

Construction - Switzerland

Amendments extend warranty claim time limit and modify terms and conditions rules

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Introduction

The statutory time limit for warranty claims for the sale of goods and under contract for works has been extended from one to two (or, in some cases, five) years from January 1 2013 (for further details please see

"[Warranty claims extended for sale of goods: impact on construction contracts](#)"). An important more recent development is that the two-year time limit is mandatory only for consumer contracts (ie, business-to-consumer (B2C)). Contracts for works between businesses (ie, business-to-business (B2B)) may still provide for shorter limitation periods for warranty claims. However, such shorter limitation periods must now be specified, otherwise the new extended statutory time bars apply.

A recent revision of the Unfair Competition Act allows tribunals to invalidate general terms and conditions that are unfair towards consumers. Terms used by businesses, including construction contractors, in their relations with other contractors or sophisticated owners are not affected by the change.

Extension of time limit for warranty claims

In mid-2012 the Swiss legislature approved an amendment extending the statutory time limit for warranty claims for the sale of goods and under contracts for works from one to two years. Accordingly, if works are defective, the owner's remedies (ie, price reduction, rectification in case of contracts for works and/or withdrawal from the contract altogether) become time barred only after two years. Up to the end of 2012 such remedies became time barred after one year. In case of a defective immovable works, an (unchanged) statutory five-year time limit applies.

However, a new development is that in the last stages of the debate on the amendment, the legislature decided that the two-year time limit would be mandatory for B2C contracts only – that is, in cases in which the contractor is a professional and the object or purpose of the contract is intended for personal or family use (as opposed to commercial or professional use). However, in B2B (and consumer-to-consumer) contracts, the parties remain free to agree on shorter warranty periods. An extension of the warranty period is still possible for both B2C and B2B contracts, up to a maximum of 10 years.

The same amendment introduced a new statutory five-year limitation period for warranty claims for defective movable goods (eg, construction materials such as paint, bricks and windows) or defective movable works which by their nature are intended to be built or integrated into immovable construction works and cause the immovable works to be defective. Such an extended time limit should enable the contractor of an immovable works to have recourse against its supplier (seller) in case the owner of the immovable works raises warranty claims. The statutory five-year limitation period may be shortened; however, it cannot be shortened to less than two years in the case of a consumer contract.

Despite the mandatory two-year time limit for consumer contracts, it should still be possible, even in B2C contracts, for parties to:

- agree to a full exclusion of warranty claims;

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- agree to limit the available remedies in case of defective works (eg, exclude rectification as remedy); and/or
- stipulate restrictive and harsher conditions for the enforcement of warranty claims (eg, provide for short mandatory inspection and notice periods, non-compliance with which would result in the forfeiting of all remedies for defective works).

However, such preclusive or restrictive provisions must be made clear to the owner, and the contractor cannot fraudulently conceal the existence of a defect (see Article 199 of the Code of Obligations). Some commentators have taken the view that allowing such preclusive or restrictive provisions is inconsistent with the aim of the amendment, which is to reinforce consumer protection.

The limitation period will begin to run from the moment of delivery of the works – not when the works were accepted or even when the defect was discovered. In addition, the strict requirements under Swiss law that the owner must inspect the works immediately on delivery and – as the case may be – immediately and specifically notify the contractor of any defect, continue to apply. Failure to do so may result in warranty claims being forfeited, unless the parties have opted for a less stringent regime in their contract.

Strengthened consumer protection against unfair general terms and conditions

The Swiss legislature has also strengthened consumer protection against unfair general terms and conditions by amending Article 8 of the Unfair Competition Act. General terms and conditions are often used in the context of contracts for works and address important issues (eg, allocation and limitation of liability, inspection and notification periods). Contrary to neighbouring jurisdictions (in particular, Germany), Switzerland lacked a comprehensive set of rules allowing an unrestricted review of the fairness of general terms and conditions. Indeed, Switzerland was known for its liberal approach towards general terms and conditions, which was sharply criticised by scholars. The revision of the act was aimed at providing stronger protection from unfair and unilateral general terms and conditions.

The revised Article 8 entered into force on July 1 2012; it is now possible for Swiss courts to review the content of general terms and conditions contained in consumer contracts. However, since the legislature has not provided for retroactive effect, amended Article 8 applies only to general terms and conditions contained in contracts entered into after July 1 2012.

According to the amended Article 8, the use of general terms and conditions in breach of the principles of good faith and to the detriment of consumers is unfair, provided such use results in a significant and unjustified imbalance of the contractual rights and obligations. Even though the law is silent on the legal consequence of unfair general terms and conditions, scholars agree that only the specific provision which is unfair, and not the entire set of general terms and conditions, should be found to be null and void.

When revising the act, the legislature was guided by the EU Unfair Terms in Consumer Contracts Directive. Accordingly, the scope of application of the amended Article 8 was limited to consumer contracts, which was not the case for the former Article 8. This is an important amendment. While the act lacks a definition of 'consumer', any natural person acting in his or her family and/or personal interest (as opposed to commercial or profession concerns) will generally qualify as a consumer. Therefore, the rules applicable to the use of general terms and conditions in B2B relationships have not changed; the liberal Swiss law approach to general terms and conditions should continue to apply to all non-consumer contracts.

A potentially problematic feature of the amended Article 8 are the many unclear requirements that it contains, as well as the lack of an indicative index of unfair provisions such as that provided for by the EU directive or German substantive law, causing a great deal of debate in academic circles. Users of general terms and conditions must therefore wait for the courts to provide some guidance as to how the amended provision should be applied. For example, it remains unclear what should be the benchmark when assessing whether there is an imbalance of contractual rights and obligations, and more generally when such an imbalance can be considered to be both significant and unjustified. Given that the reference to statutory law as providing guidance for such an assessment was explicitly dropped during the course of the legislative process, general terms and conditions deviating from Swiss statutory law should not automatically qualify as unfair (and thus be found to be null and void). It also remains unclear whether one specific clause or provision should be considered at a time when assessing the contractual rights and obligations, or whether the contractual provisions as a whole (ie, the main contract, as well as the general terms and conditions) should be taken into account.

During the course of the legislative process, the Federal Council indicated that clauses providing for the following could possibly be considered as unfair under revised Article

8:

- the exclusion of liability even for cases of gross negligence (such exclusion would, in any event, already be contrary to existing mandatory law – namely, Article 100 of the Code of Obligations);
- the accrual of interest for the entire debt, even if such debt has already partly been settled;
- the right to modify the general terms and conditions unilaterally at any time;
- automatic renewal of subscriptions that were entered into for a limited period of time; and
- automatic and tacit renewal of payable warranties.

In the absence of any case law on the interpretation of the revised Article 8, the Federal Council's indications, which have no legal force, are the only guidance currently available on how the revised provision might be interpreted. However, it remains to be seen whether the Swiss courts will adopt the Federal Council's views.

Comment

Given that the extended two-year time limit for warranty claims is mandatory only for B2C contracts for works (or sales of goods) and that a full exclusion (or similar restrictions) of warranty claims (if made clear to the contractual party) remains possible, the practical importance of the extension will be limited for (international) construction contracts. However, shorter limitation periods must now be explicitly agreed, otherwise the extended statutory time limit applies.

Similarly, despite the revision of the Unfair Competition Act, Swiss law will most likely remain attractive for users of general terms and conditions: the revised Article 8 allows only for a review of general terms and conditions provisions in consumer contracts; and it is likely that only manifest and blatantly abusive provisions will be considered unfair.

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