

THE HIDDEN DEFECT GUARANTEE IN COMPUTER SOFTWARE CONTRACTS: A STUDY IN THE FRENCH AND EGYPTIAN CIVIL LAWS

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ABSTRACT

This research addresses how a contracting party is protected, as an ordinary consumer, when entering into a contractual relationship with a professional party specializing in computer software contracts. In this regard, the paper tackles two types of guarantee: the latent or hidden defect guarantee and the issue of a nonconformity guarantee attached to a sold item. The applicability of the provisions of these guarantees is also considered within the scope of this research. The main problem covered in this paper concerns the judicial and jurisprudential dispute about whether these two types of guarantee are similar or different. This dispute includes all consequent legal effects in this regard, particularly the application of different provisions for each guarantee from both the objective and procedural perspectives, to identify which guarantee offers more protection to the ordinary consumer. The scope of the current research is determined by both the French and Egyptian legislations, as they represent the most common models for the Latin School of Private Law.

It is concluded that confusion between hidden and non-conformity defects, and between the claims of each defect, can be seen at the highest levels of judiciary. Nevertheless, protection for the ordinary consumer, including a professional buyer specialized in another field, takes precedence regarding the provision of a stronger guarantee. Although legal jurisprudence generally determines clear standards on the scope and provisions of each guarantee, it is recommended that a new legislative amendment be passed in Egyptian law with regard to calculating the stated deadline for filing a claim. This deadline should be calculated from the date of detecting the defect, and not as of the date of delivery, to provide a bona fide buyer with due protection.

Keywords: Guarantee, Contract, Hidden Defects, Computer Software, Egyptian Civil Law, French Civil Law.

INTRODUCTION

There are several forms and models of IT contract but the most common is probably the computer software contract of sale. Most disputes with these contracts are concerned with buyer warranties against the vendor under the rules of consumer protection. In this regard, most judicial precedents indicate the controversial nature of a potential defect in a sold item, especially when

determining whether this defect is a hidden/latent or a non-conformity defect. It is thus important to distinguish clearly between these types (Bohoussou, 1993).

It is widely believed that it is necessary to provide the highest possible level of protection to the ordinary contracting party against specialists in the IT field. That is, it is necessary to accept the inclusion of a hidden defects guarantee not only in computer software contracts of sale but also all other relevant contracts in this field, such as, but not limited to, computer software contracts of lease (Trezeguet, 2003). Despite this widely held belief, some IT specialists have refused in principle to include a hidden defects guarantee for computer software. This reasoning behind this is that a hidden defects guarantee has been applied, and still applies, to tangible property contracts of sale. This is not legally the case with computer software and intellectual property, however, which are not classified as tangible property (Bohoussou, 1993). Nevertheless, this argument does not prevent the existence of a hidden defects guarantee for all the items sold by a business concern, as such a guarantee covers all items, including those of a non-physical nature (i.e., intangible items). Computer software and intellectual property works are closely and personally related to the intellectual rights owner, and involve modern functional elements that were not applicable with traditional works. Even if computer software is considered intellectual property subject to Intellectual Property Law, this does not necessarily mean that all the provisions of this law are applicable to computer software especially those provisions concerning the hidden defects guarantee due to the special nature of computer software (Pretnar, 1933).

Therefore, the preponderant view, and the one accepted here, is that it is necessary to accept the inclusion of a hidden defects guarantee in the field of computer software, based on the fact that legal rules are basically protective rules that aim to protect right holders. Hence, if the legal transaction is one of computer software, the potential existence of a defect in this software requires a guarantee from the other party, whenever the relevant terms and conditions are applicable as required by the legislator and as stated by the judiciary (Pretnar, 1933). On this basis, the French Court of Cassation ruled that the provisions of Article 1641 of the French Civil Law are applicable regarding the hidden defects guarantee against a computer virus discovered in computer software purchased with a magazine specialized in the IT field.

