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What to do when quantifying
claims is not possible before
expiry of a warranty term

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2. The buyer's problem – lack of information
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The situation – expiry of warranty term

- > SPA provides
*“Except as explicitly provided otherwise hereinafter, either of the Parties shall be entitled to remedies and have the right to bring an action for breach of the representations, warranties, obligations and covenants set forth under this Agreement within a maximum period of **18 months from the Closing Date** but not later.”*

- > Since the Closing Date, **16 months** have lapsed

- > The buyer only now discovers circumstances (potentially) constituting a breach of a warranty

The situation – expiry of warranty term

- > The problem
 - > warranty period will expire before buyer is ready to fully substantiate and quantify its claim

- > The consequence:
 - > warranty claim threatens to become time-barred

- > “They don’t call it a **survival clause** for nothing”

The buyer's problem – lack of information

- > Why is the buyer not ready to quantify his warranty claim?
 - > Necessary information available – but assessment of potential claim requires more time
 - > Necessary information basically available – but in the seller's hands
 - > Claim and/or quantum are contingent upon developments not within the parties' control, e.g.
 - > Third party claims
 - > Investigation against target company initiated or announced (tax exposure, environmental conditions, anti-trust)

The buyer's options to solve the problem – alternatives to arbitration?

> Interruption of statute of limitation

> based on additional grounds provided under the contract, e.g.

- Für alle übrigen Gewährleistungsansprüche bis zum 31. März 2014.

Die Gewährleistungsansprüche verjähren nicht, soweit bis zum vorerwähnten Termin Gewährleistungsansprüche schriftlich geltend gemacht worden sind.

> Clause admissible?

> Contents clear?

> based on grounds available under applicable substantive laws (e.g. Article 135 CO)?

The request for arbitration – shaping claims and procedure

- > Introduce highest conceivable claim
 - > Substantial cost risks

- > Unquantified damage claim
 - > Procedural issues
 - > Admissibility of unquantified claims?
 - > Timing - at what point in time will claim have to be quantified at the latest?
 - > Bifurcation of proceedings to buy time?

 - > Substantive issues
 - > Interruption of statute of limitation for entire – yet to be quantified – claim?
 - > Effective interruption if prerequisites for unquantified claims under applicable laws are not met?

The request for arbitration – shaping claims and procedure

- > Request for declaratory relief
 - > Admissibility
 - > Need for – and existence of – actual interest in obtaining declaratory relief in the given situation?
 - > Possible conversion into quantified damage claim in the course of the proceedings?
 - > Substantive effect
 - > Interruption of statute of limitation for claim as such, i.e. irrespective of specific amount
 - > Subsequent claim for performance (payment of damages) may be necessary
 - > Difficulty: Drafting of sufficiently specific request to cover damages (potentially) arising in the future

Thank you for your attention.

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