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SWITZERLAND

Yeşim M Atamer[*]

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I INTRODUCTION

1 Switzerland: An Island in the EU

Switzerland is not a Member State of the European Union (EU); however, it is surrounded solely by EU Member States. Starting with the 1972 Free Trade Agreement, Switzerland and the EU are connected through an extensive network of bilateral treaties, the most important being the 'Bilateral I' ensuring market access and free movement of people, and 'Bilateral II' on cooperation in areas like justice and home affairs, asylum, environment, culture, and education policies.[1] However, an accession of Switzerland to the European Economic Area (EEA) and thereby a further strengthening of the relations was rejected by the Swiss people in a popular vote in 1992 with a very close call of 50.3 per cent of No-Votes. The main problem regarding the bilateral agreement concept is its static nature, that is, the references

[*]I am grateful to my assistants RA Florian Willi, LLM and Sabrina Vieli, MLaw for their thorough revision of the footnotes. All websites and references are up to date as of 24 July 2022.

[1] cf for a detailed overview Matthias Oesch, 'Switzerland-EU Bilateral Agreements, the Incorporation of EU Law and the Continuous Erosion of Democratic Rights' (2020) 39 YEL 602 (hereafter Oesch, 'Switzerland-EU').

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to EU law do not dynamically adjust to the newest version of law in force in the EU but remain unchanged as part of an international treaty.[2] An obligation of Switzerland to incorporate EU law is not existent in any of the bilateral treaties. Another attempt to regulate EU-Switzerland relations by way of an Institutional Framework Agreement, which would have opened the way for a dynamic incorporation of EU law,[3] also came to a halt after seven years of negotiations. On 26 May 2021, Switzerland declared that it would not sign the draft agreement.[4] For the time being, the fate of the more than a hundred bilateral agreements remains unclear.

2 Transposition of EU Consumer and Banking Law in Switzerland

Despite this rather bumpy relationship, Switzerland has a long-standing legislative maxim of 'autonomous implementation of EU law' (*autonomer Nachvollzug*). This approach has led to a certain amount of substantive law provisions being either adapted fully or influenced by EU law.[5] Among others, consumer law and banking and finance law are areas of such EU-compatible legislation. Regarding consumer law directives, readiness for transposition was at its highest in the 1990s. The so-called 'Eurolex' project, which was prepared in view of accession of Switzerland to the EEA was pragmatically renamed and adapted as the 'Swisslex' package after accession was rejected by popular vote.[6] As part of this initiative the Product Liability Directive,[7] Consumer Credit Directive,[8] and Package Tour Directive[9] were transposed as specific laws,[10] and the Doorstep Directive[11] was integrated in the Swiss Code of Obligations (CO) (Arts 40a ff CO). Some changes were also made to the Swiss Unfair Competition Act (UCA). But with the tailwind of joining the European Free Trade Area fading, willingness to further develop consumer protection in Switzerland also dwindled drastically.

To date, there has been very little progress, such as (1) the revision of Art 8 UCA concerning the control of standard contract terms (SCT) in 2011; (2) the extension of the limitation period in sales contracts as well as in contracts for work and services to two years in case of non-conforming delivery (2012);[12] and (3) finally, the inclusion of telephone or comparable simultaneous communication means to the definition of doorstep contracting,

[2] Oesch, 'Switzerland-EU' (n 1) 605.

[3] ibid 627.

[4] cf for the official declaration of the Swiss government: <www.eda.admin.ch/europa/en/home/europapolitik/ueberblick/institutionelles-abkommen.html>.

[5] See Matthias Oesch, *Switzerland and the European Union: General Framework, Bilateral Agreements, Autonomous Adaptation* (Dike 2018) paras 331 ff.

[6] Botschaft über das Folgeprogramm nach der Ablehnung des EWR-Abkommens vom 24. Februar 1993, BBl 1993 I 805; cf also Helmut Heiss and Leander Loacker, 'Einführung in das Thema' in Helmut Heiss and Leander Loacker (eds), *Grundfragen des Konsumentenrechts* (Schulthess 2020) 3, 5 (hereafter Heiss and Loacker, 'Einführung').

[7] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[8] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit.

[9] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

[10] Product Liability Act (SR 221.112.944), Consumer Credit Act (SR 221.214.1), Package Tour Act (SR 944.3).

[11] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

[12] Arts 210 and 371 Swiss Code of Obligations (SR 220).

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and thereby allowing for a right of withdrawal (2015).[13] But all other consumer protection directives, including the Unfair Terms Directive (UTD),[14] the revised Consumer Credit Directive,[15] the Distance Financial Services Directive,[16] and the Mortgage Credit Directive[17] were not transposed into Swiss law. The same is true for the enforcement of consumer rights as neither the Directive on Injunctions for the Protection of Consumers' Interests,[18] nor the Directive on Representative Actions for the Protection of the Collective Interest of Consumers[19] have counterparts in Switzerland.

In fact, there is not even a unified definition of 'consumer' or 'consumer contract' under Swiss law.[20] Article 32 of the Code of Civil Procedure (CCP), which establishes a specific jurisdiction for consumer contracts, states that these are 'contracts on goods and services for ordinary consumption intended for the personal use of the consumer or his family and offered by the other party in the course of its professional or commercial activity'. The restriction to 'ordinary consumption' implies that consumer contracts for goods and services that are exceptional for a typical private household are excluded and fall under the general jurisdiction rule for contracts (Art 31 CCP).[21] The same functional approach is shared by Swiss private international law granting preferential jurisdiction to the domicile or habitual residence of the consumer (Art 114) as well as the protection of the law at the consumer's habitual residence (Art 120) only to contracts for 'ordinary consumption purposes',[22] thereby contradicting Art 17 of the Brussels-Ia Regulation, Art 6 of the Rome I Regulation, as well as Art 15 of the 2007 Lugano Convention, which all use the established definition of a consumer contract as one concluded by a natural person 'for a purpose which can be regarded as being outside his trade or profession'. Even though both definitions focus on the aim of the contract, the Swiss approach introduces a limitation by way of the 'ordinariness' requirement, which, as will be seen below, remains disputed to this day. Provisions like Art 40a CO on doorstep sales, on the other hand, speak of 'contracts which are intended for personal

[13] Art 40b CO.

[14] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[15] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

[16] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

[17] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

[18] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

[19] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[20] See for details Helmut Heiss, 'Der Rechtsbegriff 'Konsument' in Helmut Heiss and Leander Loacker (eds), *Grundfragen des Konsumentenrechts* (Schulthess 2020) 87 ff; Dario Hug, *La formation du contrat de consummation: Entre régime général et approche sectorielle—analyse et perspectives en droit suisse* (Helbing Lichtenhahn 2020) 241 ff.

[21] Ulrich Haas and Yael Strub, 'Art. 32 ZPO' in Paul Oberhammer, Tanja Domej, and Ulrich Haas (eds), *Kurzkommentar ZPO* (3rd edn, Helbing Lichtenhahn 2021) paras 11 ff; cf BGer 08.02.2008, 4A_432/2007, para 4.3.2 qualifying a sales contract for a car worth 190'000 Swiss Francs as falling outside ordinary consumption purposes.

[22] 'Contracts pertaining to goods or services of ordinary consumption intended for a consumer's personal or family use and not connected with the consumer's professional or business activity are governed by the law of the state of the consumer's habitual residence', cf in detail Alexander Brunner and Moritz Vischer, 'Art. 120 IPRG' in Pascal Grolimund, Leander D Loacker, and Anton K Schnyder (eds), *Basler Kommentar: Internationales Privatrecht* (4th edn, Helbing Lichtenhahn 2021) para 26.

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or family use' without mentioning the 'ordinary consumption' prerequisite. Finally, the Consumer Credit Act adheres to the EU-wide accepted negative circumscription and defines the consumer as a 'natural person who concludes a consumer credit agreement for a purpose that cannot be attributed to his or her professional or commercial activity' (Art 3).

In comparison to consumer law, EU compatibility in the area of banking and finance law is more advanced as close integration with the EU market is also favoured by the finance sector.[23] Important pieces of legislation are the Federal Financial Services Act (FinSA),[24] the Financial Institutions Act,[25] as well as the corresponding ordinances.[26] Both acts and the ordinances were adopted by Parliament in 2018 and came into force with the implementing provision on 1 January 2020. They aim at transposing the Markets in Financial Instruments Regulation (MiFIR)[27] as well as the recast of the Markets in Financial Instruments Directive (MiFID II)[28] into Swiss law.[29] However, another directive of major importance for banking law, the Second Payment Services Directive[30] (PSD II), has still not been adapted, even though Switzerland has been part of the Single Euro Payment Area (SEPA) since 2006.[31]

3 Development of the Provisions for the Control of Unfair Standard Contract Terms

The attempt to introduce specific norms for the control of standard terms has a long yet unsuccessful history, a fact which indicates how strongly the approach in Switzerland differs from the rest of Europe. The first attempt to do so was made as long ago as the beginning of the 1980s.[32] An expert commission had proposed to add a new article to the UCA defining the usage of pre-formulated SCT as an act of unfair competition, if the contract terms to the detriment of a contracting party (1) deviate significantly from the directly or by analogy applicable legal rule, or (2) provide for a distribution of rights and obligations which is substantially inconsistent with the nature of the contract. Even though the proposal and its placement in the UCA was undisputed, the chambers of the Parliament made major alterations, which in fact obliterated the whole endeavour. The following quote from

[23] Heiss and Loacker, 'Einführung' (n 6) 6.

