

## Information Technology - Switzerland

### Extended warranty periods - a potential surprise to ICT providers and users

Contributed by **Wenger Plattner**

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**New rules**  
**New rules in an ICT context**  
**Comment**

On January 1 2013 new rules in the Code of Obligations on time limits for warranty breaches in sales contracts and contracts for work and services came into force. The amended rules are also relevant to information and communication technology (ICT) contracts under Swiss law.

#### **New rules**

The new warranty period for sales contracts is two years (previously one year) after delivery of the goods to the buyer. The extended warranty period is five years (previously one year), if a defective object, designated for assembly into an immovable work has caused a defect in such an immovable work.

In business-to-consumer (B2C) contracts, the amended warranty periods may not be reduced by a contractual agreement below a two-year period for new goods and a one-year period for used goods.

Equivalent warranty provisions are valid for contracts for work and services. The amended provisions apply only to the warranty of quality and fitness, not to the warranty of title, where the time bar remains 10 years.

#### **New rules in an ICT context**

##### ***Scope of application***

Under Swiss law, contracts for the procurement of hardware and standard software in return for a one-off fee are generally qualified as sales contracts. If a periodical licence fee is due for the use of software, or if a business model such as an application service provider or software as a service has been agreed, the underlying contract is not considered a sales contract.

The development of individual software, customisation and similar services, and the delivery of a bespoke turnkey ICT system, are qualified as contracts for work and services.

##### ***What defects fall under warranty and what needs to be observed?***

The warranty period describes the time period during which an ICT user may hold the ICT provider liable for any breach of warranty of quality and for any defects that materially negate or substantially reduce the value of the goods or fitness for the designated purpose. In software contracts, such typical defects are missing or improper functions, frequent program crashes, computation errors due to inaccurate algorithms, malicious code, overlong response times, insufficient system capacities, inaccurate documentation or incomplete or missing compatibility, maintainability, expandability or portability of the software.

Only defects already existing at the time of delivery (even if discovered later) fall under the warranty. For goods such as software, which are not exposed to tear and wear, this prerequisite will be normally fulfilled if the software has not been modified by the ICT user without authorisation.

Swiss law requires the ICT user to inspect the procured goods as soon as is feasible in the normal course of business and to notify the ICT provider of the discovered defects without delay. Otherwise, the procured goods are deemed accepted, except for defects not revealed by customary inspection. Defects that emerge subsequently must be notified immediately; failure to do so will mean that the goods will be considered accepted even in respect of such defects.

#### Authors

**Roland Mathys**



**Christoph Zogg**



### ***When does the warranty period begin?***

In sales contracts the time limit begins with delivery of the goods (and not with discovery of any defect). However, in contracts for work and services, under the amended law, the time limit begins with acceptance of the work only.

This is of particular relevance in contracts for the development of individual software or bespoke turnkey ICT systems. In such extensive ICT projects, acceptance may take place months or even years after delivery (eg, installation of the software). Sometimes the parties agree on partial acceptance procedures, raising questions as to when the warranty period begins. In such circumstances it is believed that only final acceptance should trigger the running of the warranty period, which should nevertheless be clarified in the ICT contract.

It may happen that the parties do not undergo any acceptance procedure at all. In this case, the work is deemed to be accepted (and the warranty period begins) once the delivered work is used in a productive setup. Only successful acceptance procedures will cause the warranty period to run. Acceptance failures due to defects will not affect the warranty period.

It is sensible to govern expressly the beginning of the warranty period and its relationship to acceptance in the contract itself. ICT providers may also consider contractually freezing the old regime and defining delivery rather than acceptance as a trigger for the beginning of the warranty period; such contractual agreements are lawful in business-to-business (B2B) contracts.

### ***Does five-year warranty period apply to software integrated into immovable work?***

A five-year warranty period for immovable works applied under the old law. The new law provides that the same warranty period shall apply for goods assembled into immovable works if the goods cause a defect to the immovable work.

