Dear clients and business friends,

On 1 January 2013, a revision to the statutory limitation periods for sales contracts and contracts for work and services (Art. 210 and 371 SCO) is expected to enter into force (for the legal text in German see: http://www.admin.ch/ch/d/ff/2012/3447.pdf).

The revision ushers in significant changes to the limitation periods applicable for sales contracts and contracts for work and services and with it aligns Swiss law more closely with the corresponding provisions in several European countries as well as the provisions of the Vienna Convention on Contracts for the International Sale of Goods.

To the extent that a sales contract or a contract for work and services relates to objects or work that are destined for commercial or industrial use, contractual arrangements that derogate from the statutory rules continue to be permitted. However, for sales contracts or contracts for work and services with private individuals or consumers, the new statutory regime shall be mandatory.

In addition to a brief presentation on the current state of the law, this issue of Legal News provides an overview of the most significant key points of the planned revision. It also addresses a number of transitional legal questions and points out what companies need to do in anticipation of the coming changes.

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Revision of the statutory limitation periods for sales contracts and contracts for work and services

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1. Currently Applicable Limitation Periods

1.1 Sales Contract Law

The time limit for asserting warranty claims under currently applicable law for movable objects is one year from delivery of the goods to the buyer (Art. 210 [1] SCO). The limitation even takes effect if the buyer was unable to discover the defects within the one-year limitation period (so-called hidden defects).

Warranty rights can be shortened subject to contractual agreement, or be largely excluded (Art. 199 SCO). In practice, contractual arrangements, particularly in General Terms and Conditions (GTC) often replace the statutory rules.

For real property, the limitation period for asserting warranty claims is five years from the date on which ownership is acquired (Art. 219 [3] OR).

1.2 Law of Contracts for Work and Services

The claims of a customer in respect of defects in the work are also limited to one year from the date of completion of the work (Art. 371 SCO). The claims of a customer for any defects in immovable construction work against the contractor, the architect or the engineer who rendered services in connection with such work are limited to five years since completion of the immovable construction work.

2. Amendments to the Limitation Periods

2.1 Sales Contract Law

In future, for the sale of movable objects, a basic limitation period of two years from the date of delivery of the object to the buyer (see Art. 210 [1] D-SCO) shall apply.

Completely new is that the statutory limitation period for sales contracts is five years, “where defects to an object that, due to its purpose, is to be integrated into an immovable work, have caused the work to be defective (Art. 210 [2] D-SCO). The application of said five-year period is thus contingent on the following conditions:

- Existence of a movable (sales) object;
- The movable object is, due to its purpose, to be integrated (built) into an immovable object;
- The object to be integrated is defective and this causes the immovable object to be defective.

This new provision is primarily intended to benefit contractors, who e.g. construct buildings or installations, and in doing so avail themselves of third-party products. This is intended to avoid a situation where a contractor, in the event of a defect to the immovable work is caused by an integrated purchased object, can still be held liable by the customer, but may not himself assert his own claims against the supplier of the movable object, because such claims are already time-barred.
Another change is that contracts with consumers ("Business-to-Consumer" or "B2C") which provide for any shortening of the statutory limitation periods for warranty claims are not permitted and are thus invalid. For sales involving used objects, it is permitted to shorten the limitation period to one year (Art. 210 [4] D-OR). In Business-to-Business matters (contract with commercial buyers ("B2B")) Art. 210 (4) D-SCO does not apply. The limitation period for warranty claims in B2B contacts, as, is the case now, be shortened as desired.

Not subject to the new rules on shortening limitation periods under Art. 210 (4) D-SCO are other warranty liability limitations or the complete exclusion of liability (Art. 199 SCO). This continues to be possible, as a rule, for both B2B as well as B2C contracts.

The limitation period for asserting claims for defects in the case of real property shall not change. This shall continue, as previously, to be five years.

2.2 Law of Contracts for Work and Services

As for sales contract law, under the law of contracts for work and services, in future the assertion of claims for defects to (movable) works shall also be subject to a limitation period of two years following completion of the work (Art. 371 [1] D-SCO).

What is new is that the five-year limitation period shall not only apply for immovable construction works, but rather generally for all immovable works (Art. 371 [2] D-SCO). This eliminates the sometimes difficult distinction of whether a work under a contract for work and services should be classified as an immovable construction work or merely as an immovable work. It is thus for instance no longer relevant for the applicable limitation period, whether a production installation that has been built into a building is a part of the construction work (factory floor) or merely an immovable work. This extends the scope of application of the five-year time limit considerably.

Otherwise, the limitation provisions under sales contract law apply mutatis mutandis. Accordingly, under the law governing contracts for work and services, any shortening of the limitation period for works "for personal or family use" (for consumers) to anything less than two years is invalid (Art. 371 [3] SCO).

3. Transitional Regime

With the entry into force of the amended rules on limitation periods, a number of unavoidable transitional issues arise, namely if and to what extent old or new law should apply to factual situations which concern the time both before and after the entry into force of the new law. Although not all the outstanding questions have been resolved, one can nevertheless state the following pursuant to the latest developments: In the absence of a specific provision, Art. 49 Final Section SCC is to be observed in particular, since this concerns changes to limitation provisions under civil law. This provision contains an explicit exception from the general ban on retroactive application of the law. This results in a situation where - in the event that the period of limitations has already begun upon the entry into force of the new provisions, but has not yet expired - the new provisions with the longer period shall apply. If the period under the new law is shorter than five years, there shall be no credit accorded for the time that has accrued under current law. In other words, the time period begins anew with the entry into force of the new law. Only where this new period lasts at least five years, will any time already accrued under the old law be credited.

If the parties have shortened the limitation period under a B2C contract below two years (or below one year for a used object), and if the limitation period is still running at the date of entry into force of the statutory revision, the contractual shortening of the limitation period would almost certainly have to be qualified as impermissible. Thus the time period would, as a rule, continue to run, but would have to be replaced by the mandatory minimum period of two years (or one year for used objects).

Where the limitation period has expired under the old law, or if it only begins to run under the new law, there should not be any issues under the transitional regime. Every factual situation must be evaluated subject to the law under which it transpired.

4. Summary / Recommendations

The adopted statutory revision is a call to action, particularly in B2C matters. Thus sales contracts, or contracts for work and services, as well as GTCs which stipulate a limitation period that is shorter than the mandatory limitation period of two or five years, will have to be amended. Companies would thus be well advised to identify any need to amend existing contracts and GTCs in a timely fashion, and to make such amendments as are necessary.

In B2B matters, the consequences are prima facie less invasive, because shortening the statutory limitation periods remains possible and permitted. However, any shortening of the limitation periods would require the existence of a corresponding contractual arrangement and/or GTCs. Companies, who have until now waived their right to make contractual changes to the statutory limitation periods, would be well advised to either introduce contractual limitations or to make the adjustment to longer time periods.

Regardless of whether a company is dealing on a B2C and/or B2B basis, it is certainly worth taking the new statutory requirements into account in terms of how to structure any new legal relationships.