[24] Bundesgesetz über die Finanzdienstleistungen (SR 950.1).

[25] Bundesgesetz über die Finanzinstitute (SR 954.1).

[26] Verordnung über die Finanzdienstleistungen (SR 950.11); Verordnung über die Finanzinstitute (SR 954.11).

[27] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L173/84.

[28] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ 2014, L173/349.

[29] cf Rolf Sethe, 'MiFIR/MiFID II—Drittstaatenzugang für die Schweiz und Äquivalenz von FINIG/FIDLEG' in Dieter Gericke (ed), *Private Equity VI* (Schulthess 2018) 135, 156 ff.

[30] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] OJ L337/35.

[31] cf in detail Susan Emmenegger, 'PSD2: Eckpunkte und Relevanz für Schweizer Finanzdienstleister' in Emmenegger (ed), *Zahlungsverkehr* (Helbing Lichtenhahn 2018) regarding the extent of the obligation of the Swiss banks to adjust to the requirements of the PSD2 due to the SEPA Adherence Agreements.

[32] A detailed overview of the drafting history can be found in Alexander Brunner, 'Entwicklung des schweizerischen Rechts der Allgemeinen Geschäftsbedingungen' (2014) HAVE 13, 22 ff (hereafter Brunner, 'Entwicklung'); cf also Thomas Probst, 'Control of Price Related Terms in Standard Form Contracts in Switzerland—The Control of Standard Contracts Terms: The Swiss Approach' in Yeşim M Atamer and Pascal Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer 2020) 653, 659 ff (hereafter Probst, 'Price Related Terms').

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the rapporteur of the National Council regarding the proposal reflects the mindset of the Parliament at that time:

> Like the National Council, the Council of States has come to the conclusion that the regulation of general terms and conditions proposed by the Federal Council goes too far. Today's business transactions with their very frequent mass transactions are dependent on the legal instrument of general terms and conditions. Only abuse must be combated. . . . The Council of States has chosen a completely different criterion to limit the encroachment on contractual freedom, namely the characteristic of 'misleading'. It must be acknowledged that the Council of States thus introduced an element that fits very well with the whole philosophy of the Federal Act on Unfair Competition.[33]

As a result, a provision for the control of SCT was added to the UCA in 1986, but only pre-drafted contract terms that—to the detriment of a contracting party *in a misleading manner*—either (1) deviate significantly from the directly or by analogy applicable legal order, or (2) provide for a distribution of rights and obligations which is substantially inconsistent with the nature of the contract were supposed to be causing unfair competition (Art 8 UCA). With the addition of the 'misleadingness' criteria, the aim of controlling the content of standard contract terms had become secondary, as the court first had to ascertain whether the term was misleading. If it was not, no further inquiry was needed. Unsurprisingly, this version of Art 8 UCA was not applied by courts, neither for a content control nor in relation to an injunctive measure against misleading SCT.[34]

The many attempts in the following years by MPs as well as consumer organizations to revise Art 8 in a manner that would shift the focus to control of SCT, thereby also achieving alignment with the meanwhile issued UTD of the EU (1993), were blocked by the Swiss Parliament.[35] However, after twenty-five years and long debates, the Parliament agreed on an amendment to Art 8 UCA in 2011. But those expecting that an EU-compatible protection would be granted were disappointed once more.

The Settlement Commission, consisting of members of both chambers of Parliament, only succeeded in having the requirement that the SCT be 'misleading' deleted. This would at least have opened the door for a control of SCT focusing on the content of the terms and not anymore on their effect on competition, but the criteria for the control of SCT were also deleted. It was argued that even a significant deviation in SCT from the directly, or per analogy, applicable legal order cannot by itself be qualified as unfair given that these rules are non-mandatory (default) and therefore the parties are free to deviate from them.[36] As a result, both criteria ((1) and (2)) were eliminated and a new version of Art 8 UCA came into force in July 2012.[37] This version borrows heavily from Art 3(1) UTD,[38] albeit without adapting a black or grey list of unfair terms:

[33] AB N 1986, 1252 f.

[34] See Section II C 1.

[35] See, for more detail, Helmut Heiss, 'Art. 8 UWG' in Reto Heizmann and Leander D Loacker (eds), *UWG: Bundesgesetz gegen den unlauteren Wettbewerb: Kommentar* (Dike 2017) paras 37 ff (hereafter Heiss, 'Art. 8 UWG').

[36] See Brunner, 'Entwicklung' (n 32) 36.

[37] AS 2011 4909.

[38] cf for details regarding the references to the UTD during the drafting process Jörg Schmid, 'Die Inhaltskontrolle Allgemeiner Geschäftsbedingungen: Überlegungen zum neuen Art. 8 UWG' (2012) 148 ZBJV 1, 5–6 (hereafter Schmid, 'ZBJV').

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> In particular, the use of general terms and conditions that cause a significant and unjustified imbalance between contractual rights and obligations to the detriment of consumers in a manner that violates good faith constitutes unfair competition.

Even though unfair competition law is for the benefit of all market actors, the compromise between the chambers of the Parliament has limited the scope of application of this provision solely to consumers. But, as will be seen below, the missing unified definition of the 'consumer' under Swiss Law constitutes yet another obstacle in applying the new Art 8 UCA.

4 Description of the 'Swiss Way'

To date, the Federal Supreme Court of Switzerland has not decided a single case in which it qualified a standard term as unfair according to Art 8 UCA, and therefore annulled it. The Supreme Court's reluctance is mainly due to the ambiguous legal basis for the control of standard terms. In addition, the legislature, as well as the judiciary, are very cautious about interfering with freedom of contract by explicitly controlling the contract content.

Despite these difficulties, Swiss courts still find a way of exercising a somewhat 'disguised'[39] control of SCT by way of scrutinizing whether the SCT as a whole, and specific terms of the SCT particularly, have become part of the contract. If a term is found to be 'unusual' or 'surprising' " in relation to an inexperienced customer, the term is simply not covered by the consent of the parties and therefore not applicable. The Supreme Court employed this approach for the first time in relation to jurisdiction clauses in SCT.[40] However, it was later generalized as a maxim to exclude all surprising terms in SCT used in contractual relations with customers unfamiliar with the specificities of the given sector. Beside this so-called 'consent control', the courts also exert a modest control of SCT by way of interpreting them *contra proferentem*, or by giving individually negotiated terms preference.

Given that the UTD was not transposed into Swiss law, and the unfairness control of SCT is not a priority at all, the analysis of the Swiss approach and case law below will follow the same order as applied in Swiss jurisprudence, namely: (1) the incorporation of SCT and the heavily relied on consent control (Section II 1); (2) the interpretation of SCT (Section II 2); and (3) the content control of SCT (Section II 3).

[39] cf for the term Thomas Koller, 'Einmal mehr: das Bundesgericht und seine verdeckte AGB-Inhaltskontrolle' (2008) AJP 943, 943 ff; Markus Vischer, 'Zur generell-abstrakten AGB-Kontrolle nach UWG' (2014) AJP 964, 966 ff (hereafter Vischer, 'AGB'); Heiss, 'Art. 8 UWG' (n 35) para 30. Even the Zurich Cantonal High Court speaks of a disguised content control of SCT, see HG150136, 16.12.2016, ZR 116/2017, 132.

[40] Ernst A Kramer, Thomas Probst, and Roman Perrig, *Schweizerisches Recht der Allgemeinen Geschäftsbedingungen* (Stämpfli 2016) para 66 (hereafter Kramer, Probst, and Perrig, 'AGB').

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II LEGAL BASIS OF UNFAIR TERMS CONTROL

1 Incorporation of SCT and Consent Control

1.1 General requirements of incorporation

Standard contract terms can only be applied to a contractual relationship if they are incorporated into the contract. The party invoking the applicability of the SCT carries the burden of proof regarding their incorporation.[41] Incorporation can be explicit or implicit. In case of express incorporation, the SCT are mostly part of the contract document the customer is concluding. If the SCT are printed on the back of the document, or on a separate document, an explicit and legible reference to the SCT needs to be made on the main document, so that the customer understands the wish of the drafter to include the SCT.[42] Such a reference needs to be made before contract conclusion in order for the customer to have at least a theoretical chance to reject the inclusion of the SCT.[43] If the contract is concluded via electronic means, the drafter of the SCT has to inform the other party about the usage of SCT and their inclusion.[44] Whereas for business-to-consumer (B2C) contracts only an express incorporation is accepted, the doctrine and case law are more lenient with regard to business-to-business (B2B) contracts. If, for example, the parties are in a long-term relationship and the customer has concluded several contracts by expressly accepting the inclusion of the SCT, a tacit incorporation by practice is possible for the next transaction.[45] However, the customer must have known the intent of the user to include them in all future contracts.

