



International Distribution Institute

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ESTABLISHING SPECIFIC CONDITIONS OF GUARENTEE IN GENERAL CONDITIONS OF SALE

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Introduction

- **Limitations**

- Presentation is limited to B2B sales
- Consumer sales are not covered

- **Buyer's legal remedies in case of defective goods**

- Buyer may request, at its option, in addition to claiming damages:
 - ✓ Replacement
 - ✓ Repair
 - ✓ Price reduction
 - ✓ Rescission of the contract by returning the goods
- Buyer must obey the defect notification and claim periods stated under the applicable law

- Provisions regulating seller's liability for defects are not mandatory rules

- Parties could agree otherwise within the scope of freedom of contract: contractual guarantees

What does Contractual Guarantee Offer to the Parties to a Sales Contract?

■ Advantages for the buyer

- Having additional and broader remedies than law
- Faster and easier solution
- Longer repair or replacement periods
- No need for evidencing that the conditions for liability for defect have been met – remedies are precise and mostly unconditional
- No need for examination of the goods and notification of defects

■ Advantages for the seller

- Attracting purchasers
- Setting its own conditions of guarantee instead of being subject to those included under law and therefore knowing well its liabilities
- **Excluding or limiting its liabilities in terms of time, amount, type or remedies in return for providing broader guarantees than law**

Scope of Contractual Guarantees

- How does a contractual guarantee affect the seller's defect liability under the law? Liability under the law may be either:
 - repeated,
 - extended,
 - excluded, or
 - limited.
- Several types of exclusion and limitation
 - Excluding liability of the seller at all
 - Limiting the maximum amount of damages payable to the buyer
 - Limiting the type of damages to be compensated (e.g. consequential losses)
 - Limiting remedies (e.g. making available to the buyer only repair or price reduction options, preventing rescission of the contract)
 - Modifying time-limits for examination and notification of defects or the prescription period
 - Reversing the burden of proof

Effectiveness of Exclusion/Limitation

- Exclusion or limitation clauses are considered to be «exemption clauses».
- An exemption clause is a contract term which directly excludes or limits the non-performing party's liability in the event of non-performance or defective performance.
- Limitation or exclusion must be **expressly stated**.
 - the contract must state that **all the warranties or conditions, whether express or implied by law are excluded and inapplicable**;
 - otherwise, legal liability for defect will continue to exist along with the contractual guarantee, the buyer will have competing rights and still be able to resort to the remedies available under the applicable law.
- Express exemption clauses excluding seller's liability do not cover the defects that the buyer could not reasonably expect from the subject goods in good faith.
- Warranties on certain qualities of the goods and an exemption clause within the same contract creates a contradiction.
 - Seller should be held liable for defects relating to such expressly warranted qualities.

Effectiveness of Exclusion/Limitation (cont.)

- Effectiveness of exemption clauses under several jurisdictions:
 - **Swiss law:** Any agreement purporting in advance to exclude or limit liability for unlawful intent or gross negligence is invalid (Code civile suisse Art. 100)
 - **Turkish law:** If the buyer has gross fault in delivering the defective goods, exemption clauses related to defects are invalid (Turkish Code of Obligations Art. 221)
 - **German law:** Parties cannot agree in advance to exclude liability for unlawful intent (BGB Art. 276)
 - ✓ Specific rule for exemption clauses under general conditions: Ineffective if limits the essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised (BGB Art. 307)
 - **English law:** A reasonableness test is applied, which requires that any term «shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made» (The Unfair Contract Terms Act Section 11)

Effectiveness of Exclusion/Limitation (cont.)

- **CISG:** Exemption clauses not regulated.
 - Principle of freedom of contract applies, parties may derogate from the provisions of the CISG by exemption clauses (CISG Art. 6).
 - CISG does not include provisions such as intentional breach, gross negligence, or unreasonableness;
 - Exemption clauses shall be interpreted with the general principles and the applicable law (CISG Art. 7/2).
- **UNIDROIT Principles 2016:** Exemption clauses may not be relied upon if it would be grossly unfair to do so, having regard to the purpose of the contract (Art. 7.1.6 UNIDROIT Principles 2016)
 - Grossly unfair:
 - ✓ The case where the term is inherently unfair and its application would lead to an evident imbalance between the performances of the parties; or
 - ✓ Even a term is not in itself manifestly unfair, where the non-performance is the result of grossly negligent conduct or where the aggrieved party could not have obviated the consequences of the limitation or exclusion of liability by taking out appropriate insurance (Comment par. 5 to Art. 7.1.6)



Sample Contract Clauses

■ Exclusion

- «The Seller gives no warranties in relation to the quality of the Equipment or its suitability for any purpose, and all such warranties or conditions, whether implied by statute, common law or otherwise, are hereby excluded. The Seller shall be under no liability, whether in contract, tort or otherwise, in respect of the quality of the Equipment or its fitness for any particular purpose.»

■ Limitation

- «In the event of any breach of the warranty in Clause 11.1. (whether by reason of defective materials or otherwise) the Seller's liability shall be limited to at Seller's sole discretion (i) replacement of the Products in question (including costs associated with such replacement); or (ii) proportional reduction from the Net Price (where this has been paid). Save as provided in Clause 11.1, all representations, conditions, warranties and terms, whether express or implied by common law, statute or otherwise as to the quality, condition or fitness for any purpose of the Goods or Services, are excluded to the maximum extent permissible by law.»
- «Seller shall not be liable, whether in contract, tort or otherwise, for any loss of profit, loss of business, loss of goodwill or reputation, caused whether directly or indirectly, or for any indirect, incidental, punitive or consequential loss, damage, cost or expense.»

General Conditions

- Exemption clauses are usually included under the general conditions of sale.
- General conditions are the standard conditions prepared unilaterally by one side of a transaction, i.e. the seller in a sales contract, to be used in various similar contracts.
- Unless the buyer has been given the opportunity to read such conditions and has accepted them, general conditions to the detriment of the counter party are considered not written at all.
- In any event, general conditions cannot impair counterparty's rights in violation of good faith.
 - A general condition of a sales contract stating that the buyer shall be entitled to repair or replacement valid only for one week following the sale of a laptop would be void.

Conclusion

- Contractual guarantees usually provide the buyer with broader remedies than law in the event of defective goods, while at the same time excluding or limiting seller's liability regulated under the applicable law.
- Exclusion or limitation clauses are considered to be «exemption clauses».
 - In such clauses, limitation or exclusion must be expressly stated.
 - The contract must state that all the warranties, whether express or implied by law are excluded and inapplicable.
- Legal systems generally allow exemption clauses, save for the seller's unlawful intent or gross negligence in delivering the defective goods.
 - In the event an exemption clause is included under the general conditions instead of the contract itself, the buyer must have been given the opportunity to read such conditions and have accepted them and the limitation must not be in violation of good faith.



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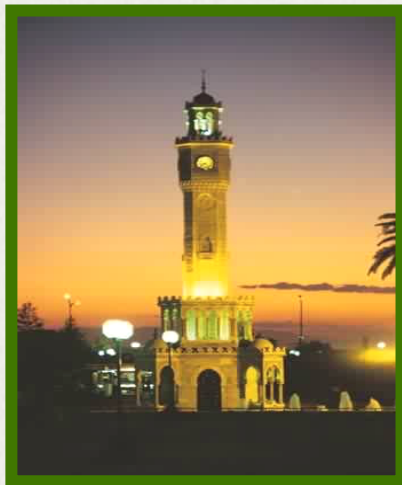
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