Form B-5

CHECKLIST TO ANSWER AND AFFIRMATIVE DEFENSES UNDER FEDERAL LAW

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:

☐ Statute of Limitations
☐ Failure to Give Notice for
  Avoidance within Reasonable
  Period of Time
☐ Express Warranty; Breach of
  Implied Warranty
☐ No Deficiency Judgment
  Permitted by Law
☐ Accord and Satisfaction
☐ Improper Notice of Defect for
  Avoidance
☐ Failure of Condition Precedent
☐ Failure to Pursue ADR
☐ Lack of Privity
☐ Comparative Fault
☐ Estoppel
☐ Failure to Join a Party Under
  Fed. R. Civ. P. 19
☐ Avoidance
☐ Full Performance

☐ Frustration of Purpose
☐ Setoff
☐ Breach by Plaintiff
☐ Attorney's Fees Not
  Recoverable
☐ Improper Notice of Avoidance
☐ Waiver
☐ Anticipatory Repudiation
☐ Disclaimer
☐ Knowledge of Defect by Seller
☐ Other Jurisdictional Matter
  Personal, Venue, Subject
  Matter
☐ Excuse for Lack of Notice
☐ Impossibility of Performance
☐ Laches
☐ Fraud and Misrepresentation
☐ 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. Counterclaims may also be filed at time of filing Answer.


2 Article 40.

3 Article 44.

4 Depending on circumstances of pleading, defense may be outside scope of CISG.