At least in B2C contracts, for an explicit inclusion of SCT, a mere reference is not deemed to be sufficient.[46] Additionally, the other party needs to have been given a reasonable opportunity to take notice of the content of the SCT, which is a direct consequence of the transparency requirement.[47] Other than the UTD, which does not govern the incorporation of SCT in Switzerland,[48] the transparency requirement is applied mainly at this stage. This means that for B2C contracts the SCT have to be handed over in printed form, or as an

[41] Christoph Müller, 'Art. 1 OR' in Regina E. Aebi-Müller and Christoph Müller (eds), *Berner Kommentar zum schweizerischen Privatrecht: Art. 1-18 OR* (Stämpfli 2018) para 309 (hereafter Müller, 'Art. 1 OR').

[42] Kramer, Probst, Perrig, 'AGB' (n 40) para 125; Ingeborg Schwenzer and Christiana Fountoulakis, *Schweizerisches Obligationenrecht Allgemeiner Teil* (8th edn, Stämpfli 2018) paras 45.01 ff (hereafter Schwenzer and Fountoulakis, 'Obligationenrecht'); cf BGer 8.10.2012, 5A_511/2012, para 5.1; BGE 119 II 443, para 1a.

[43] Kramer, Probst, and Perrig, 'AGB' (n 40) para 118; Claire Huguenin, *Obligationenrecht Allgemeiner und Besonderer Teil* (3rd edn, Schulthess 2019) paras 616 ff.

[44] Müller, 'Art. 1 OR' (n 41) para 313.

[45] BGE 77 II 154, para 4; cf BGer 27.7.2015, 4A_106/2015, para 5.1; Schwenzer and Fountoulakis, 'Obligationenrecht' (n 42) para 45.05.

[46] Kramer, Probst, and Perrig, 'AGB' (n 40) paras 135–36. Especially if smart contracting is used the customer (consumer) must get the standard contract terms in a printable form as reading a program code cannot be expected of him, Müller, 'Art. 1 OR' (n 41) para 331.

[47] Müller, 'Art. 1 OR' (n 41) paras 323 ff; Kramer, Probst, and Perrig, 'AGB' (n 40) para 133; Pichonnaz, 'Switzerland' in Hannes Wais and Thomas Pfeiffer (eds), *Judicial Review of Commercial Contracts—A Comparative Handbook* (C.H. Beck 2021) 309 (hereafter Pichonnaz, 'Country Report') 27 ff; Schwenzer and Fountoulakis, 'Obligationenrecht' (n 42) para 45.03; cf BGE 104 Ia 278, para 3. There are special provisions regarding transparency eg in Art 3 Insurance Contract Act ('The insurer must inform the policyholder in a comprehensible manner about the identity of the insurer and the essential content of the insurance contract before the insurance contract is concluded'). See, similarly, Art 4 Package Tour Act. cf BGer 14.09.2004, 4C.202/2004, para 4 where the court considered that the unusual nature of the terms had been brought to light, partly due to the use of bold print.

[48] cf also Chapter 3, in this volume.

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attachment to an email, or be downloadable from a link made available to the consumer in an email.[49] The customer is under no duty to ask for the SCT.[50]

Even if the user of the SCT has expressly referred to them and given the customer a fair chance to read the terms, this still may not be enough for them to be incorporated. In B2C contracts especially, the terms also need to be transparent in several other ways.[51] First, SCT printed in a faint colour or in an illegible manner do not become part of the contract.[52] In addition, the terms need to be intelligible for an average customer. Overly complex terms using technical language, for example with references to statutes, will be considered intransparent.[53] The language of the SCT is mostly also treated as a transparency matter. If the language of the SCT is different from the language in which the negotiation was conducted, or in which the contract was drafted, and the customer did not explicitly consent to this change of language, the SCT will not become part of the contract.[54]

The consent of the customer to the SCT can be twofold: either it is a 'full acceptance', meaning that the customer has read and agreed to the terms individually, or he has just accepted them 'in global/toto' without understanding or even reading them.[55] Either way, the SCT are included in the contract.[56] In principle, the user's reliance on their incorporation will be protected if all requirements (ie explicit reference, reasonable opportunity to take notice, and transparency requirements) are met. However, in case of global consent the unexpectedness test is an additional barrier to inclusion.

1.2 Surprising standard contract terms are not incorporated

Given that freedom of contract is the major tenet of the CO, the Swiss Supreme Court has abstained especially from relying on general contractual limits like the *ordre public* or good morals (Art 19 CO) to control SCT. How far the Supreme Court deploys Art 8 UCA for such control will be examined in Section II 3. At this point, the main instrument of the Supreme Court of eliminating unfair terms, that is, excluding 'surprising terms' from the parties' consent, will be analysed.

1.2.1 In general

The reason why customers in B2B as well as in B2C contracts accept SCT without even reading them is the high transaction costs involved with reading, understanding, and negotiating these terms.[57] Even if someone does read the SCT, the chances that the user will

[49] Müller, 'Art. 1 OR' (n 41) para 313; Pichonnaz, 'Country Report' (n 47) para 33; BGE 139 III 345, para 4.4.1 (however, the Federal Court left open the question of whether a mere reference to a website would suffice if not preceded by an email exchange).

[50] BGE 139 III 345, para 4.3.

[51] Schwenzer and Fountoulakis, 'Obligationenrecht' (n 42) para 45.03.

[52] Kramer, Probst, and Perrig, 'AGB' (n 40) paras 149ff; Thurgau Cantonal High Court 25.08.2003 RBOG 2003 Nr. 9; see also BGE 119 II 443, para 1b (in an insurance contract, a collision damage waiver was moreover made difficult to read because of the typography used). However, the submission that an illegible term qualifies as a surprising one is not convincing. See Müller, 'Art. 1 OR' (n 41) para 365.

[53] BGE 64 II 380. cf also BGE 129 III 702, para 2.4.3 for the interpretation of contracts using specific terminology.

[54] Müller, 'Art. 1 OR' (n 41) para 330.

[55] BGer 2.11.2021, 5A_86/2021, para 3.1.1: 'Pre-formulated contractual terms and conditions which, according to general experience, a party does not read, does not take note of, or does not understand in their scope are deemed to have been adopted globally.' See also Probst, 'Price Related Terms' (n 32) 658; Pichonnaz, 'Country Report' (n 47) para 37.

[56] BGer 2.6.2015, 4A_47/2015, para 5.4.2.

[57] Yeşim M Atamer and Pascal Pichonnaz, 'Control of Price Related Terms in Standard Form Contracts: General Report' in Yeşim M Atamer and Pascal Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer 2020) 13 (hereafter Atamer and Pichonnaz, 'General Report').

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change the content in favour of the customer is almost zero, so that ignorance may even be considered to be rational.[58] However, knowledge of this ignorance gives the user of SCT a power which is prone to abuse as it facilitates inclusion of terms that the other party would have rejected under normal circumstances had it been aware of them. In order to exclude surprising/unexpected terms from the scope of the parties' agreement, the courts apply the good faith and fair dealings principle.[59] Nobody should take unfair advantage of a counterparty that rightfully does not read the SCT.

1.2.2 Definition of surprising terms

A contractual term is considered surprising when it is unexpected in the specific circumstances, especially with regard to the qualifications of the customer in the given case.[60] The evaluation is subjective as the level of knowledge, skills, education, and experience of the customer is important.[61] A term which is surprising for a consumer may not be so for a qualified businessperson. However, in B2B relations a term can also be unexpected if the customer does not have special knowledge regarding the contract at issue.[62] The exact placement of a term in the SCT, contradiction between the terms and pre-contractual negotiations, and contradiction between the heading and the content of the specific term can all lead to the classification of a term as surprising.[63] Accordingly, not only material but also formal characteristics may cause a term to qualify as unexpected, that is, surprising.[64]

In addition, the term must also fulfil an objective criterion.[65] The specific term must lead to a substantial change in the character of the contract or fall outside the legal framework of the type of contract to a considerable extent in order to be defined as surprising.[66] The more a clause affects the legal position of the contracting party by deviating from the otherwise applicable default rules, the more likely it is to be judged as surprising.[67] The unusual nature of a clause can also result from the fact that it provides for unequal treatment between the

[58] cf on the transaction costs inflicted on the customer by using SCT and the related information asymmetry causing a market failure, Yeşim M Atamer, 'Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer—Insights from Behavioural Law and Economics' (2017) 80(4) MLR 624, 629 ff. See also Valentin Jentsch, 'Schutzzweck der Inhaltskontrolle von allgemeinen Geschäftsbedingungen' (2020) SZW 106, 111 ff.

[59] Müller, 'Art. 1 OR' (n 41) para 358; Kramer, Probst, and Perrig, 'AGB' (n 40) para 173; Pichonnaz, 'Country Report' (n 47) paras 47–48.

[60] Pichonnaz, 'Country Report' (n 47) paras 8 ff.

[61] cf Pichonnaz, 'Country Report' (n 47) para 43 with further notes.

[62] BGE 138 III 411, para 3.1, 3.5; BGer 10.12.2018, 4A_499/2018, para 3.3.2: 'The unusualness rule is an instrument of the doctrine of consent. It substantiates the principle of trust. This principle aims to protect good faith in business transactions and is not primarily intended to protect the weaker or inexperienced party from the stronger or more experienced party. . . . Even a stronger party with business or industry experience can be surprised by a globally adopted clause in general terms and conditions and invoke the unusualness rule.' Same BGE 148 III 57, 4A_330/2021, para 2.1.3.1.

