

The new Sales Law and the Digital Products

March 30, 2022

Due to the implementation of the Sale of Goods Directive (SGD) and the Digital Content and Services Directive (DCD) into national German law, the German Civil Code (BGB) was updated as of January 1, 2022. Even though the amendments largely affect the laws governing contracts for the sale of consumer goods, there are also some changes concerning B2B transactions. Please note the following changes:

New concept of defect

A major change has been made to the definition of material defect pursuant to Section 434 of the German Civil Code (BGB). As of January 1, 2022, products are considered to be free of defect if they meet both the subjective as well as the objective requirements and also comply with the instruction requirements. This constitutes the biggest change to the previous legal situation: The quality criteria of a product agreed upon by the parties no longer take precedence over the objective requirements (suitability for normal use and other criteria).

The parties, however, can choose to waive the objective requirements. But for B2C transactions, the deviation from this new regulation is only permissible under strict conditions. Namely, consumers must have been specifically informed of the deviation and the deviation must be expressly and separately agreed upon in the contract.

New type of contract: consumer contract for digital products / products with digital elements

A new innovation to the BGB is the introduction of consumer contracts for digital products. The provisions under Sections 327 et seq. BGB contain separate rules and separate warranty rights for this new type of contract. It covers consumer contracts that provide digital content (e.g. streaming) or digital services (e.g. comparison platforms, cloud services).

This must be distinguished from the equally new type of contract for goods with digital elements, (Section 327a (3), 475a ff. BGB. This includes all physical objects that contain digital products or are connected to them in such a way that they cannot fulfill their function without the digital products (e.g., smartphones with operating systems).

The newly introduced update obligation applies to both types of contracts. Sellers are obliged to provide constant updates for goods with digital elements as of the beginning of the year. This obligation includes function-maintaining updates and security updates; however no “upgrade” obligation. Please note that failure to provide updates in due time may lead to the product being rendered defective retrospectively!

Change in general contractual duties

No more Deadlines required for compensation claims and withdrawals

Consumers no longer have to set a deadline if they wish to assert damages or withdraw from a contract. It merely suffices to notify the seller of the defect. Upon notification a fictitious reasonable period for subsequent performance is set in motion. If the seller fails to provide subsequent performance within that period, the consumer may withdraw from the contract without further ado.

We therefore advise to adjust the company's internal complaints management system accordingly.

Reversal of burden of proof extended to one year

Another innovation that makes it easier for consumers to assert warranty rights is the extension of the reversal of the burden of proof. Previously it was presumed for a period of six months that a defect occurring during this period already existed at the time of transfer of risk. Now this period was extended to one year.

Suspension of expiry of limitation period may lead to longer warranty period

In principle, warranty claims are regularly subject to a limitation period of 2 years after a defect becomes apparent. However, if a defect becomes apparent for the first time shortly before the end of the warranty period, it shall not become time-barred before the expiry of four months after the defect has first become apparent. However, if an attempt is made to remedy the defect within the warranty or guarantee period, the defect shall not become time-barred before the expiry of two months after the repaired item has been returned to the consumer. This de facto can lead to a warranty period of 26 or 28 months.

With regard to B2B transactions, please note that the time limit of a maximum of 5 years that applied until recently for the possibility of the seller to take recourse against the supplier has been completely eliminated. The seller can now assert any recourse claims against its supplier even after 5 years have lapsed.

Warranty statements

There are also some considerable changes concerning warranty regulations. A warranty statement must now contain additional information such as name and address of the guarantor and a reference to the consumer's warranty rights, as well as the fact that these rights can be asserted free of charge and that other rights are not restricted by the warranty. Moreover, warranty statements must be provided to consumers on a durable medium at the latest when the goods are handed over.

Please note that it no longer suffices to merely include the warranty statement on the website or in the general terms and conditions! Violation of such relevant obligations may result in a warning from the guarantor.

Most recently, the requirements for a durability warranty developed by case law have been enshrined in law in the course of the amendments. Anyone who provides a durability guarantee for an item is obliged to bear the costs for subsequent performance, including any costs for installation and removal and transportation.

What does it mean for you?

The numerous amendments must be put into practice. In particular, the general terms and conditions, sample contracts and warranty statements must be adapted to the new regulations. With regard to digital products, the updating obligation and the provision of updates by the manufacturer should be agreed upon. We advise to adapt the

complaint management system accordingly and provide training for the personnel responsible for the areas newly amended.

If you have any questions or require support with regard to the implementation of the new regulations, please do not hesitate to contact us.

New requirements for e-commerce

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