The Applicability of the Hidden Defect Terms to Computer Software

Since the legislator has specified the terms and conditions necessary for the inclusion of a hidden defects guarantee in traditional contracts of sale, it is reasonable to wonder about the availability of these terms in the computer software contracts of sale due to their special nature. This section addresses the answer to this question.

A Defect that is Effective

The warranty always considers effective defects, i.e., a defect that prevents the sold item or the contracted object from performing its function satisfactorily (Najida, 2003). On this basis, there are defects that have usually been condoned, as simple defects in the sold item do not amount to effective defects (Ahmed, 1999). In this regard, the French Judiciary has stated that the recurrence of a defect during a short period of time, even if a simple one, could eventually

lead to fulfilling the definition of an effective defect. Such a recurrence will necessarily affect the buyer or program user's utilization in one way or another, and so once the rest of the guarantee's applicability terms are fulfilled, the guarantee takes full effect against the vendor, especially if the vendor is a professional.

Furthermore, with regard to the liability of the computer software vendor, the acquisition of a certified licence from the vendor is not as effective for the buyer as the software's information content. Therefore, if there is any hidden defect that affects the buyer's benefit from this information, there will be legal grounds for the buyer's recourse to the vendor pursuant to the provisions of the hidden defects guarantee.

A Defect that is Hidden

A hidden defect is typically determined by the buyer in accordance with their level of specialisation in the field of the concluded contract, as well as by the nature of the sold item. The buyer's knowledge about the sold item at the time of entering into the contract of sale is also taken into consideration. On this basis, the buyer's warranty may not include the apparent defect, or a defect detected by the buyer during their ordinary inspection of the sold item. However, in the case that the buyer and vendor are equally specialized in the field in which the contract was concluded, the French Judiciary states that certain information shall be considered as presumed information regarding the sold item. This presumption may only be excluded if it is proven that there is a fraud by the vendor, or if the vendor has committed a gross fault by confirming to the buyer that the sold item is free of defect.

Therefore, even when a defect may be considered hidden for an ordinary person, for a specialist, the same defect may be considered an apparent defect, taking into account all consequent legal effects with regard to accepting or dismissing a claim or its consequent legal effects. In other words, a specialist buyer may not make a plea to revoke the claim on the grounds of the presence of a defect of which they are fully aware by virtue of their specialisation; in such a case, the defect is not considered a hidden one. Hence, for this legal effect to be applicable, the buyer must be specialised in the same field as the vendor (i.e., the contract's subject matter). If the buyer is specialised in another field, this rule does not take effect, as the buyer is considered an ordinary consumer. Although it may be argued that the hiddenness of the defect is itself a legal principle specified by the legislator, it is based on either actual or presumed knowledge with regard to the possibility of detecting the defect upon inspection of the sold item. If the actual knowledge is fulfilled, the presumed knowledge will naturally be forfeited; however, if the presumed knowledge is excluded, then the issue becomes about determining whether the buyer actually knew of the defect or not (Elahwani, 1989).

Furthermore, the defect's hiddenness shall also be acknowledged if the buyer could not detect such hiddenness during an ordinary inspection of the sold item. Hence, for the matter to be decisive, there are two standards, the first of which is an objective criterion through which a defect is estimated as either apparent or hidden, according to the ordinary consumer's perspective and regardless of the personal traits of the buyer. On this basis, a defect is considered apparent in two cases: if the ordinary consumer can detect the defect when inspecting the sold item; and, if the buyer cannot detect the defect due to being inferior to an ordinary consumer.

This is pursuant to the provision of the Egyptian legislator (Dutilleul & Delebcque, 1998; Elahwani, 1989). As for the second standard, this is a subjective criterion under which a defect is estimated as either apparent or hidden according to the buyer's personal traits that enable them to resolve the matter. Naturally, this standard requires separate consideration of cases according to each person and contract. In this regard, some jurists may argue that the second standard can be elicited from the provisions of Article 447(2) of the Egyptian Civil Law, which states that "*the vendor may not guarantee the defects which can be detected by the buyer himself*"; as the term "*himself*" here indicates that the buyer's own behaviour shall be taken into consideration, rather than the common behaviour of the ordinary consumer in general (Kasem, 2005).

