Construction - Switzerland

Warranty claims extended for sale of goods: impact on construction contracts

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Comment

On September 14 2011 the National Council, the lower house of the Swiss Parliament, overwhelmingly approved a revision of the Code of Obligations extending the time limit for warranty claims for the sale of goods from one to two years. It is expected that the upper house of the Swiss Parliament, the Council of States, will also approve the amendment, which will align Swiss law on warranties with the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) and the EU Sale of Consumer Goods Directive (1999/44/EC). Since the rules on warranties applicable to the sale of goods under Swiss law also apply to contracts for works, the extension of the time limit will impact on Swiss construction law.

Time limits for contracts for works

Under existing Swiss law, a purchaser's warranty claim against a seller for defective goods becomes time barred one year after the handing-over/delivery of the purchased good, irrespective of when the defect was discovered. As an exception, the time limit for warranty claims in case of fraudulent behaviour by the seller (eg, concealment of the defect) is 10 years.

According to Article 371(1) of the code, these statutory time limits applicable to a buyer's claim for defects in the context of the sale of goods also apply to an owner's claim for a defective work in the context of a contract for works. The idea behind this alignment of the prescription periods for sales contracts and contracts for works is to enable a contractor to have recourse against the supplier in case the owner raises warranty claims. However, pursuant to Article 371(2) of the code, an owner's warranty claim against a contractor, an architect or an engineer in the context of a contract for an "immovable construction work" becomes time-barred only after five years. As is the case for the sale of goods, the limitation period begins to run at the handing-over/delivery of the work and not at the acceptance of the work or the discovery of the defect.

The notion of "immovable construction work" includes not only construction works that are fixed to the soil (eg, buildings, streets, tunnels, bridges, underground water and oil pipelines or railway tracks), but also certain significant works performed on an immovable construction work (eg, alteration, repair and refurbishment works, including painting works, sealing of the floor, installation of insulation or the renovation of a facade).

Except for the 10-year time limit in case of fraudulent behaviour, the time limits applicable to both sales contracts and contracts for works are not mandatory and parties are free to shorten or extend them, up to a maximum of 10 years.

The time limits under Swiss law are inconsistent with international standards, and are often criticised for being too short and therefore impractical. In contrast, the CISG and the EU directive provide for a mandatory two-year time limit for warranty claims in the context of the sale of goods. These two regulations do not apply to contracts for works. However, some standard-form construction contracts, used internationally and domestically, provide for longer time limits for warranty claims.

http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=1a7f3424-2049-40... 24.11.2011
Another important inconsistency under the existing regime is that warranty claims under a purchase contract relating to movable goods that are built or integrated into an immovable construction work, to which the statutory five-year time limit applies, become time barred after only one year. As a result, a contractor could be held liable for a defect by the owner up to five years after delivery, yet the contractor itself could not have recourse against its supplier (ie, the seller of the goods) for the defect after the first year. Therefore, the reasoning behind the alignment of the time limits for sales contracts and contracts for works — to enable a contractor to have recourse against his supplier (seller) in case the owner raises warranty claims — is defeated in the case of an immovable construction work.

The same problem can occur where a contractor hires a subcontractor in the context of a contract for immovable construction works. The Federal Supreme Court has held that a claim for defects (under a contract for works) against a subcontractor which merely manufactured and supplied slabs to be used to restore and refurbish the facade of a house, but did not itself perform any of the restoration (immovable construction) work, is time barred after one only year. In contrast, the general contractor which performed an immovable construction work by using the slabs when refurbishing the facade could be held liable for five years by the owner if the slabs were found to be defective. According to the court, it was irrelevant that the subcontractor manufactured and supplied the slabs in the knowledge that they would be used in respect of an immovable construction work. The court ruled that the decisive factor was exclusively that the subcontractor did not itself perform any immovable construction works, but merely manufactured and delivered the movable goods. As a consequence, the general contractor’s recourse to its subcontractor was dismissed on the ground that it was time barred.

Reform of statute of limitation regime

The amendment to the code, which has now been passed by the National Council, seeks to address these inconsistencies. First, the standard time limit for warranty claims relating to defective goods will be extended from one to two years. Second, the new two-year limitation period will become mandatory. Finally, warranty claims relating to movable goods that are to be built or integrated into an immovable construction work will become time barred after five years, rather than one or two. This will align Swiss law with international standards and address the inconsistencies mentioned above relating to warranty claims for movable goods which are integrated or built into immovable construction works.

However, despite the extension of the time limits, the strict requirements under Swiss law for the immediate inspection of goods or works and notification of defects remain unchanged. Indeed, unless otherwise agreed by the parties, the purchaser or owner must still inspect the goods or work immediately upon delivery and immediately notify the contractor or the seller of any defect. Failure to do so will preclude any warranty claim.

Comment

Although, under the existing statute of limitations regime, parties are free to deviate from the short one-year time limit, if passed by the Council of States the amendment of the code will constitute a positive step towards aligning Swiss law with international standards. Further, it will usher in a long overdue extension and alignment of the time limits applicable to movable goods that are integrated or built into an immovable construction work.

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Endnotes

o The text of the directive can be accessed at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0044:en:HTML.

o Supreme Court, Decision 113 II 264, Cons 2c; 93 II 242, Cons 2a.

o For further examples see Peter Gauch, Der Werkvertrag, 5th edition, 2011, N 2231 et seq.

o For instance, the standard rules provided for by the Swiss Association of Engineers and Architects provide for a two-year period in case of apparent/obvious defects and a five-year period in case of latent defects (SIA 118, Article 172 et seq).
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