

# LIMITATION OF LIABILITY FOR THE SELLER

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UNIDROIT PRINCIPLES stresses that all legal systems recognise the influence of passage of time on rights. We can distinguish two basic systems which lead to opposite consequences. Under the first system the passage of time extinguishes rights and actions when under the second one the passage of time operates only as a defence against an action in court.

## Polish legislation.

There are two main aspects that need to be considered in regard to the limitation. Firstly, it needs to be stressed that the Polish law provides two year period within which a seller is responsible for a defect of a product that was sold (article 568 of the C.C). Nevertheless this rule finds some exception in the matter of defects to real estate. In that case the seller's liability is prolonged over a period of 5 years from the date when the property was handover to its buyer.

Polish law introduce some modification in the matter of the seller's liability. Polish system emphasises the need to obtain the conscious consent between a seller and a purchaser. This means that the seller is released from any liability if the purchaser knew about the existing defect in time of conclusion of a contract. The second provision is connected with the contractual freedom in regard of actions taken by parties. The said modification of a contract is possible as long as the contractual provision is not against the nature of the contractual relationship. Under the provision of Polish law the seller is liable only for defects which existed at the time when the peril passed to the buyer.

We find similar provisions in other national laws:

- Under **the French regulation** we can distinguish two types of limitation: the limitation of liability and limitation of damages. The main aim of the limitation of liability clause is to limit or identify cases where the seller's liability may be sought. It needs to be stressed that this type of clause has to be clearly stated in a contract and expressly accepted by the other party. On the other hand, the limitation of damages clause allows to set the maximum amount of damages. However, any limitation of this clause which conflicts with the scope of the related essential obligation shall be deemed as unenforceable. It needs to be stressed that in B2B relationships limitation clauses are valid as a matter of principle. The contracting parties which benefit from a limitation clause may not enforce it in the event of a proven gross negligence or intentional misconduct on its part.

- **Belgian** legislation as well as a Polish one emphasise the need of obtaining the conscious consent. Under the Belgian law in case when purchaser accepts the product with a visible defect the seller is released from any liability towards him. However, the seller is liable for hidden defects if the buyer obeys two conditions: firstly the defect must exist at the moment of a conclusion of a contract and secondly the purchaser needs to undertake a legal action "within short notice" –fulfilment of this condition would be a subject of judge's ruling. The Belgian law provides two provisions which are restricting seller's liability. First of them allows seller to set the concrete period within which the seller is liable for the said defect. It needs to be highlighted that such a clause is allowed only if the said clause does not prevent the purchaser from exercising his rights to undertake legal actions. The second provision gives the seller a possibility to limit his liability to certain types of hidden defects or even allows to exclude seller's liability for all hidden defects. Nevertheless the seller cannot have any knowledge about the existence of a defect at the time of the conclusion of a contract ergo the seller needs to act with the provision of a good faith. In case when the professional seller wants to invoke on this provision he needs to prove that had no knowledge about the hidden defect.

- In **Italy**, the seller is allowed to limit his liability as long as he acts with a good faith and when he was not conscientiously aware of any defects of the goods sold (art. 1490 of C.C.). Nevertheless, under the Italian law we can find some limitation of that provision. In case when a clause leads to limitation of a seller's liability and when it can be considered as unbalanced one, it needs to be approved expressly in writing (art. 1341 and art. 1342 of C.C.). Any clause which excludes or limits the liability of the debtor in advance is void when such a responsibility arises from fraud or gross negligence (art. 1229 of c.c.). We need to bear in mind that the clause which does not apply to rules of public order shall be deemed unenforceable (art. 1229 co.2 of c.c.).

- To be able to discuss the issue of the limitation of seller's liability in **the United Kingdom** we need to distinguish three types of contracts: consumer contract, non-consumer contract (B2B relationships) and contracts made on the seller's standard terms of business. In respect to consumer contracts the English law does not provide the provision which would lead to exclusion of Seller's responsibility for the satisfactory quality of the goods sold. What is more in consumer contract any clause that excludes liability or limit the liability of the seller for the breach of the contract can be valid only if it satisfies the requirement of reasonableness that are set by the Unfair Contract Terms Act 1977. Nevertheless, the above mentioned restriction does not apply to non-consumer contract where commercial parties are allowed to set their own terms. In regard to contracts made on the seller's standard terms of business is allowed to exclude or limit liability for breach of a contract as long as the limitation clause satisfies the requirement of reasonableness. It needs to be stressed that according to English law it is forbidden to include the clause which purports to exclude liability for personal injury or death.

- In **Netherlands** the limitation of liability is based on the principle of contractual freedom and on obtaining the consent between a seller and a purchaser while the contract was formed. According to the Dutch law the limitation of liability operates mostly through the system of the General Terms and Conditions that are incorporated into contract by way of reference in the offer of the seller or in its invoices (art. 6:232 DCC). Nevertheless, it needs to be stressed that in the respect to the international sale contract the buyer receives the higher

level of protection. In these types of contract the buyer can omit use of GTCs by claiming its unreasonableness or the fact that the buyer was not given the reasonable opportunity to access the content of the GTCs (art. 6:233). However, those provisions are applicable only if both parties are domiciled in the Netherlands. The Dutch law provide two more mechanisms of buyer's protection. According to the Dutch Civil Code the limitation of liability does not apply in case of wilful misconduct or gross negligence of the seller and secondly the buyer can rely on the principles of reasonableness and fairness to advocate the inapplicability of the limitation of liability clause contained in the GTCs (art. 6:248-2 DCC).

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