On the other hand, the French Judiciary has adopted a legal interpretation that favours the buyer, especially if the buyer is an ordinary consumer dealing with a professional vendor, as well as when the buyer himself is a professional specialised in the same field of the vendor. As for the first case, when the vendor is a professional and the buyer is just an ordinary consumer, it has been legally stated that a non-professional buyer is not obligated to hire professional experts in order to detect a defect that he himself cannot detect; as he only shall check the sold item through the ordinary inspection according to the standards of the ordinary consumer; and this situation shall be considered as a legal presumption in favour of the non-professional buyer in case of the presence of hidden defects. Consequently, if the defect is an apparent defect that could be detected during the ordinary inspection by anyone without the need for any technical expertise, then, the buyer's non-detection of such defect shall be considered as a personal failure by the buyer himself, who shall in this case assume the full liability for all legal effects regarding the provisions of the hidden defects guarantee (Dutilleul & Delebcque, 1998; Elahwani, 1989).

Moreover, the French Judiciary strictly takes the hidden defects clause into consideration, when the buyer is specialised in the field of the contract. Therefore, the French Judiciary accepts claims based on the presumption of the specialised buyer's knowledge of the sold item's defects; as this presumption shall be applicable, when the buyer is specialised in the same field of the vendor; and it may not be applicable, when the buyer is a professional specialised in another field.

A Defect that is Old

An old defect refers to a defect which exists in an item prior to its purchase (De-Lamberterie, 1977; Serour, 1983). That is, if the item's defect appears after its sale and delivery to the buyer, then the buyer may not recourse to the vendor regarding the guarantee. The French Court of Cassation has ruled that such defects usually emerge due to the buyer's misuse, and therefore the buyer may not benefit from the warranty for something for which they are at fault.

In light of the above, one interesting question which arises concerns whether we may consider a software virus to be a defect covered by a hidden defects guarantee. In order to protect the intellectual rights of their software and increase profits from its utilisation, manufacturers may protect their software by adding a latent virus in a computer's control unit; if the user attempts to copy the original software, the virus destroys the control unit or, at the very least, destroys the device's memory, including its data. In such a case, some may consider this latent virus to be a hidden defect for which the hidden defects guarantee is applicable, because it is

undoubtedly an effective defect that fulfils the elements of the defects warranty clause. That is, if the buyer of the software or device had known about the virus, they would not have bought the item, or would have done so at a lower price, as the item does not entirely fulfil its purpose; as such, the virus prevents the buyer, entirely or partially, from benefiting from the purchase (Le-Tourneau, 2002; Zez & Pansier, 2000). In Egyptian Law, a defect is generally considered a hidden defect if the buyer does not know about it, or if the buyer cannot detect it through ordinary inspection of the sold item; hence, the same principle is applicable more accurately in the field of computer software. In most cases, an expert is hired in these situations. However, because this expert cannot often easily decide whether there is a latent virus or not, the special natures of this field, both legally and technically, is revealed.

Usually, during the inspection of a purchase, the buyer verifies several points: 1) the safety of the medium in which the software is loaded; 2) the software is provided with all relevant documents, especially the vendor's warranty certificate, guaranteeing that the sold item is free of defects and that no viruses are present in the software; and, 3) the software is original and not fake (Khalil, 1994). In other words, the buyer's role is limited to ascertaining the aforementioned aspects, and does not extend to the detection of computer viruses, which is a technical point that is difficult to detect, even by experts.

