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"Guarantee" in purchase and work contracts: stumbling blocks and scope for maneuver in B2B business

Friday, November 29, 2024

File number KMU_today_006: The column by André Brunschweiler, partner at the law firm Lalive in Zurich, provides answers to legal questions that can or should concern Swiss SMEs.

André Brunschweiler, partner at the law firm Lalive in Zurich. (Photo: PD)

The warranty – colloquially known as a "guarantee" – is central to both the purchase contract and the work contract. Nevertheless, it often leads to disputes: When is there a defect? What obligations and rights arise from this? When is the seller or contractor liable?

Purchase contract and work contract – differences with consequences

The distinction between a purchase contract and a work contract is important because the consequences of a defect in purchase contracts and work contracts are regulated differently by law.

In a sales contract, the seller transfers ownership of a finished (movable or immovable) item to the buyer. The buyer pays the seller a purchase price for it. In a work contract, however, the entrepreneur owes the customer an individual service (work, success, result) in return for payment. The service can be material (e.g. the manufacture of a special component, the construction of a house or an industrial plant) or immaterial (e.g. the creation of software, a source code or the design of a logo).

The legal consequences of a defect vary from law to law: While the buyer can primarily demand withdrawal from the contract (so-called rescission) or a reduction in the purchase price in a sales contract, the customer also has the right to rectification (repair) in a work contract. In a sales contract, however, the law does not provide for rectification - but this is often agreed upon in the contract.

The warranty period is generally two years; it is five years for real estate or movable objects that are integrated into immovable objects (e.g. fitted kitchens). These periods are not mandatory in the B2B sector, but can be extended or shortened.

The reality: dispute over the defects

"Defect" is defined in the same way in the purchase contract as in the work contract: it is the deviation of the "actual" from the "target". That sounds simple, but in practice it is complex. The "target" arises primarily from the contractual agreement. For example: "The car sold is accident-free" or "The beverage bottling plant has an output of 1000 bottles per hour". The burden of proof for the existence of a defect lies with the buyer or purchaser.

In practice, difficulties arise as to whether there is a defect in the legal sense at all. Is the product just "not perfect" or is it actually defective? Particularly in the B2B sector, with sometimes complex contracts, disputes often arise over interpretation: Was a certain property actually guaranteed? Was the purchased item or work used incorrectly, and is there therefore no defect but only an operating error? Who is responsible for this? These questions can often only be answered by means of a technical report.

Inspection and complaint obligations as a stumbling block

Further stumbling blocks are the inspection and complaint obligations: Both the buyer and the customer must inspect the purchased item or the work upon receipt and immediately report any defects. The complaint must be substantiated, i.e. contain a precise description of the defect, for example a note that the seller or entrepreneur is liable for it. If this complaint is not made or is made too late, there is a risk of losing the warranty rights.

Unless otherwise stipulated in the contract, the obligation to inspect and give notice of defects is, according to case law, no longer than seven to ten days. This is very short.

Tip: Clear contracts are also the key to success here

The statutory provisions on the warranty can be regulated differently in the contract. In order to minimize disputes about the warranty, companies should attach importance to clearly formulated contracts: In particular, the expectations regarding the purchased item or the work should be precisely described. If performance specifications or product properties are defined too imprecisely, this opens the door to conflict.

Contractual provisions regarding the obligation to inspect and give notice of defects are just as important. Last but not least, in the B2B sector, limitation periods must be included in every contract.

Attorney André Brunschweiler specializes in advising and representing clients in (mostly contentious) commercial law matters with a focus on contract and corporate law, debt collection and bankruptcy law, and labor law. He is a partner at the commercial law firm Lalive , which advises companies, authorities, and private individuals on complex, primarily international issues and, above all, disputes from its offices in Zurich, Geneva, and London.

André Brunschweiler

partner of the law firm Lalive in Zurich