[63] BGer 1.10.2004, 5C.134/2004, para 4.2: 'The rule may apply to standard insurance terms if the scope of coverage described by advertising is reduced quite significantly so that precisely the most common risks are no longer covered, or if the meaning and scope of a provision are obscured as a result of complicated wording, or if it appears surprising and unexpected to the policyholder due to its location within the SCT.' Same BGE 148 III 57, 4A_330/2021, para 2.1.3.3.

[64] Pichonnaz, 'Country Report' (n 47) para 42.

[65] BGer 18.3.2016, 4A_592/2015, para 5.3.1; BGE 148 III 57, 4A_330/2021, para 2.1.3.3.

[66] BGer 02.11.2021, 5A_86/2021, para 3.1.1; BGer 20.9.2016, 4A_329/2016, para 5.1.2.

[67] Kramer, Probst, and Perrig, 'AGB' (n 40) para 179; BGer 18.11.2019, 4A_232/2019, para 2.2; BGE 135 III 1, para 2.1, BGE 135 III 225, para 1.3; BGer 9.5.2008, 4A_187/2007, para 5.1; BGE 148 III 57, 4A_330/2021, para 2.1.3.3.

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contracting parties without an objective reason.[68] Such evaluation inevitably also includes a judgement on the adequacy and equitableness of the clause,[69] that is, the content of the clause, which should not normally be an issue at the stage of contract formation. Therefore, the Swiss doctrine almost unanimously qualifies the practice of the Supreme Court as a 'disguised content control'.[70]

1.2.3 Effect of knowledge and/or accentuation of surprising terms

The ratio of excluding surprising terms is to protect the adhering party from being blindsided with contract terms that no one would accept had they been aware of them. The very reason for protection seems to fall away where the customer has gained actual knowledge of the term in question, for example due to previous dealings.[71] The same is true if the customer is specifically warned about the existence of a certain clause by the use of bold print or by the placement of the term at the very beginning of the SCT text so that the customer would certainly take notice of them.

However, whether such disclosure would be enough also to counterbalance a so-called 'objective unexpectedness' as defined by the Supreme Court is another issue. In a case where the SCT of a sports facility included an automatic renewal clause with a notice period of three months by registered letter, the Supreme Court first analysed whether the customer's attention was sufficiently drawn to the disputed clause.[72] This was affirmed as the clause was printed in large and bold letters. However, the Court did not stop there but went on to analyse whether the clause was also objectively surprising. According to the Court, this would have to be affirmed should the term lead to a substantial change in the character of the contract. The Supreme Court found that a contract providing for a fixed term on the one hand and for automatic renewal in the event that no (timely) notice of termination is given on the other hand, deviates—by definition—from the functioning of a fixed-term contractual relationship. However, this circumstance alone was not held to be sufficient to qualify the automatic renewal of a fixed-term contract as objectively unusual and surprising, considering the interest of the gym operator in planning certainty and a rather short cancellation period.[73]

1.2.4 Surprising terms in case law

Given that to date, the Supreme Court has only controlled SCT by way of the 'unusualness test' rather than the 'unfairness test', it makes sense to give a short overview of clauses deemed surprising, or rather unsurprising. Representative examples of surprising clauses are mainly to be found in insurance contracts:

[68] BGer 31.3.2010, 9C_3/2010, para 3.1, not published in: BGE 136 V 127; Zürich Obergericht 29.12.2020, PP200011-O/U, para 3.6 (unilateral right of the web-designer to terminate the contract whereas the customer has no parallel right).

[69] In a three-year contract, a clause stipulating an automatic contract extension and a termination period of two years was found to be surprising (BGer 13.5.2005, 5P.115/2005). Neither the fact that the contracting party was experienced nor the fact that such terms were frequently used in these publishing contracts was important for the Court. By contrasting the two-year notice period with the three-year contractual term, the Court considered the contractual provision to be unusual due to its disproportionately long notice period.

[70] See n 39.

[71] cf Pichonnaz, 'Country Report' (n 47) para 50.

[72] BGer 15.7.2014, 4A_475/2013, para 5.3.1 (part not published in BGE 140 III 404).

[73] BGer 15.7.2014, 4A_475/2013, para 5.3.2 (part not published in BGE 140 III 404). The Court also contrasted this decision with BGer 13.5.2005, 5P.115/2005, E. 1.2 (n 69).

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- Art 14 Federal Law on Insurance Contracts (LIC)[74] provides that the insurer is not liable for wilful misconduct of the insured and may reduce the benefits in case of its gross negligence. The SCT of a business liability insurance were, however, stipulating a reduction in case of slight negligence of the insured. According to the Court, it was absurd and unusual to grant insurance cover to the policyholder for serious breaches of the duty of care, but to refuse liability for less serious breaches. The clause was found to be unusual in the contract with an SME, both objectively as well as subjectively. The fact that the clause had been used in the insurance industry for many years was not relevant, as unusualness had to be assessed from the perspective of the individual policyholder, who was not familiar with the practices in the industry.[75]
- A casco insurance (fully comprehensive) included in a car rental agreement limiting coverage also for slight negligence is surprising. The insured could rightfully assume that if he were to commit a simple violation of traffic regulations, the damage caused to the leased vehicle would be covered by the insurance.[76]
- A clause that denies a group insured person his entitlement to a daily allowance due to incapacity for work where he later takes out an individual insurance policy is surprising. The claimant, an unqualified worker with no experience in the insurance industry, did not have to take into account such an unusual clause, since this clause considerably weakened his legal position, whereas he was precisely trying to safeguard his interests in applying for an individual insurance.[77]
- Terms giving the insurer the right to modify the contract without giving the customer the right to terminate the contract are surprising. In certain industries, it may well be customary to provide for an adjustment of agreed prices, for example to inflation according to a certain index. However, if the future event triggering adjustment is not sufficiently determined in long-term contracts, the parties are regularly granted a right of termination. In the case of long-term contracts, it is generally expected that an adjustment clause is linked to such a right.[78]
- A right of the insurance company to unilaterally change the temporal scope of the coverage is problematic. If, for example, a daily sickness benefits insurance can be terminated by the insurer after the occurrence of the insured event, this would be contrary to the nature of the insurance contract and generally to the principle of *pacta sunt servanda*, and therefore unusual.[79]
- A clause that provides for the reduction by half of the daily allowance due in the event of illness if the insured suffers from a mental illness is unusual. There is no apparent objective reason for different daily allowances depending on the type of illness.[80]
- A clause which provides that the bank has the right to deem the holder of a savings account passbook, or the holder's authorized representative with the power to make

[74] Federal Law on Insurance Contracts (SR 221.229.1).
[75] BGer 9.5.2008, 4A_187/2007, paras 5.2, 5.4.2.
[76] BGE 119 II 443, para 1b.
[77] BGer 7.5.2002, 5C.74/2002, para 2c.
[78] BGE 135 III 1, para 2.6. Besides, the Supreme Court also stated that adjustment clauses can only validly be concluded if both the expected event and the scope of the adjustment are contractually determined. An undefined right to unilaterally modify contractual obligations would contradict the nature and purpose of the contract, which is precisely intended to define the rights and obligations of each contracting party. However, the Court did not base this argument on any provision.
[79] BGE 135 III 225, para 1.4.
[80] BGE 138 III 411, para 3.5.

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withdrawals, to be the holder of the account, without the need to ascertain the identity of the customer is surprising.[81]

In contrast, the courts denied the surprising nature of the following terms.

- A clause according to which claims arising from an insurance contract are subject to a limitation period of two years from the date of the event giving rise to the claim is not surprising given that a parallel limitation period of two years is provided for in Art 46 LIC[82].[83]
- A term granting the bank the right to make payment of a cheque conditional of the cheque being honoured later is customary in banking practice and not surprising to a party active in international business.[84]
- A clause in a contract with a bank, with which the buyer of a B2B sales contract waives his right to plead against the assignee bank any defence which was available to him against the original creditor (ie seller), including set-off is not surprising.[85]
- A clause providing that under an accident insurance the insurance company is only liable to pay benefits to the extent that the personal injury or the resulting incapacity to work is actually attributable to the accident and not to pre-existing non-accident-related circumstances is not unusual.[86]

  A clause in a small business insurance covering epidemics in general but excluding special risks due to 'pathogens for which the WHO pandemic levels 5 or 6 apply nationally or internationally'.[87]

2 Interpretation of SCT

According to the Swiss Supreme Court, pre-formulated contractual provisions are in principle to be interpreted like individually drafted contractual clauses.[88] This means that if it is not possible to ascertain the actual will of the parties (Art 18 para 1 CO), their presumed will must be considered. The latter is to be determined according to the principle of trust (*Vertrauensprinzip*), based on all relevant circumstances of the conclusion of the contract. In doing so, the judge must start with the wording and interpret the clauses in the context in which they were drafted and the way in which they had to be understood by a reasonable person in the same situation. Therefore, the outcome of the interpretation may differ according to the actual party to the contract, that is, consumer or business person.[89]

[81] BGE 116 II 459, para 2a.