The new provision raises the question as to whether software components may be integrated into immovable works. This might be the case if a contractor manufactures a complete industrial plant for a customer and procures specific software from a third-party provider. Affected ICT providers should therefore be aware that the law provides for a five-year warranty period and might consider shortening that period by contractual agreement, which is lawful in B2B contracts.

### ***Can warranty periods be modified?***

It remains possible to agree contractually on shorter or longer warranty periods. In ICT contracts parties often replace the statutory law with specific rights and remedies, since statutory law does not always lead to adequate results. In B2C relationships, warranty periods may not be reduced below two years for new goods or below one year for used goods. Surprisingly, a total exclusion of warranty remains possible in B2C relationships.

The extension of warranty periods in ICT software contracts resurrects the discussion of the relationship between contractual remedies for software errors under the software licence agreement and the services provided under an additional software maintenance contract. During the warranty period, the correction of errors is covered by the licence agreement, which might justify a lower initial fee under the maintenance contract (essentially limited to upgrades, among other things). ICT providers should take care to counter this valid user argument.

### ***Complex and surprising transition issues***

The new law applies to warranty periods beginning from January 1 2013. Claims for the warranty of quality and fitness that became time barred before January 1 2013 will remain time barred.

Problems arise if a warranty period began under the old law (ie, before January 1 2013), but ends under the new law (ie, in 2013 or later). Under Swiss law, the applicable transition rules provide that where a warranty period of five years or more is introduced, the part of the warranty period that lapsed before the new law came into force must be taken into account. However, at least two years must elapse from this enforcement date in order to complete the warranty period. Warranty periods shorter than five years will start again from the beginning when the new law comes into force.

Some examples may help to clarify this point:

- Standard software is ordered on December 15 2012 and delivered on January 15 2013. The warranty period begins with the delivery of the software and is covered completely by the new law. Accordingly, the new two-year warranty period (instead of one year) begins on January 15 2013 and ends on January 15 2015.
- Standard software is sold and delivered on January 31 2012. Under the old law, the one-year warranty period would end on January 31 2013. However, the transition rules state that limitation periods shorter than five years will run again from the beginning. Accordingly, the new two-year warranty period begins on January 1 2013 and ends on January 1 2015. This leads to an unexpected *de facto* extension of the

warranty period to almost three years.

If the parties have contractually agreed on a warranty period, then the new law has no impact. Ambiguity remains if a time limit was contractually reduced in a B2C relationship before the new law entered into force, but ends under the new law. Some legal scholars argue that the new law should apply in this case - meaning that the time limit should be extended to the statutory minimum period - while others argue that party autonomy should prevail.

Another question is whether the parties have contractually agreed on a specific warranty period if they have only restated the time period provided in statutory law or even simply referred to the pertinent statutory provisions. The question is relevant since the new law has no impact if the parties have agreed on a warranty period, whereas it can have far-reaching consequences if the parties have not addressed warranty periods in their contract at all. Further complex questions may arise if warranty periods that began under the old law are interrupted under the new law by acknowledgment of a claim, debt enforcement proceedings or submission of a claim to a court or arbitral tribunal.

### Comment

The new rules on warranty periods give rise to complex questions and unexpected results. Both ICT providers and users should carefully analyse their existing agreements regarding the effects of the amended law on warranty periods. For future contracts, parties should keep the extended statutory warranty periods in mind when drafting and negotiating their agreements.

*For further information on this topic please contact [Roland Mathys](#) or [Christoph Zogg](#) at [Wenger Plattner](#) by telephone (+41 61 279 7000), fax (+41 61 279 7001) or email ([roland.mathys@wenger-plattner.ch](mailto:roland.mathys@wenger-plattner.ch) or [christoph.zogg@wenger-plattner.ch](mailto:christoph.zogg@wenger-plattner.ch)).*

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