With old defects in the IT field, the most acceptable view is that a computer virus which infects a computer can only be considered an old defect; thus, if the software manufacturers and producers want to add a destructive virus, they do so during the production stages of the software itself. The most suitable stage is the design stage, i.e., when determining the problem for which the software is being created, including the data input and output, and the information system analysis. During this stage, a virus may be placed in the software and is thus undoubtedly present prior to the contracting, sale and delivery of the software to the buyer (Khalil, 1994). On the other hand, some believe that the presence of a computer virus before a sale is naturally presumed, as the computer software producer adds such a virus during the manufacturing process, i.e., the issue of the virus being an old defect does not raise much controversy compared to the other elements necessary to the guarantee's applicability (Claviez, 1990). In this regard, we believe that this presumption is a positive aspect that favours the buyer, especially when the buyer is an ordinary consumer dealing with professional vendors specialised in a field considered to be very difficult, even for experts. Hence, the only matter which might be controversial in this case is the timeframe stated for the determination of an old defect, in terms of whether it is the time of entering into the contract or the time of receiving the sold item.

The Impact of the Hidden Defects Guarantee in the Field of Computer Software

At this point, it is necessary to distinguish between a vendor who is unaware of the presence of a defect, and a vendor who is fully aware. The obligation of the former is limited to the sold item's guarantee; if a defect is detected, the vendor refunds the price paid by the buyer upon the contract's termination, but the vendor is not obligated to compensate the buyer for any damages incurred due to this defect. However, if the vendor is fully aware of the defect, this is a clear indication of ill will and so the vendor must refund the price and compensate the buyer for any damages incurred to the buyer's other properties due to this defect. In the field of IT and

computer software, there is an argument that the provisions of the hidden defects guarantee will not provide the buyer with the desired protection, as most virus-infected software performs its functions with the required efficiency for long periods of time, potentially the lifespan of the software, while the virus continues to perform its task. In this way, the defective software may function normally without causing any damage; in this case, there will be no commercial damages as defined by the legislator in the stated rules for the hidden defects guarantee. On the contrary, there could be serious damages due to a virus in software which functions perfectly. On this basis, the buyer's compensation for the software and for the economic damages incurred due to the contract do not provide the required protection from the virus itself as a defect in the software, because the commercial damages will not amount to the damages caused by the virus included in this defective software (Khalil, 1994).

Moreover, if a professional vendor is considered to be fully aware of the presence of a defect in the sold item, this will allow the buyer to claim compensation with all of its elements. This legal interpretation is the most consistent with the concept of 'professionalism' regarding the personal traits that shall be fulfilled in a professional vendor, as well as the experience they have which enables them to detect and remove these defects from the sold item; otherwise, they are considered to be at fault (Gatsi, 1998).

In this sense, there is a reasonable question over the buyer's benefit from such a presumption when the buyer is a professional and not just an ordinary consumer. Indeed, it is also worth noting that the French Judiciary has hesitated to place ordinary and professional buyers on an equal footing with regard to benefiting from the presumption of the vendor's knowledge of the sold item's hidden defects. The answer to this question involves two views; the first opinion believes that a presumption of the professional vendor's knowledge of the sold item's defects shall be in favour of the professional buyer – just like the case is with the ordinary buyer – who trusts the professional vendor; hence, a professional buyer shall benefit from such presumption as well. On the other hand, the second view believes that a professional buyer may not enjoy the same protection granted by judiciary to a buyer who is just an ordinary consumer; which means that this presumption is not applicable with the professional buyer. Hence, if a professional buyer seeks compensation in this regard, he shall prove the vendor's ill intent and knowledge of the sold item's defects. The supporters of this latter opinion believe that presuming the vendor's knowledge of the sold item's defects has originally been decided for the ordinary buyer due to the lack of his technical experience; consequently, if the buyer has such technical experience based on their specialisation and professionalism, they may not benefit from such presumption (Diyab, 1981).

