitioner when pleading a cause of action should provide for a breach of an obligation not a breach of warranty² and alternatively plead all provisions of Article 35 as the "CISG Article 35 does not contain a specific rule for warranted characteristics." Instead, the seller generally vouches for all qualities which the buyer is entitled to expect from the goods under the contract³ and therefore a complaint should not be limited to only express terms of a contract. This suggestion is enclosed, but based on the author's research the majority of pleadings filed in the United States, courts have distinguished between a "breach of contract claim" versus "breach of warranty." The author leaves this to the practitioner's discretion but with the caution that if "obligations" is employed that counsel should be prepared to educate the court and maybe even opposing counsel as to the distinction under the CISG. On this note, counsel should review local federal law to ensure complaint is in compliance prior to filing with the court.

¹ See also *Magellan Int'l v. Salzgitter Handel*, 76 F. Supp. 2d 919, 1999 U.S. Dist. LEXIS 19386, 1999 WL 112288468 (N.D. Ill), also at available <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/991207u1.html#eabc> for pleading requirements.

² See Joseph Lookofsky, *Understanding the CISG in the USA* (2d ed. Kluwer Law International 2003) pp. 74-75.

³ See Schwenzler in v. Caemmerer/Schlechtriem, *Kommentar zum einheitlichen UN-Kaufrecht*, 2d ed., Munich 1995, Art. 35 n. 37; Staudinger/Magnus, *op. cit.*, Art. 35 n. 16; Conrad, *Die Lieferung mangelhafter Ware als Grund für eine Vertragsaufhebung im einheitlichen UN-Kaufrecht (CISG) unter Berücksichtigung des öffentlichrechtlich bedingten Sachmangels [Delivery of Defective Goods as a Condition for Contract Avoidance Under the CISG with Special Regard to Defects Caused by Administrative Law]*, [Thesis] Zürich 1999, p. 17).

[NAME OF COURT]

[PLAINTIFF'S NAME]
Plaintiff

v. Case No. [INSERT NUMBER]
COMPLAINT

[DEFENDANT'S NAME]
Defendant

COMPLAINT AND MONETARY RELIEF SOUGHT

Plaintiff, [PLAINTIFF'S NAME], by and through undersigned counsel, files this Complaint against Defendant, [DEFENDANT'S NAME] and states as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant 18 U.S.C. § 1331 in that this is a civil action arising under the treaties of the United States, specifically the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG"), opened for signature April 11, 1980, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. 22 (1983), 19 I.L.M. 671, reprinted at, 15 U.S.C. app. 52 (1997).

2. Defendant has continuously conducted commercial activities within the United States with Plaintiff and also conducted acts outside the United States having a direct effect within the United States, to wit: negotiating contracts with Plaintiff, selling products to Plaintiff. These activities were such that normally could be engaged in by a private party in the relevant marketplace; thus constituting a "commercial activity" thereby establishing personal jurisdiction over the parties.

3. Venue is proper pursuant to 28 U.S.C. § 1391(f)(1) as a substantial part of the events giving rise to the claims and causes of action occurred in this District and Division.

THE PARTIES

4. Plaintiff, [PLAINTIFF'S NAME] (hereinafter referred to as "Buyer") is a corporation existing under the laws of [STATE COUNTRY]

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OR STATE], having its principal place of having a principal place of business and registered agent at [STATE ADDRESS].

5. Upon information and belief, Defendant, [DEFENDANT'S NAME] (hereinafter referred to as "Seller"), at all relevant times to this Complaint, has been and is a corporation and existing under the laws of [STATE COUNTRY OR STATE].

PRESENT FACTUAL BACKGROUND

[INSERT RELEVANT FACTS IN CHRONOLOGICAL ORDER]

Factual Scenario 1.

[INSERT NUMBER] Cause of Action

(Breach of Contract)

[E.g. Articles 30 through 44]

IF ASSERTING AVOIDANCE INSERT LANGUAGE AND NOTICE REQUIREMENTS

6. On or about [INSERT DATE] Buyer entered into a written agreement (hereinafter referred to as "Agreement") with Seller to [INSERT PRODUCT] with an agreed purchase price of [INSERT MONETARY AMOUNT AND CURRENCY] to be delivered to Buyer on [INSERT DATE] the Buyer agreed to pay Seller [INSERT DATE] upon delivery. A copy of the Agreement is attached hereto as "Exhibit A." The Agreement is valid, binding, and enforceable under the CISG.

7. On or about [INSERT DATE], a representative of Buyer contacted Seller and confirmed that the ordered goods failed to conform with the terms of the Agreement and sent a correspondence thereafter confirming the conversation. See copy of facsimile dated [INSERT DATE], attached hereto as "Exhibit B."

8. On or about [INSERT DATE], Seller notified that they would cure the defect within seven (7) business days. A copy of the confirmation is attached hereto as "Exhibit C."

9. On or about [INSERT DATE], a representative of Seller contacted Buyer and informed them that the goods would not be ready until [INSERT DATE]. Buyer indicated that the new business date was unacceptable as time was of the essence as stated in the Agreement and indicated that it was declaring the contract avoided pursuant to Article 49 of the CISG. A copy of Declaration of Avoidance is attached hereto as "Exhibit D."

10. On or about [INSERT DATE], Buyer entered into a new contract with a third party to fill the terms of the Agreement with Seller at a purchase price of [INSERT MONETARY AMOUNT OR CURRENCY], approximately three times the amount that was charged by Seller.

11. On [INSERT DATE], Seller sent invoice to Buyer demanding the acceptance of the delivery and payment under the terms of the Agreement. A copy of invoice attached hereto as "Exhibit D." Buyer refused to make payment reasserting its avoidance of the Agreement. A copy attached hereto as "Exhibit E."

