

## Construction - Switzerland

### Time limits for main contractor's warranty claims against subcontractors

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#### Introduction

Under statutory law, an owner's claims against a contractor for defective works is subject to a one-year time bar (five years in case of immovable construction works), which begins to run from the handover of the works, even if the defect is discovered later. However, parties to a construction contract are free to extend these limitation periods for up to 10 years from the moment of delivery of the works. The same rules apply to the relationship between the main contractor and its subcontractor(s). In a recent landmark decision,<sup>(1)</sup> the Federal Supreme Court confirmed that a main contractor can align the contractual time bars for warranty claims against its subcontractor(s) with the time limits applying to warranty claims that the owner has against the main contractor. This decision is relevant for both main contractors and subcontractors involved in large construction projects.

#### Facts

When participating in a tender for a major construction project (an office building), the subcontractors accepted the main contractor's general terms and conditions stipulating, among other things, that:

*"the warranty period does not start running at the moment when the subcontractor has handed over its partial work to the main contractor but only as from the moment when the main contractor has delivered the completed (whole) work to the owner, provided that the latter occurs subsequent to the delivery of the subcontractor's (partial) work to the main contractor."*

The rationale behind this provision was to ensure that in the event of a claim by the owner against the main contractor, the latter's possible future claims against the subcontractors would not be time barred.

After the completion and handover of the office building, the owner brought a claim against the main contractor for alleged defects in the building's heating system. The main contractor in return sued four of its subcontractors - the suppliers of the heating system and floors - for approximately Sfr500,000, corresponding to the repair costs of the defects. Subsequently, the main contractor settled its dispute with two of the four subcontractors. However, the two other subcontractors took the view that the main contractor's claim was time barred. The subcontractors argued that the above mentioned provision of the main contractor's general terms and conditions violated mandatory law and was thus null and void. The subcontractors relied on Article 141(1) of the Code of Obligations, according to which statutory time limits cannot be waived in advance (ie, at the moment of conclusion of the contract).

The Zurich Commercial Court accepted this argument and dismissed the main contractor's claim on the ground that it was time barred. The court held that this provision was not merely an extension of the warranty period, but rather a waiver of the subcontractors' right to invoke the statute of limitations until the whole works were completed and handed over to the owner. According to the court, the disputed provision of the general terms and conditions was tantamount to a waiver of the statute of limitations, since pursuant to that provision, the warranty period would begin to run only at an undetermined moment in the future which was unknown and unpredictable to the subcontractors. The limitation period could thus be triggered well after completion and hand over of the subcontractors' (partial) work to the main contractor, and was outside their sphere of influence. It was thus uncertain for the subcontractors when, if at all, the

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completed works would ever be handed over to the owner. In its decision, the court relied on previous Federal Supreme Court case law, confirming that when concluding a contract, parties may not waive their right to invoke the statute of limitations in advance (ie, when entering into the contract). Under Swiss law the right to invoke the statute of limitation may be waived only after conclusion of the contract.<sup>(2)</sup>

The main contractor appealed the Zurich Commercial Court's decision to the Federal Supreme Court, which overruled it.

### **Supreme Court decision**

First, the Supreme Court confirmed that parties to a construction contract are free to extend the limitation period by mutual agreement by a maximum of 10 years from delivery of the work.<sup>(3)</sup> Second, the Supreme Court reconfirmed that it is not possible to waive the statute of limitations in advance (ie, at the moment of conclusion of the contract) - for instance, by invalidating the statutory limitation regime altogether - or otherwise to prevent the debtor from invoking the statute of limitations. However, a debtor may waive its right to plead the statute of limitation subsequently (ie, after the contract has been signed).

Contrary to the Zurich Commercial Court, the Supreme Court characterised the relevant provision of the main contractor's general terms and conditions as a mere (and thus admissible) extension of the statutory limitation period, and not as an illegal (and thus null and void) partial waiver thereof, given in advance. In the Supreme Court's view, the disputed provision addressed only the commencement of the limitation period and, as a consequence, also its end and duration, but did not provide for a waiver to again invoke the statute of limitations. The Supreme Court underpinned its findings by reference to the prevailing legal doctrine, according to which the parties may freely modify the limitation period. This right embraces the possibility not only to extend the limitation period, but also to adjourn the date from which the limitation period begins to run. However, the limitation period must not exceed the maximum 10-year period as from handover of the work. In conclusion, the Supreme Court confirmed the validity of the general terms and conditions, and thus rejected the subcontractor's invocation of the statute of limitations and remanded the case to the Zurich Commercial Court. The commercial court must now resume the proceedings and deal with the further argument of the defendant subcontractors, according to which the relevant provision of the general terms and conditions was not binding for other reasons. This case gives rise to further issues concerning general terms and conditions. As the subcontractors further argued, general terms and conditions - even if signed by both parties - may be found to be non-applicable if the respective provision is, from an objective point of view, unusual for the addressee and/or the particular area of industry, and the addressee did not expect the provision to be part of the general terms and conditions.

### **Comment**

Main contractors will welcome this decision, since it confirms that it is possible to align the various limitation periods for warranty claims in large construction projects involving subcontractors. As the Supreme Court confirmed, the main contractor may stipulate in its (sub)contract(s) for works that the limitation period for warranty claims shall begin to run only when the completed works have been handed over to the owner (but not when the subcontractor has handed over its partial work).

This case further illustrates the flexibility that contractors and owners have to tailor their contracts for works according to their needs. For instance, the parties may extend the short statutory limitation period up to a maximum of 10 years from delivery of the work (from January 1 2013 the statutory one-year prescription period will be extended to two years, which becomes mandatory for business-to-customer relationships only). Beyond the Supreme Court's decision, the contractor may also grant the owner a longer warranty period (as opposed to the limitation period). The warranty period must be distinguished from the limitation period, and it is a question of contractual interpretation whether the parties intended to stipulate a particular warranty period or merely to extend or modify the statute of limitations.

Parties must be careful when addressing the issues of warranty and limitation periods in their works contracts. As seen in this decision, parties should ensure that the wording used is not characterised as an (illegal) advance waiver of the statute of limitations.

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### **Endnotes**

(1) Swiss Federal Supreme Court, January 12 2012 (4A\_221/2010).

(2) Supreme Court Decision 132 III 226.

(3) Supreme Court Decision 118 II 142.

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