

## A Guarantee of New Warranty Periods

European unity is making great strides forward. The year 2002 will give us the euro as well as new uniform provisions for warranty periods. As of January 1, a warranty period of two years applies to all products. What consequences does the new law of obligations reform have in store for the economy?

Sebastian Korts, ([www.korts.de](http://www.korts.de)) a Cologne attorney, offers some insight:

### Effects of the Law of Obligations Modernization Bill on General Terms and Conditions

Beginning on 1/1/2002, the law of obligations modernization bill will effect serious changes in the areas of the law of limitations, general law of obligations and sales contract law. It will furthermore introduce several changes that will result in greater consumer protection.

Businesses who base their transactions on General Terms and Conditions (GTC) must prepare for the new legal provisions by adapting their GTCs. Many clauses now common in GTCs will no longer be applicable under the law of obligations modernization bill, as they run contrary to the new law in their current form. Even the legal provisions for the General Terms and Conditions themselves, previously regulated by the German law governing GTCs [AGBG], have been changed on several points within the framework of integration into the German civil code [BGB].

In the following, we wish to focus on some individual changes and additions to the law and paint a picture of their effects on General Terms and conditions so as to highlight what GTC users need to do.

### Law of Limitations

The extension of warranty periods is perceived as being very sweeping and a particular burden to entrepreneurs. Instead of the previous 6 months, the seller or manufacturer of goods will, effective 1/1/2002, have to warrant such goods free from defects for two years. This applies not only to new goods but also to used ones. The warranty period for building materials has also been extended: here the seller will be liable for 5 years if the materials sold by him are built into a structure and result in defects there. This period may not be reduced, not even through GTCs.

### Sales Law

In sales law, key importance is assigned to the concept of the defect as a prerequisite for warranty claims. This concept of the defect has been clearly expanded in favor of the buyer. Thus, starting on 1/1/2002, not only faulty goods are considered defective but also the undershipment of otherwise nondefective goods as well as faulty assembly instructions (so called IKEA clause).

Furthermore, the seller will have to be bound by public statements about the goods, in particular by promotional claims, insofar as it emerges that such statements are not true. In a dispute over a defect, it has previously been the responsibility of the buyer to prove that the cited defect was already present at the time of purchase. The bill will turn this around: if the defect appears during the first 6 months following delivery of the item, it will be assumed in

the buyer's favor that the defect had already been present since delivery. It is then the responsibility of the entrepreneur to disprove this.

Many GTCs make warranty provisions subject to the buyer's duty to examine the product and give timely notice of any defects pursuant to §§ 377 and 378 of the HGB has been rendered invalid by the law of obligations modernization bill.

In the presence of a defect, the new law gives the buyer the following rights:

First of all, the so-called right of subsequent fulfillment applies, whereby the buyer has the choice of whether the seller should repair or replace the item. This is already provided for in many current GTCs, but often with the seller having the right to decide whether to repair or replace. This is no longer compatible with the new law, which expressly accords the buyer and not the seller the right to choose.

After two unsuccessful attempts to repair or replace, the buyer may either reduce the purchase price or withdraw from the contract. This applies irrespective of whether the seller is at fault for the defect or the unsuccessful subsequent fulfillment. The right of cancellation no longer exists in this form. If the buyer withdraws from the contract, he also has an additional claim to damage compensation if the seller is guilty of a culpable violation of his obligations.

## Sale of Consumer Goods

The introduction of rules on the so-called sale of consumer goods is new.

A sale of consumer goods is present whenever an entrepreneur sells goods to a consumer. Especially strict rules for consumer protection apply here, made stronger by the fact that they cannot be suspended in the course of freedom of contract. An exclusion of liability for the entrepreneur, in particular, is no longer possible, either by contract or through GTC. Only for used goods is it assumed that a shortening of the warranty period from 2 years to 1 year is possible. The clause "sale excludes any and all warranty" should be invalid even for used goods, according to the new law.

## Entrepreneur Recourse

Special attention should be given to the provisions on so-called entrepreneur recourse, relevant whenever a "supply chain" is present, i.e. when goods pass through one or more middlemen on their way to the consumer. Distribution contracts, in particular, should also be kept in mind here.

The provisions on entrepreneur recourse should prevent such cases where the last retailer in the supply chain is liable to the consumer for warranty obligations to their full extent even though his own warranty claims against his suppliers or the manufacturer have expired due to limitations. Here the law provides for the seller's demand of compensation from his suppliers for expenses incurred in a subsequent fulfillment performed because of a defect. In addition, the aforementioned reverse in the burden of proof also applies to the seller vis-a-vis his suppliers and the expiration of his claims against his suppliers is subject to the expiration restriction by which the expiration shall take effect no sooner than 2 months after the seller has honored the claims of the consumer, but no later than 5 years after the seller himself has received the goods from his suppliers. GTCs that exclude this form of entrepreneur recourse should be invalid in the future.

## Area of Application

The new law is applicable from 1/1/2002 for all contracts concluded from that day onward. Contracts concluded before this time period are subject to the old law. The principle, therefore, is: old law for old contracts, new law for new contracts. One exception applies to long-term obligation circumstances, i.e. framework agreements. The new law shall govern these from 1/1/2003 if they were already concluded before 1/1/2002. The application of the new provisions on limitations is somewhat more complicated. For contracts concluded before 1/1/2002, the rule of thumb is that the deadline applies that runs out sooner.

Even from this selected overview of changes and additions, it is clear that entrepreneurs should definitely have their General Terms and Conditions examined by a qualified expert, as the danger of the invalidity of "old" GTCs is widespread.

Considering that CTCs are designed to apply specifically to cases where disputes between the entrepreneur and the customer are inherent, i.e. for warranty, liability and limitation issues, the invalidity of the General Terms and Conditions can have additional negative repercussions for the entrepreneur, as he will bear the full brunt of the new consumer rights.