12. The parties expressly agreed that all goods were to be delivered in conformity with the Agreement. Buyer had indicated to Seller the importance of the specific goods for a new project it was under taking.

13. Seller's failure to deliver the goods in conformity to the terms of the Agreements resulting in a material breach of the Agreement.

14. On [INSERT DATE] when Seller agreed to deliver conforming goods and then subsequently failed to deliver on time constituted a material breach of the Agreement as both parties agreed that time was of the essence.

15. Seller's failure to comply with the new delivery date caused Buyer to seek the material at a competitor of Sellers.

16. The actions of the Seller constitutes a fundamental breach and therefore Buyer declares that it is entitled to avoidance of the Agreement.

[AND/OR]

Factual Scenario 2.

BREACH OF WARRANTIES

[OR]

"OTHER OBLIGATIONS"

[Insert Obligation]⁴

1. On [INSERT DATE] Buyer entered into a written agreement with Seller [INSERT DESCRIPTION OF GOODS] with an agreed purchase price of [INSERT MONETARY AMOUNT AND CURRENCY] to be delivered to Buyer on [INSERT DATE] the Buyer agreed to pay Seller one half or [INSERT AMOUNT] prior to shipment and the remaining balance upon delivery. Buyer specifically ordered [DESCRIBE GOOD]

⁴ Counsel can combine breach of contract claims and breach of warranty claims. The claims were presented separately for demonstrative purposes.

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for its business, which was made known to Seller prior to its purchase. A copy of the Agreement is attached hereto as "Exhibit A."

2. On or about [INSERT DATE], a representative of Buyer contacted Seller and confirmed that the ordered Goods should be sent upon receipt of their first installment. See copy of facsimile dated [INSERT DATE], attached hereto as "Exhibit B." A copy of check or money order # [INSERT NUMBER] attached hereto as "Exhibit C."

3. On [INSERT DATE], Buyer received and accepted the shipment and the final payment to Seller in the amount of [INSERT MONETARY AMOUNT]. A copy of check or money order # [INSERT NUMBER] attached hereto as "Exhibit D."

4. On [INSERT DATE], Buyer sent notice to the Seller that the [INSERT NONCONFORMITY] and demanded return of payment. A copy of Nonconformity Notice is attached hereto as "Exhibit E."

5. On [INSERT DATE], Seller informed Buyer he would not refund payment and there was no warranty for the goods. A copy attached hereto as "Exhibit E."

[INSERT NUMBER] Cause of Action

(Breach of Express Warranty or "Other Obligations" [Insert Obligation])

[Based on Contractual Terms or Implied Terms]

6. Plaintiff repeats and realleges each allegation in paragraphs "1" through "5" of the complaint as if fully set forth at length herein.

7. In its proposal, Seller expressly warranted that the goods would endure high temperatures. This warranty was incorporated into the Agreement. A copy of the Agreement is attached hereto as "Exhibit A."

8. Notwithstanding the foregoing express warranties, the goods were unable to withstand the temperature.

9. The failure of the goods to withstand the temperature rendered the goods unusable for further use and also resulted in [INSERT SUBSEQUENT FAILURES].

10. The failure of the goods to withstand high heat constitutes a breach of the Seller's express warranty.

[AND/OR]

[INSERT NUMBER] Cause of Action

(Breach of Implied Warranty or "Other Obligations")

[E.g. Articles 35 and 41]

A PRACTICAL GUIDE TO THE CISG

11. Plaintiff repeats and realleges each allegation in paragraphs "1" through "10" of the complaint as if fully set forth at length herein.

12. In order for the goods to be useful and for their intended purpose, the goods must be able to withstand heat of over 100 degrees.

13. Seller is a manufacturer of goods including the type of goods sold to Buyer and dealing in goods of this kind.

14. As merchant in such goods, Seller impliedly warranted that the goods would be merchantable quality. A copy of the Agreement is attached hereto as "Exhibit A."

15. Notwithstanding the implied warranty that the goods were of merchantable quality, the goods were not of such quality for one or more of the following reasons:

[INSERT DEFECTS]

16. As a result of the foregoing defects in the design and/or manufacture of the goods, the goods were virtually unusable and subject to

[INSERT CONSEQUENCES].

17. Notwithstanding Buyer's expenditure time and monies in endeavoring to repair the goods, Buyer was unable to use the goods at high temperatures.

18. Buyer has notified Seller on numerous occasions seeking to resolve this matter, but Seller has failed to remedy same.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Buyer, respectfully requests for relief as follows:

1. The avoidance of the Agreement dated [INSERT DATE].
2. Lost profits in the amount of [INSERT AMOUNT].
3. The amount incurred by the Plaintiff to cover for the goods not delivered in the amount of [INSERT AMOUNT].

[AND/OR]

1. This Court finds that Defendant breached the express warranties as to the capabilities of the goods.

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2. This Court finds that Defendant breached the implied warranties of merchantability that the goods were fit for ordinary use.

3. That this Court award damages to Plaintiff including but not limited to the return of the purchase price, amounts expended to repair the goods, lost productivity stemming from the failure of the goods to perform in the amount of [INSERT AMOUNT].

[AND]

4. Incidental damages.

5. Costs.

6. Attorney fees pursuant to [REFERENCE PROVISION IN CONTRACT, IF APPLICABLE].

7. Such other relief this Court shall deem just and necessary.

Dated: [INSERT DATE].

[SIGNATURE OF ATTORNEY]

[TYPED NAME OF ATTORNEY]

Attorney for Plaintiff

[ATTORNEY'S ADDRESS]

[ATTORNEY'S TELEPHONE AND FACSIMILE, IF WARRANTED BY FEDERAL RULES]

[ATTORNEY'S BAR NUMBER]