[82] As of 1 January 2022, this limitation period was raised to five years. The parties cannot stipulate a shorter period (new Art 46 LIC).

[83] BGer 18.08.2008, 4A_200/2008, para 2.3.

[84] BGer 04.05.2006, 4C.427/2005, para 2.

[85] BGE 109 II 213, para 2.

[86] BGer 16.06.2009, 4A_84/2009, para 2.5.

[87] BGer 5.1.2022, 4A_330/2021, para 4.2.5 (not published in BGE 148 III 57). For a critical appraisal of the case cf Jörg Schmid, 'Die privatrechtliche Rechtsprechung des Bundesgerichts im Jahr 2022—Obligationenrecht' (2023) 159 ZBJV 323, 325 et seq.

[88] BGer 20.9.2016, 4A_329/2016, para 5.2.2; BGer 7.4.2009, 4A_39/2009, para 3.4; BGE 135 III 1, para 2; BGE 135 III 410, para 3.2; BGE 133 III 607, para 2.2.

[89] Kramer, Probst, and Perrig, 'AGB' (n 40) para 236.

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There are also several interpretation rules that are applied specifically in the realm of SCT.[90] First, individual contractual provisions trump contradicting clauses in SCT. Individually defined stipulations are intended to take precedence over the pre-formulated content of the SCT.[91] Second, SCT must be drafted in an unambiguous and transparent manner. Article 33 LIC states this explicitly regarding contractual provisions on risk coverage in insurance contracts. According to this provision, the insurance company shall be liable for all events which bear the characteristics of the risk against which insurance has been taken out, unless the contract excludes individual events from the insurance in specific, 'unambiguous' terms. Ambiguous terms are interpreted against the drafter (*in dubio contra stipulatorem*), just as provided in Art 5 UTD.[92] However, according to settled case law, this interpretation rule is only applied if all other means of interpretation fail.[93]

The third rule is interpretation in conformity with the statutes. According to the Supreme Court, among several reasonable interpretations of a contractual provision, the interpretation which corresponds to statutory law shall be preferred. This interpretation is based on the assumption that default rules provide for a solution that balances the interests of both parties. Therefore, in case of ambiguity, the judge shall be guided by these default rules. Anyone wishing to deviate from default rules must do so with sufficient clarity.[94] Ambiguous exemption clauses especially are interpreted in a restrictive manner so that they reflect the default risk distribution.

For example, in a decision regarding a clause authorizing the bank to pay out the savings account balance without the need to check the identity of the holder of the passbook, the Supreme Court decided that such SCT must be interpreted restrictively. No exemption was granted as the stipulation was drafted by the bank itself and allowed to considerably weaken the security a bank is supposed to provide to its clients:

> Notwithstanding the power granted in the general terms and conditions, both the rules of good faith and the nature of the contract oblige the bank to be vigilant about any transaction that is unusual, even slightly so; in view of the principle of good faith, it cannot easily hide behind a clause allowing it not to verify the identity of the holder of a passbook.[95]

Whether a third party giving a unilateral security as 'joint and several debtor' in SCT really wanted to assume an independent obligation against the creditor or to just provide a surety is also subject to strict scrutiny by the Supreme Court. The Court has ruled that in order to

[90] cf on the unfairness of SCT stipulating other interpretation rules as those developed by the Supreme Court Arnold F Rusch, 'Was braucht es, damit die SIA-Normen gelten?' (2019) AJP 631 ff (hereafter Rusch, 'SIA-Normen').

[91] BGer 19.1.2021, 4A_503/2020, para 5.3; BGer 14.4.2016, 4A_512/2015, para 3.1; BGE 135 III 225, para 1.4.

[92] BGer 3.9.2021, 4A_244/2021, paras 4.2; BGE 133 III 607, para 2.2; BGE 133 III 61, para 2.2.2.3; BGE 124 III 155, para 1b. cf regarding the possible invalidity of intransparent norms n 125; Pichonnaz, 'Country Report' (n 47) para 40. BGer 5.1.2022, 4A_330/2021 (with parts not published in BGE 148 III 57) where the Supreme Court found that a provision excluding special risks due to 'pathogens for which the WHO pandemic levels 5 or 6 apply nationally or internationally' from a small business insurance covering epidemics in general was not violating Art 33 LIC. Especially the fact that the WHO categorization of pandemic levels had changed in 2015, ie before contract conclusion in 2018, and therefore the reference in the contract that was not accurate anymore was not seen as proof of an ambiguity.

[93] BGer 15.2.2021, 4A_14/2021, para 8.3.2; BGer 30.7.2018, 4A_650/2017, para 3.3.3; BGer 9.2.2016, 4A_327/2015, para 2.2.1 (not published in BGE 142 III 91); BGE 133 III 61, para 2.2.2.3; BGE 122 III 118, para 2a.

[94] BGE 133 III 607, para 2.2.

[95] BGE 116 II 459, para 2a.

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protect the party assuming a unilateral obligation, the contract itself has to make clear in an individual manner (ie not only in SCT) the scope of the obligation entered into, and the reason why the legal form of a suretyship, which gives the third party more protection, is waived.[96] If the third party has no recognizable interest of his own in the transaction concluded between the principal debtor and the creditor, the interpretation will mostly be in favour of a suretyship.

3 Control of the Content of SCT

To date, the only provision for a general control of standard contract terms remains Art 8 UCA. Given that this provision was revised in 2012, its application in case law will be outlined separately below (Sections 3.1 and 3.2). In addition to this general provision, there are several specific provisions which only ban a certain type of SCT. These will be discussed in Section 3.3. Finally, the general limits to freedom of contract in Swiss law and their relevance for the control of SCT will be elaborated (Section 3.4).

3.1 Old Article 8 Unfair Competition Act

As explained above, the original version of Art 8 UCA was focused on the potential of SCT[97] to mislead a customer when concluding a contract.[98] Given that one of the major aims of unfair competition law is to prevent the infliction of economic losses on customers due to deceptive business practices, the same approach was adopted for the control of SCT. However, how SCT, which are regularly and rationally ignored by customers due to high transactions costs, could in fact mislead them, is lacking any explanation in the drafting history of the norm.[99] A feature of a contract, or product/service, or seller/supplier can only be misleading if the customer actually takes notice of this feature and bases his decision to contract on a false assumption regarding the feature. SCT, on the other hand, are in principle not taken into consideration when concluding a contract and therefore cannot mislead a customer.[100]

An exception applies where the subject matter of the contract forms part of the SCT.[101] If, for example, the annual percentage rate (APR) of a credit contract is stated to be lower in the SCT than the rate actually charged, the stipulation in the SCT can qualify as a misleading

[96] BGE 129 III 702, para 2.4.3.

[97] The UCA does not provide for a definition of SCT, however, the literature on the question is unanimous. In order to qualify as SCT the terms need to be pre-drafted (i) with the aim of multiple usage (ii) and they have to be proposed by the user for inclusion into the contract without negotiation (iii). cf Valentin Jentsch, 'Grundlagen und Anwendungsbereich der Inhaltskontrolle von allgemeinen Geschäftsbedingungen' (2020) recht 73, 80 ff; Pichonnaz, 'Country Report' (n 47) para 15.

[98] cf Section I 3.

[99] As underlined by the Supreme Court, any marketing strategy based on 'better terms' in the SCT can hardly be effective, since it is notorious that these are not read, BGE 122 III 118, para 2c.aa.

[100] However, given that, via SCT, the user is burdening risks and costs involved with the transaction on the customer, he can reduce his own costs and offer his goods or services to a lower price. If the clause in the SCT is unfair, that is unlawfully burdening the customer with costs normally the user would have to carry himself, and the competitors who are not using such unfair SCT will suffer a competitive disadvantage as their prices will remain higher (unfair advantage). This can be the only circumstance which could cause unfair competition. See, for more detail, Yeşim M Atamer, 'Unlauterer Wettbewerb durch Nutzung von ungültigen AGB?' in Susan Emmenegger et al (eds), *Brücken bauen: Festschrift für Thomas Koller* (Stämpfli 2018) 35 ff (hereafter Atamer, 'Unlauterer Wettbewerb').

[101] cf for a detailed comparative analysis of this problem Yeşim M Atamer and Pascal Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer 2020).

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term in the sense of the UCA. But this is due to the fact that the main subject matter of the contract (eg the price) is in principle open to competition and therefore also not subject to an SCT control. This is explicitly stated in Art 4(2) UTD. The only exception is intransparent drafting of the price term.[102] As long as the stipulation regarding the subject matter is drafted in a transparent manner, it will not be subject to SCT control.

In its first decision on this issue the Court of Justice of the European Union (CJEU) stated, regarding the relation of the UTD and the Unfair Commercial Practices Directives that:

> a commercial practice such as that at issue in the main proceedings which consists in indicating in a credit agreement an APR lower than the real rate must be regarded as 'misleading' within the meaning of Article 6(1) of Directive 2005/29 in so far as it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. . . . A finding that such a commercial practice is unfair is one element among others on which the competent court may, pursuant to Article 4(1) of Directive 93/13, base its assessment of the unfairness of the contractual terms relating to the cost of the loan granted to the consumer.[103]

As rightly ascertained by the CJEU, when evaluating whether a provision in SCT is prone to mislead the adhering party and thus constitutes an unfair commercial practice, the courts are working with different criteria than when deciding on the unfairness of the same provision, that is, whether it causes an unfair imbalance in the parties' rights and obligations. Terms which are misleading might not be unfair and vice versa.

