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JusLetter

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New risks of recourse due to liability for defects under German Sales Law

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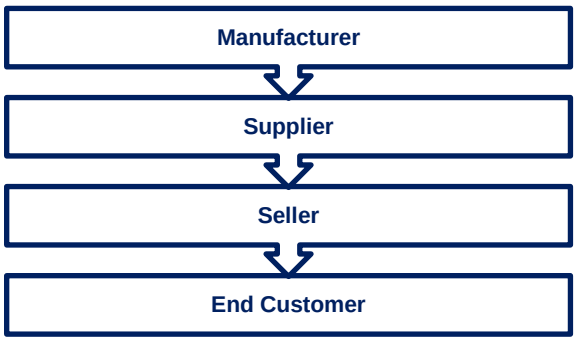
On 01.01.2018, the German "Act on the Reform of Building Contract Law and on Liability for Defects under Sales Law" came into force. The new regulations lead to significant changes of liability within supply chains and the underlying sales contracts. Consequently, significant new risks of recourse for manufacturers, suppliers and sellers arise. Under the new rules, also in the B2B business costs for removal of defective goods and installation of the new goods have to be borne by the seller regardless of fault. In this JusLetter we set out the consequences of the new statutory provisions and how this might affect your business with German buyers.

The basic structure of a typical supply chain is as follows:



For clarity we shall use the above designations to identify the relevant parties.

1. Background and previous legal position

Already in 2011 the ECJ decided two related cases (C-65/09 and C-87/09) concerning the problem of so-called “installation cases“. One of these cases was initially brought before the German Federal Supreme Court (VIII ZR 70/08) which then stayed the proceedings and referred it to the ECJ. In this German case, an End Customer had bought floor tiles of an Italian supplier from a Seller (a store for building material). After the End Customer had laid part of the floor tiles, visible shades became apparent on the surface of the tiles and the End Customer notified the Seller - the store for building material - of the defects. An expert came to the conclusion that the defects could not be removed, so that the only available remedy was the complete exchange of the floor tiles. Finally, the End Customer filed a claim against the Seller for the delivery of defect-free tiles as well as the payment of the costs for removal of the defective and installation of the new tiles.

The ECJ held that the Seller of a movable object is obliged to remove the defective object which had been installed into another object, to install the replacement object and to bear the costs for removal and installation as part of the subsequent performance. As the national courts are bound by this interpretation of the ECJ, the German Federal Supreme Court interpreted Sect. 439 para. 1 alt. 2 of the German Civil Code (“GCC”) on subsequent delivery in its decision of 21.12.2011 to also include the removal and transport of the defective tiles.

The Seller who sold defective building material to the End Customer was thus obliged to remove the defective goods and to install the new, defect-free material at his own expense, without being able to take recourse action against his Supplier because the Supplier was not subject to the Consumer Sales Directive (Directive 1999/44/EC). An exception from this principle was only to be taken into account if the Supplier was at fault with regard to the delivery of the defective product. The decisions each concerned cases in which the End Customer was a consumer and therefore did not necessarily apply to B2B sales. In consequence, this led to a split interpretation of Sect. 439 GCC on subsequent delivery by the German courts whereas the costs for removal and installation were only to be reimbursed if the End Costumer was a consumer and thus subject to the Consumer Sales Directive. Hence, if the End Costumer was an entrepreneur, the claim for subsequent delivery did not encompass removal of the defective and installation of the new product.

2. Codification of the ECJ jurisprudence

The jurisprudence of the ECJ as described above has now been codified by the reform of Sect. 439 para. 3 GCC. Thereby, the legislator has now also abandoned the requirement that the End Costumer is a consumer, so that the Seller is also obliged to reimburse costs of installation if the defective product was sold to an entrepreneur.

Further, Sect. 439 para. 3 GCC now also provides for the possibility that the defective object has been installed in/on another object, so that the scope was extended beyond the classic "installation cases". Apart from that, it is already sufficient if the End Costumer installs the defective item himself, so that it is generally not necessary that the installation is conducted by the Seller, f.e. due to an additional contract to produce a certain work.

Finally, the Seller is not granted any right to choose whether to carry out the removal of the defective item and the installation of the replacement item himself or whether only to reimburse the necessary expenses. This was considered in the original draft of the act (BT-Drs. 18/8486, p. 39). In the end, the legislator decided not to grant the Seller the right to conduct removal and replacement in order to avoid potential concurrences of laws, especially between the performance obligations under contracts to produce a work and warranty rights out of the purchase contract (BT-Drs. 18/11437, p. 2). It is thus as per Sect. 439 para. 1 GCC the End Customer's choice whether he demands that the defect is remedied by way of removal of the defective item and the installation of the replacement item or by the supply of a new product that the End Customer installs himself.