In this sense, there is general controversy about the presumption of the professional vendor's knowledge of the sold item's defects. One argument is that when the buyer is just an ordinary consumer, the presumption is decisive and may not be challenged, as it represents common sense consistent with the provisions of consumer protection as set forth in law. From another perspective, this presumption can be viewed as a simple judicial presumption that can be challenged if the vendor proves their ignorance of the defect, which is the whole point of the principle of justice in protection. A third view is that it is necessary to distinguish between the producer and the vendor of the sold item and, based on this distinction, the presumption is considered decisive for the producer and simple for the vendor (Ali, 1996).

In all cases, the right to the hidden defects guarantee passes from the buyer to their designated and non-designated successors, as the buyer's legitimate heirs or designated successors may have direct recourse to the first vendor with a defect guarantee claim (Elsanhori, 1996). In addition, those who acquire the right to guarantee must pay attention to the stated procedural dates for exercising such a right, including the statute of limitations for the claim after one year as of the date of actual receipt, pursuant to Article 452(1) of the Egyptian Civil Law. In France, the French legislator has not precisely determined a specific period in which the buyer must exercise the right to initiate a claim for a hidden defects guarantee against the vendor. In Article 1648 of the French Civil Law, the French legislator merely states that it is necessary to initiate litigation within a short period of time. However, in light of the harsh criticism of this failure to determine a specific date (Fourment, 1997), a legislative amendment was issued in 2005 specifying the permissible date for initiating litigation within two years of the date of detecting the defect. The current French provision may therefore be considered superior to the Egyptian with regard to the litigation date's validity being from the date of detecting the defect, not from the date of receiving the sold item; this undoubtedly provides the buyer with a better and more powerful protection and guarantee.

Agreed Amendments to the Scope of the Hidden Defects Guarantee in the Field of Computer Software

By virtue of Article 1643 of the French Civil Law, the vendor guarantees all hidden defects in the sold item, even if they are unaware of such defects, unless it is stipulated that the buyer may not recourse to any guarantee in such a case. Consequently, if it is proven that the vendor was fully aware of the defect at the time of the sale; such stipulations may not produce any legal effects in respect of reducing or dismissing the guarantee. Moreover, pursuant to the presumption of the professional vendor's knowledge of the sold item's defects, the vendor may not include such stipulations in their contracts; otherwise, they shall be considered void and invalid (Ali, 1996).

Furthermore, the French Court of Cassation has ruled that any abusive terms shall be considered void and may not be used as legal grounds, if both contracting parties are considered professionals in their field. In addition, some have supported this latter judicial approach on the grounds that it is consistent with the European Directive issued on April 15, 1993, with regard to abusive terms. This Directive defines the 'consumer' in its Second Article as *"every natural person taking some actions for the fulfilment of purposes that do not fall within the scope of [their] professional activity"*, not to mention that specifying such legal protection to the consumer fulfils the objective of the legislator (Ali, 1996).

Problems with the Non-Conformity Guarantee in the Field of Computer Software

Hidden and non-conformity defects are not equivalent as each has its own basis and various effects. A non-conformity defect in the field of computer software relates to when the item received by the buyer is not the same item as the one bought the latter being that which the contracting parties agreed upon at the time of entering into the contract. In many cases, it is difficult to distinguish hidden and non-conformity defects and the French judiciary has

acknowledged this issue by confirming an error in enforcing the law. It ruled that, when contracted computer devices and spare parts inefficiently perform their functions, the concept of non-conformity is fulfilled due to the vendor's obligation of delivery. That is, since the legislator has not determined a specific period during which the delivery has to be completed, the claim shall be accepted and the vendor shall fulfil the guarantee. On these grounds, it was ruled that the devices' failure to function correctly shall be interpreted as a hidden defect, and the provisions of the hidden defects guarantee become applicable, rather than the provisions of the non-conformity defect guarantee.