Given that all requirements of Art 8 had to be met cumulatively,[104] an SCT which was obviously unfair could not be eliminated under the previous version of the norm if it was not also misleading. In fact, it is striking to see that the Supreme Court often argued that the requirement of deception was not existent in the given case and ended up not applying Art 8 UCA. Since the customer was not misled in the specific case by the usage of SCT, a further review on the basis of the UCA was deemed irrelevant.[105]

In the few cases where the Supreme Court examined whether the debated term was also unfair, the result was negative. For example, a risk distribution clause in the SCT of a bank which limited the liability of the bank for the unauthorized usage of Eurocheque to '10 cheques per ec card and case' was not found to be abusive. But this assessment was not decisive in the particular case, as the customer had violated its duty of care by leaving his Eurocheque card with thirty-two cheques, including his passport, in a parked vehicle. It was no longer a fair risk distribution issue as the customer was at fault and had to bear the consequences.[106]

[102] Atamer and Pichonnaz, 'General Report' (n 57) 32.

[103] Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECLI:EU:C:2012:144, para 47. See also Joined Cases C-776/19 bis C-782/19 *VB et al v BNP Paribas Personal Finance SA and AV et al v BNP Paribas Personal Finance SA, Procureur de la République* [2021] ECLI:EU:C:2021:470, paras 76–77.

[104] BGE 117 II 332, para 5a; BGer 15.2.2001, 5C.237/2000, para 2c.

[105] Heiss, 'Art. 8 UWG' (n 35) para 33; BGer 19.5.2008, 4A_120/2008, para 2.1.2; BGer 6.6.2002, 5C.53/2002, para 4.3; BGer 26.9.2001, 4C.88/2001, para 1a; BGer 27.3.2001, B_22/2000, para 6 (decided by the previous Federal Insurance Court); BGer 15.2.2001, 5C.237/2000, para 2c; BGer 29.6.2000, 4P.52/2000, para 3b.

[106] BGE 122 III 373, para 3b.

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3.2 New Article 8 Unfair Competition Act

3.2.1 Personal scope of application of Article 8 UCA

Given the stark hesitancy of the Swiss lawmaker to tamper with freedom of contract, it came as no surprise that an opening towards the control of the content of SCT had to be limited at least in its personal scope.[107] Therefore, even if unusual for a code on unfair competition, the application of Art 8 was restricted to B2C contracts. In fact, with the elimination of the misleadingness requirement, the connection of the provision to unfair competition was also lost. But the lawmaker could not be convinced to move the provision into the general Code of Obligations. One important argument in favour of keeping it in the UCA was certainly the right of consumer organizations to initiate actions for injunction against the users of SCT—even though, to date, no organization has made use of this right.[108]

With the limitation of the personal scope of application of Art 8, the discussion regarding the definition of 'consumer' was introduced into the UCA. As addressed above,[109] Swiss law does not have a unified definition of consumer but several different ones in different codes.[110] Given that the UCA does not define consumer, the question arises which definition should be applicable in the context of Art 8 UCA. The Supreme Court recently had the chance to shed light on this debated issue, but preferred to leave it open.[111] The Court cited in detail the two contradicting interpretations, one being in favour of applying the stricter definition and therefore subjecting only contracts for the 'ordinary consumption purpose' to Art 8 UCA, the other being more lenient and advocating an application of Art 8 to all consumer contracts without any limitation.[112] Even though the Supreme Court declared its tendency to follow the second interpretation, it stated that it 'does not have to decide this delicate question, since there are already other obvious reasons for not applying Art. 8 UCA'.[113] Therefore, as of 2023, it is still not clear which B2C contracts using SCT are subject to Art 8 UCA.

3.2.2 Unfairness according to Article 8 UCA

The definition of unfairness follows pretty much the German wording of Art 3(1) UTD with the addition regarding unfair competition. For a clause in SCT to trigger concerns of unfair competition, it must cause a significant and unjustified imbalance between the contractual rights and obligations of the parties to the detriment of consumers in a manner that violates good faith. These are the only guidelines for the courts—no black or grey list is provided. The criticism in the literature that this provision is 'overly rich in general legal terms but poor in guiding criteria'[114] is certainly justified.

[107] Peter Jung, 'Die systematische Stellung der offenen AGB-Inhaltskontrolle im UWG' in Alexander Brunner, Anton K Schnyder, and Andrea Eisner-Kiefer (eds), *Allgemeine Geschäftsbedingungen nach neuem Schweizer Recht* (Schulthess 2014) 129, 150–51.

[108] cf on the issue Section V.

[109] cf Section I 2.

[110] cf Florent Thouvenin, 'Art. 8 UWG' in Reto M Hilty and Reto Arpagaus (eds), *Basler Kommentar: Bundesgesetz gegen den unlauteren Wettbewerb* (Helbing Lichtenhahn 2013) para 80 (hereafter Thouvenin, 'Art. 8 UWG').

[111] BGer 28.10.2021, 4A_54/2021, para 6.4.2.

[112] BGer 28.10.2021, 4A_54/2021, para 6.4.2; cf also for the different views on the issue, Lorenza Ferrari Hofer and David Vasella, 'Art. 8 UWG' in Yeşim M Atamer and Marc Amstutz (eds), *Handkommentar zum Schweizer Privatrecht: Wirtschaftsrechtliche Nebenerlasse: FusG, UWG, RauRG und KKG* (4th edn, Schulthess 2023) para 3 (hereafter Ferrari Hofer and Vasella, 'Art. 8 UWG'); Pascal Pichonnaz, 'Art. 8 LCD' in Vincent Martenet and Pascal Pichonnaz (eds), *Commentaire Romand: Loi contre la concurrence déloyale (LCD)* (Helbing Lichtenhahn 2017) paras 131 ff (hereafter Pichonnaz, 'Art. 8 LCD'); cf Pichonnaz, 'Country Report' (n 47) paras 93 ff.

[113] BGer 28.10.2021, 4A_54/2021, para 6.4.2.

[114] Heiss, 'Art. 8 UWG' (n 35) para 185.

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The vagueness of the definition has also led to a very lively discussion regarding the relation of the individual requirements to each other as they seem to be overlapping.[115] Given that the Swiss lawmaker has chosen the German wording of Art 3(1) UTD, which requires in addition to the prerequisite of causing a 'significant imbalance' also that this imbalance is 'unjustified', it is argued that this has to be weighted as a separate requirement in addition to the others. According to one view for example, the judge has first to decide whether the clause causes an imbalance, second whether this imbalance is significant, third whether the significant imbalance can be qualified as one that also violates the principle of good faith, and lastly whether despite breaching the good faith principle the standard term can be justified because of concrete benefits which were granted to the consumer.[116]

However, it seems preferable to follow the view in the literature that the prerequisites of Art 8 UCA cannot be strictly isolated from one another and that the significant imbalance of rights and obligations is at the foreground with the principle of good faith providing further clarification of the control benchmark, which is mainly the fairness of the contract at hand.[117] In fact, the preamble of the UTD also underlines that the principle of good faith provides the judge with guidelines for the evaluation of the imbalance and ensures that the assessment includes all relevant circumstances of the case at hand.[118]

As the central feature of the content review is an imbalance between the contractual rights and obligations of the parties, and as Art 8 UCA no longer provides a benchmark, another debated question is whether the default rules of private law can still be utilized as control standards since this element of Art 8 UCA was abolished in the reform of 2012. Case law on the issue is lacking. However, given that the lawmaker wanted to adopt the unfairness criteria of Art 3 UTD, and the CJEU repeatedly stated that whether a term causes a significant imbalance in the parties' rights and obligations must be examined 'in the light of national rules which, in the absence of an agreement between the parties, are applicable',[119] the better view seems to be the use of the default statutory provision also under Swiss law as the benchmark of fairness.[120] The function of statutory default rules is to fill contractual gaps fairly and appropriately. Consequently, these rules are also very well suited to be used as a yardstick for unfair terms control.[121] Should there be no applicable default rule in the

[115] cf for these different views, Heiss, 'Art. 8 UWG' (n 35) paras 150 ff.

[116] cf Kramer, Probst, and Perrig, 'AGB' (n 40) paras 510–13; Probst, 'Price Related Terms' (n 32) 661; Pichonnaz, 'Art. 8 LCD' (n 112) paras 138 ff; Vischer, 'AGB' (n 39) 972 ff.

[117] <REF:BK>Peter Gauch, Walter R Schluep, and Jörg Schmid, *Schweizerisches Obligationenrecht Allgemeiner Teil: Band I* (11th edn, Schulthess 2020) para 1154 (hereafter Gauch, Schluep, and Schmid, 'Obligationenrecht'); Eva Maissen, *Die automatische Vertragsverlängerung* (Schulthess 2012) paras 313 ff. In the same vein, Heiss, 'Art. 8 UWG' (n 35) paras 219–20; Thomas Koller, 'Art. 8 UWG: Eine Auslegeordnung unter besonderer Berücksichtigung von Banken-AGB' (2014) AJP 19, 31 (hereafter Koller, 'Art. 8 UWG').