3. New regulations regarding recourse

Due to the newly inserted Sect. 445a GCC, the Seller's right to take recourse against his Supplier for the costs of removal and installation as well as the costs of subsequent delivery now also applies to sales contracts where an entrepreneur is the End Costumer, always provided that the defect of the good already existed at the time the transfer of risk from the Supplier to the Seller took place. The Supplier against whom recourse is sought can in turn seek to be held harmless by the Manufacturer, so that the claim for recourse is passed up the entire supply chain to the person responsible for the defect. It is also noteworthy that these possibilities for recourse are regardless of fault and cumulative to any potential product liability claims.

Pursuant to Sect. 445a para. 4 GCC, the obligation to give notice of defects as set out in Sect. 377 German Commercial Code remains unaffected. The Supplier can thus still raise the argument that the Seller did not properly inspect the delivered goods or did not give notice of the defect (in due time).

The recourse claims as set out in Sect. 445a GCC are subject to a limitation period of two years after delivery of the goods has taken place in accordance with Sect. 445b para. 1 GCC. Pursuant to Sect. 445b para. 2 GCC, however, the limitation period starts to run at the earliest two months after the Seller has fulfilled the claims of the End Customer. This suspension of expiry of the limitation period as stipulated in Sect. 445b para. 2 GCC, however, expires at the latest five years after delivery of the goods from the Supplier to the Seller has taken place.

4. (No) Exclusion of liability in General Terms and Conditions

The reform of the liability for defects under sales law has also led to changes in the statutory provisions relating to General Terms and Conditions. For the inclusion of General Terms and Conditions in contracts with consumers, the newly inserted Sect. 309 No. 8. b) cc) of the GCC stipulates that the exclusion or limitation of the Seller's obligation to bear or reimburse the expenses required for the purpose of subsequent delivery is invalid. Even though this provision does not apply directly to contracts in the B2B business, it is to be considered indirectly within Sect. 307 GCC and has to be complied with in B2B contracts accordingly. The extension of the prohibition to exclude the Seller's liability as set out in the new Sect. 309 No. 8 b) cc) GCC in General Terms and Conditions in B2B contracts was also discussed in the legislative procedure. A statutory codification was, however, finally held not to be necessary considering that German case law consistently held that a statutory prohibition of the use of a clause in General Terms and Conditions in contracts with consumers has also an indicative effect for B2B contracts. Accordingly, if a clause in the General Terms and Conditions of a consumer contract falls within the scope of a prohibition provision of Sect. 309 GCC, this is as per the decisions of the Federal Supreme Court, an indication that it also leads to an unreasonable disadvantage pursuant to Sect. 307 para. 1, s. 1 GCC in B2B contracts and is therefore invalid (see BT-Drs. 18/11437, S. 39).

However, it is generally still possible to exclude or at least limit the Seller's liability for costs of removal and installation in an individual agreement. This was also acknowledged by the draft of the act (BT-Drs. 18/8486, p. 36). However, the courts impose high burdens of proof on the existence of individually negotiated contractual terms and conditions.

Also, due to the new regulation of Sect. 478 para. 2, s. 1 GCC there only remains a small degree of flexibility for

the drafting of contractual agreements between Supplier and Seller. According to this provision, the Supplier may not invoke an agreement that was concluded between Supplier and Seller prior to the notification of a defect and which deviates to the detriment of the Seller from Sects. 439, 445a paras. 1 & 2 GCC or Sect. 445b GCC if no equivalent compensation is granted to the Seller. Notwithstanding Sect. 307 GCC on General Terms and Conditions, this does, however, as per Sect. 478 para. 2, s. 2 GCC not apply to the exclusion or limitation of the claim for damages. Finally, Sect. 478 para. 2 s. 3 GCC makes it clear that the provisions referred to in Sect. 478 para. 2 s. 1, meaning inter alia Sects. 439, 445a paras. 1 & 2 GCC as well as Sect. 445b GCC, shall also apply if they are circumvented by other arrangements.

5. Conclusion

The new provisions on liability for defects under sales law contain considerable risks of recourse for entrepreneurs. Companies should therefore check their inspection processes upon delivery goods and to document the findings of the inspection accordingly. In addition, it should be considered to invest into a quality management system or improve the existing system as well as to conclude an insurance for the remaining risks. All in all, the contractual terms and conditions which are currently in use should be reviewed in the light of the new regulations under sales law and it should be examined whether the remaining freedoms set out in Sect. 478 para. 2, s. 1 GCC can be applied in the individual case.

Disclaimer
The content of our JusLetter has been researched thoroughly. However, the general presentation of the legal situation cannot account for the specifics of an individual case. Should you have any further questions, please do not hesitate to contact us.

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