In this regard, it is legally stated that the buyer is not forced to receive anything other than the contracted sold item, even if it is of equal or higher value to the agreed item. In addition, the sold item must conform to all the agreed contractual terms, representing an essential element of the vendor's obligation of delivery. This is pursuant to the provision of Article 431 of the Egyptian Civil Law, which states that "*the vendor shall deliver the sold item to the buyer on its same condition at the time of the sale*". In this context, a non-conforming sold item is one which does not conform to the generally accepted standards for safety and administration, in addition to any other standards affecting the purchase process, which, if absent from the beginning, would have changed the buyer's position (Van-Overstaraten, 1998).

It is worth noting that there is no specific legislative definition for the non-conformity defect; therefore, some believe that the term conformity not only indicates the transfer of the sold item's possession from the vendor to the buyer, but also the buyer's aim from such a purchase. In the field of computer software, the user's desired benefit is fulfilled in accordance with their specialism and needs. That is, the technical needs of a legal counsellor are different from that of an accountant or engineering consultant. On this basis, it is necessary to distinguish between a non-conformity defect attributed to the nature of the sold item itself, and a non-conformity based on explicit contractual provisions. With the first type, the non-conformity concerns the presence of defects in the sold item, regardless of what the buyer's needs from the purchase; with the second, a contractual non-conformity concerns the explicit terms and conditions of the concluded contract of sale when the sold item does not fulfil the buyer's needs (Pretnar, 1933).

In addition to the above, it is necessary to distinguish between a non-conformity that is attributed to internal elements in the computer software, and a non-conformity attributed to external elements outside the software itself. The first case emerges if the software contains manufacturing defects or the contracted software is incomplete; in such a case, the buyer's needs cannot be fulfilled in a way that entitles recourse to the vendor for the agreed guarantee (Bitan, 1996).

Moreover, in the absence of contractual terms specific to the sold item, the competent judge may be guided by two standards: 1) the minimum efficiency standard that must be fulfilled by the software; and, 2) the buyer's needs from the software standard. Consequently, the first standard is realised when the software does not perform what could have been manually performed by the buyer, and for the second standard it is acceptable to have a tolerance limit for the buyer's lack of needs, which is 2–10%, and not more.

As for the software's external elements, verifiable by the competent judge, these are mainly based on the buyer's needs as specified by him/her. Therefore, it should be taken into consideration whether the contract has included or annexed a list of terms and specifications

concerning the sold item; in such a case, the role of the judiciary is easier as the non-conformity defect is undisputedly fulfilled once any of the agreed terms and specifications is absent.

The Difficult Distinction between Hidden and Non-Conformity Defect Guarantees

It may be argued that the conformity of the sold item should be considered from two perspectives: the material and the functional. The former is uncontroversial as it can easily be elicited by reviewing the contract, its terms and the agreed specifications of the sold item. The functional aspect involves the difficult distinction of hidden and non-conformity defects. That is, the functional perspective of non-conformity refers to the ability of the sold and delivered item to perform the purpose for which it was purchased; as such, this is practically identical to the definition stated for the hidden defect (Bensoussan, 1997). However, from another perspective, hidden and non-conformity defects are not identical as each has its own claim based on different legal grounds and causes.

In this regard, the French Court of Cassation ruled that a non-conformity defect guarantee shall be applicable when the item delivered to the buyer does not conform to the sold item as agreed in the contract or book of specifications, regardless of whether there are defects or not in this item. In the IT field, the Court ruled that a manufacturing defect in the sold item delivered to the buyer shall be considered grounds for non-conformity rather than a hidden defect. In light of this ruling, the non-conformity defect can be viewed as broader in concept than the hidden defect, as a hidden defect can constitute a cause for a non-conformity defect, but not vice versa (Viney, 1993).