[118] cf Recital 16. This has also been underlined by the CJEU. See, eg, Joined Cases C-776/19 bis C-782/19 *VB and Others v BNP Paribas Personal Finance SA and AV and Others v BNP Paribas Personal Finance SA and Procureur de la République* [2021] ECLI:EU:C:2021:470, paras 97–98.

[119] Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García* [2017] ECLI:EU:C:2017:60, para 67; Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECLI:EU:C:2013:164, para 68.

[120] Jörg Schmid, 'AGB und die Rolle des dispositiven Rechts' in Alexander Brunner, Anton K Schnyder, and Andrea Eisner-Kiefer (eds), *Allgemeine Geschäftsbedingungen nach neuem Schweizer Recht* (Schulthess 2014) 205, 209 (hereafter Schmid, 'AGB'); Vischer, 'AGB' (n 39) 973; Thouvenin, 'Art. 8 UWG' (n 110) para 126; Heiss, 'Art. 8 UWG' (n 35) para 199; Kramer, Probst, and Perrig, 'AGB' (n 40) paras 465ff; Pichonnaz, 'Art. 8 LCD' (n 112) para 148; Ferrari Hofer and Vasella, 'Art. 8 UWG' (n 112) para 6.

[121] Schmid, 'AGB' (n 120) 209.

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case the judge has to act *modo legislatoris* and to define, first, a fair and just rule for the conflict of interest at hand and then compare this with the content of the SCT in dispute.[122]

Whether the deviation from the otherwise applicable law rules is so significant and unjustified as to violate the good faith principle has to be defined in a second step. Not every pre-formulated departure from the default rules is unfair within the meaning of Art 8 UCA. The assessment of the court shall take account of the nature and subject matter of the contract, all the circumstances existing at the time the contract was concluded, as well as all other terms of the contract, and weigh the interests of the user of the SCT.[123] If a pre-formulated clause deviates significantly from a default legal norm with a distinctive equitable content, the unfairness of the clause in question shall be presumed.[124] It is also often underlined in the literature that the grey list in the Annex of the UTD can serve as control criteria for the Swiss judiciary given that Art 8 UCA was modelled on Art 3 of the Directive.[125]

Another open issue under Art 8 UCA is whether a lack of transparency can also cause a term to be qualified as unfair as is required under Art 5 UTD.[126] Transparency is especially important to promote competition which presupposes comparability. Regarding the old version of Art 8 UCA, it could easily be argued that an intransparent clause is also 'misleading' as it would jeopardize the aim to promote competition.[127] Even though under the new Art 8 UCA a clause no longer needs to be misleading to qualify as unfair, nevertheless the argument that comprehensibility is an important feature of fairness remains. If an average consumer cannot even grasp the meaning of a clause, this also indicates an unjustified imbalance of the rights and obligations of the parties.[128] But all these questions regarding 'unfairness' in the sense of Art 8 UCA are still waiting to be answered by the Supreme Court.

3.3 Specific prohibition norms

In addition to this general provision allowing for the control of unfair SCT in all types of contracts, Art 141/I^{bis} CO can also be of importance in the context of banking and financial contracts. According to this provision, a debtor who waives their right to raise the defence that their obligation is already time-barred has to do so in writing. And if the waiver is included in SCT only the user of SCT can waive their right, not the adhering party. The adhering party can only validly waive their right by way of a negotiated term.

[122] Pichonnaz, 'Art. 8 LCD' (n 112) para 151.

[123] Schmid, 'ZBJV' (n 38) 14–15.

[124] Schmid, 'AGB' (n 120) 211.

[125] See, eg, Gauch, Schluep, and Schmid, 'Obligationenrecht' (n 117) para 1154e; Anne-Christine Fornage, *La mise en œuvre des droits du consommateur contractant* (Stämpfli 2011) para 1010; Kramer, Probst, and Perrig, 'AGB' (n 40) para 474; Pichonnaz, 'Art. 8 LCD' (n 112) para 152.

[126] Joined Cases C-776/19 bis C-782/19 *VB et al v BNP Paribas Personal Finance SA and AV et al v BNP Paribas Personal Finance SA, Procureur de la République* [2021] ECLI:EU:C:2021:470, para 94. cf on the transparency requirement and its relation to interpretation n 92.

[127] Peter C Matt, *Das Transparenzgebot in der deutschen AGB-Rechtsprechung: Ein Mittel zur Aktivierung von Art. 8 UWG?* (Helbing Lichtenhahn 1997) 106 ff. But given that the old version of Art 8 UCA required that the SCT be misleading in addition to having unfair content, a lack of transparency would not have sufficed to invalidate a clause. See ibid 139 f.

[128] Leander D Loacker, 'Preisanpassungsklauseln: Rechtsvergleichende Überlegungen de lege lata und de lege (non) ferenda am Beispiel der Versicherungsprämie' in Anton K. Schnyder (ed), *Versicherungsvertragsgesetz: Rückblick und Zukunftsperspektiven* (Schulthess 2015) 127, 163 f (hereafter Loacker, 'Preisanpassungsklauseln'); Gauch, Schluep, and Schmid, 'Obligationenrecht' (n 117) para 1153d; Heiss, 'Art. 8 UWG' (n 35) para 227; Rusch, 'SIA-Norm' (n 90) 638.

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3.4 General civil law

Finally, some other mandatory rules of general civil law may be of some importance for the control of SCT in financing contracts and are, therefore, briefly mentioned here.[129]

- **Illegality, immorality, public policy, and personality rights (Arts 19–20 CO, 27 Swiss Civil Code (CC))**: The subject matter and/or the terms of any contract may not be illegal, immoral, or impossible, and may not violate public policy or personality rights, irrespective of the fact that SCT are used.
  - Among these broad limits to freedom of contract mandatory provisions contain the most important restrictions regarding SCT (illegality). Some of those rules will be explained below.
  - Another tool for controlling SCT could have been derived from the requirement that contracts in general may not violate 'public policy'. However, the interpretation of this term and the limits it imposes on contracts is debated under Swiss law. One major strand of the literature was in favour of qualifying the usage of SCT that deviate from default statutory rules as infringing public policy.[130] As underlined above, default rules have a unique role in contract law since they represent the just and fair distribution of rights and obligations as envisaged by the lawmaker.[131] The users of SCT on the other hand are subverting the application of the default rules in a systematic and holistic way and impose their own rules on the adhering party. Therefore, it was argued that a clause deviating from default statutory rules should be invalid if it causes a significant imbalance to the detriment of the adhering party violating public policy conceptions. But this view was never shared by the Supreme Court. Its reluctance became apparent once again in the decision on the temporary scope of application of the new Art 8 UCA.[132] The Court expressly left open even the question of whether this provision forms part of Swiss public policy and can therefore also apply retroactively.
  - The limit of immorality can also become important for financial contracts as the Supreme Court finds excessive interest rates to violate moral boundaries. Except for consumer credit agreements, there is no statutory ceiling regarding interest rates (Art 14 CCA).[133] However, the Supreme Court has always practised a certain control also in B2B contracts as well as other contracts which do not fall within the scope of application of the CCA—irrespective of the usage of SCT.[134]
  - Finally, the protection of personality rights (*Persönlichkeitsrecht*) in Art 27 CC can serve as a limit to freedom of contract. According to this provision no person may, wholly or in part, renounce its legal capacity or surrender or restrict its freedom to a degree that violates the law or public morals. The individual is thus protected

[129] cf for a list of such norms Kramer, Probst, and Perrig, 'AGB' (n 40) paras 276 ff.

[130] Ernst A Kramer, 'Art. 19/20' in Arthur Meier-Hayoz (ed), *Berner Kommentar zum Schweizerischen Zivilgesetzbuch, Art. 19-22 OR* (Stämpfli 1991) paras 136 and 158 ff.

[131] Ernst Kramer, 'Konzeptionsfragen zur Vertragsinhaltskontrolle' (2018) ZSR 295, 304–05 (hereafter Kramer, 'Konzeptionsfragen').

[132] BGE 140 III 404, para 4.2.

[133] See n 142 and related text.

[134] BGE 93 II 189, para b (26 per cent grossly violates the customary interest rate); BGer 28.4.2014, 4A_69/2014, para 6.3.3 (rates over 18 per cent are considered excessive); BGer 7.12.2018, 5A_131/2018, paras 3.2.1 and 4 (16 per cent is not extraordinary).