In Egyptian jurisprudence, there is some controversy regarding whether the absence of a specification from those agreed on the sold item is considered a violation by the vendor of their obligation of delivery, based on their contractual liability, or a hidden defect invoking the provisions of the hidden defects guarantee. Contrary to what has been stated about hidden defects, it has been suggested that in Egyptian legislation there is no stipulation that the absence of an agreed specification shall be effective in itself regarding the value or usability of the sold item. Therefore, the buyer can initiate a guarantee claim as the mere absence of an agreed specification is sufficient in itself for the guarantee to apply. This view can be justified by taking into account that specifications agreed to by both contracting parties are terms of significant importance measured by a self-standard. In other words, a breach of the description's specifications is considered to be effective, as long as the vendor has guaranteed this description. Moreover, such a breach leads to a lack of benefit from the sold item, compared to what was expected by the buyer according to their personal considerations. That is, the objective standard of the hidden defects guarantee is inapplicable regarding the absence of a specification (Gemiaei, 1993).

The preponderant view, and the one supported here, is that the buyer has the right either to initiate a claim for the contract's termination due to a non-conformity defect, or to initiate a claim for a hidden defect guarantee, in the absence of a guaranteed specification relating to the sold item being made to the buyer. Nonetheless, yet another view suggests that initiating a claim for a non-conformity defect guarantee can be regarded as the beginning of an extraordinary move towards making a claim for a hidden defect guarantee; thus, invoking the vendor's contractual

liability for not delivering a sold item conforming to agreed specifications is contradictory to the provision of Article 227(1), as well as every value of legislative intervention in current Egyptian Civil Law (Gemiaei, 1993).

To illustrate the difficulty of distinguishing between hidden and non-conformity defects, we can consider a well-known case involving a company that bought several computer devices showing functional defects; the buyer initiated a claim for contract termination on the grounds that he had received devices that did not conform to the agreed specifications. The Court of Appeal ruled that delivery of a non-conforming sold item had indeed occurred, and that the buyer's claim for contract termination was not limited by a short period of time for filing the claim. This ruling was appealed on basis that the contract included the purchase of forty computer devices but only eleven were defective. Hence, by virtue of law, the provision of Article 1641 of the Civil Law becomes applicable, i.e., the said defect represents a hidden defect, not a non-conformity defect.

In light of the above, the French Court of Cassation has adopted a broader concept in several rulings for non-conformity, as it considers a hidden defect to be an aspect of non-conformity (Ghestin, 1992). In this context, the Court ruled that merging the respective claims of hidden and non-conformity defect guarantees shall not be excluded, as the choice is left to the buyer. The Court added that if the litigated sold item includes a defect preventing this item from performing the purpose for which it was purchased, then this defect shall be considered a non-conformity defect. The grounds for this reasoning are that the defect in this sense-even if hidden-constitute an aspect of non-conformity. Hence, the date specified for initiating a claim in this regard shall not be the same date stated in the provisions concerning the organisation of the hidden defects guarantee; rather, a claim under this condition concerns the contractual liability arising from the vendor's obligation to deliver to the buyer an item that conforms to what is agreed in the contract.

CONCLUSION

The confusion between hidden and non-conformity defects, and between the claims of each defect, can be seen at the highest levels of judiciary. Nonetheless, the protection of the ordinary consumer-in the broader concept for this consumer, which includes a professional buyer specialised in another field other than that of the concluded contract takes precedence in terms of providing a more protective guarantee. That is, if the defect is a hidden one, and the date specified for initiating a guarantee claim has passed due to it being a short period, the defect may be interpreted as one which makes the delivered item functionally non-conforming; in this case, more time is provided for a liability claim, with the right to the stated guarantee. On this basis, it is mainly legal jurisprudence which is left to set specific and clear standards that significantly determine the scope and provisions of each guarantee, or to develop a general theory that basically aims to protect the consumer. This is because the judiciary must play a prominent role in the application of this theory in accord with the conditions and circumstances of each claim. It is recommended that a new legislative amendment be passed with regard to calculating the stated deadline for filing a claim as of the date of detecting the defect, and not as of the date of delivery. In so doing, a bona fide buyer will be provided with the due protection.

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