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against excessive legal obligations. According to the Supreme Court, contractual terms that do not give the debtor a right to recover an asset pledged,[135] or that provide a right of lien that includes an unlimited circle of present and future claims, are inadmissible.[136]

- **Gross disparity (Art 21 CO)**: As in many civil law countries, the Swiss Code of Obligations contains a specific rule on gross disparity/excessive advantage-taking in contracts. According to this rule, where there is a clear discrepancy between the obligations of the parties as a result of one party's exploitation of the other's situation of distress, inexperience, or improvidence, the person suffering a detriment may declare, within one year after the conclusion of the contract, that they will not honour the contract and demand restitution of any performance already made. There are several obstacles in employing this rule for the control of SCT. As mentioned above, the main subject matter of the contract and the adequacy of the price and remuneration, even if stipulated in the SCT, is not an issue of SCT control. Article 21 CO focuses precisely on this adequacy: it is not the specific terms of the contract that are crucial, but the equivalence of the obligations.[137] Besides, a right to rescind the contract in total within one year after the contract has been concluded is also not an appropriate remedy for the control of SCT where the main aim is to keep the contract alive and just to erase the unfair term.
- **Limitation of Liability (Arts 100–101 CO)**: Certainly, the most important boundary for SCT is drawn by Art 100 CO.[138] The first paragraph of the provision defines limits for liability exclusions for all types of contracts, irrespective of the contracting parties, and forbids the exclusion for intent and gross negligence in general. In case of slight negligence, the judge has discretion to invalidate the stipulation, especially if the responsible party is limiting its liability for commercial activities conducted under an official licence.[139] However, this rather strict regime is put into perspective by Art 101(2) CO. According to this provision, the debtor can limit his liability in principle even for the intentional breach of an auxiliary person he uses in performing his obligation. Given that division of labour today almost always forces the obligor to involve third persons in the performance process, this rule seems to be far too lenient. The only remaining restriction is Art 101(3) CO, which forbids such exclusion for intentional and grossly negligent behaviour of the auxiliary if the liability arises from commercial activities conducted under an official licence. The Supreme Court has repeatedly classified banks as institutions conducting commercial activities under such an 'official licence'[140] and has therefore applied the stricter regime on exemption clauses in banking contracts.[141]

[135] BGer 20.8.2007, 4A_141/2007, para 4.3.

[136] BGE 142 III 746, para 2.2.2. See Section III 1.

[137] Kramer, Probst, and Perrig, 'AGB' (n 40) para 278.

[138] cf Pichonnaz, 'Country Report' (n 47) paras 77 ff.

[139] According to the Supreme Court '[i]n exercising its discretion, i.e. in applying the rules of law and equity the court must examine the risk transfer clause in the light of the other provisions of the contract and all the circumstances of the particular case; it must take into account, on the one hand, the need to protect clients from pre-determined clauses that are practically impossible to discuss and, on the other hand, the bank's interest in protecting itself against certain risks that are difficult to avoid', BGE 132 III 449, para 2.

[140] BGE 132 III 449, para 2; BGer 5.12.2016, 4A_386/2016, para 224. However, cf also Susan Emmenegger, Luc Thévenoz, Martina Reber, and Célian Hirsch, 'Das schweizerische Bankprivatrecht 2020' (2021) SZW 192, 199 who detect the tendency of the Court in some cases at least not to follow this approach.

[141] See n 154 for case law. cf also Pichonnaz, 'Country Report' (n 47) para 79.

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- **Penalty clauses**: As a rule, parties are free to include penalty clauses in their contact as well as in SCT. However, Art 163(3) CO grants the court the right to reduce excessive penalty clauses at its discretion.[142]
- Another mandatory rule of potential importance for banking contracts is **Art 35 CCP**, which prohibits waiving the preferential jurisdiction in Art. 32 for consumer contracts in advance or by defence pleading.
- The **Consumer Credit Act** forbids any deviation from its provisions to the disadvantage of the consumer. Even though the Act is not restricted to contracts with an 'ordinary consumption purpose', its scope of application is still limited as it excludes, similar to Directive 2008/48, credit agreements which involve a total amount of credit higher than 80,000 Swiss francs. Besides the mandatory rules on information duties, right of withdrawal, and so on, the law also prescribes the maximum chargeable interest rate, which is defined by the Federal Council (Art 14 CCA). For the year 2022, the maximum interest rate was set at 10 per cent for cash credits (Art 9 CCA), contracts to finance purchase of goods or services (Art 10 CCA), and leasing contracts (Art 11 CCA). For overdraft facilities on current accounts, or credit and customer card accounts with credit option (Art 12 CCA), the maximum interest rate is set at 12 per cent.[143]

III MAIN EXAMPLES OF DEBATED CLAUSES IN FINANCIAL CONTRACTS

In this third section, some of the terms in financial contracts that have been discussed in the case law will be analysed. In these cases, the Supreme Court mostly did not deal with the fact that the terms were part of SCT. Rather, the Court applied the general limits to freedom of contract. The decisions are also not about typical consumer contracts but contracts in which considerable sums were involved, either being invested, or being fraudulently embezzled. In any case, the Court did not discuss at all whether these could be consumer contracts and Art 8 UCA could be applied.

1 Validity and Interpretation of a Right of Lien

As stated above,[144] an unlimited right of lien of the bank for possible future claims may be considered invalid under Swiss law in order to protect the individual from excessive contractual subjugation. This invalidity applies regardless of whether such clause is used in SCT, or the adhering party is a consumer. The inclusion of uncertain future claims in a right of lien is deemed to be permissible, provided that, first, the claims are sufficiently determined or determinable at the time of the conclusion of the financial contract through clear

[142] Pichonnaz, 'Country Report' (n 47) paras 66 ff.
[143] Verordnung des EJPD über den Höchstzinssatz für Konsumkredite, 22.11.2021 (SR 221.214.111).
[144] cf nn 134 and 135.

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allocation to the business relationship between the bank and the customer and, second, the parties could reasonably expect those claims of the bank to arise against the customer.[145]

In recent years, the Supreme Court has had to rule on the validity and scope of such right of lien in several cases. These cases concerned so-called 'clawback claims' of the Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC against Swiss banks.[146] The banks had invested for their clients in several Madoff, or rather Ponzi, schemes and had already paid out the funds as well as the profits to their clients. However, after the investment fraud was discovered in 2008, the Trustee initiated 'avoidance actions' against investors and intermediaries to recover money paid out prior to the scheme being exposed.[147] Given that Swiss banks had to pay back the Trustee the amounts they already transferred to their clients, they now made use of their right of lien on the assets of their customers to recover the amount paid to the Trustee.

In two decisions, rendered in the space of only six months, the Swiss Supreme Court ruled that a clawback claim was reasonably to be expected in the first case,[148] but not in the second one.[149] Interestingly enough, the Court did not see the need to distinguish both cases.[150] In fact, it did not even mention the first decision in its second ruling. However, the facts of the cases do make it possible to distinguish them.[151] Whereas in the first case the client himself instructed the bank to invest in the Madoff feeder funds on a fiduciary basis, in the second case it was the bank's call to invest in these funds. In the first case, the bank was acting on an execution-only basis, in the second as an investment advisor. Given that in the first case the bank was confronted with clawback claims due to the investment decision taken by the client, the Court found that these were also 'closely linked to an investment transaction that is part of a foreseeable business relationship'.[152] The Supreme Court discussed the matter without once mentioning the fact that these rights of lien were introduced into the contract as part of SCT. Neither did it discuss the fairness of such a clause.[153]

2 Risk Distribution Clauses Regarding Unauthorized Transactions by Third Parties

An issue which is ever-pertinent in the Supreme Court's case law is the validity of risk distribution clauses regarding unauthorized transactions by third parties.[154] If such a clause is

[145] BGE 142 III 746, para 2.2.2. See also Annabelle Peschke, *Das Fahrnispfandrecht und die Sicherstellung künftiger Forderungen* (Schulthess 2021) 69ff; Damian A Fischer, 'Generelle Pfandklauseln in Bank-AGB' (2018) AJP 1003, 1009 (hereafter Fischer, 'Pfandklauseln').

[146] cf in detail: <http://www.madofftrustee.com> accessed 14 June 2022.

[147] As of December 2021, the Trustee has recovered or reached agreements to recover more than USD 14 billion.

[148] BGer 1.4.2016, 4A_540/2015, para 2.3.3.

[149] BGE 142 III 746, para 2.4.2. Parallel BGer 8.11.2016, 4A_62/2016, paras 3–5.

[150] cf for a critical review, Susan Emmenegger, Luc Thévenoz, Thirza Döbeli, and Leandro Lepori, 'Das schweizerische Bankprivatrecht 2016' (2017) SZW 210, 211–12.

[151] See, for more details, Fischer, 'Pfandklauseln' (n 145) 1012.

[152] BGer 1.4.2016, 4A_540/2015, para 2.3.3.

[153] As a result of these decisions the SCT of the banks today read mostly as follows: 'This right of lien and set-off also applies to any right of the Bank to be indemnified and held harmless, especially when claims are asserted against it by third parties (including issuers, liquidators, legal administrators, bankruptcy administrators, institutions, and government authorities) in connection with transactions conducted or assets held on behalf of the client.'

[154] cf, eg, Sandro Bernet and Hans Caspar von der Crone, 'Haftungsrechtliche Stellung der Bank bei Vollmachtsverhältnissen' (2020) SZW 489.

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part of SCT of a bank, a multi-step analysis is needed to ascertain their validity. In the first stage, the Court must establish whether the transactions were executed on the customer's instructions or not. If the money transfer was carried out without a mandate, the Court must ascertain, second, whether the risk of such unauthorized transaction must be assumed by the bank, or, where there is a valid risk transfer clause, whether it must be borne by the customer. Again, the Supreme Court does not question the validity of such risk transfer clauses in SCT on the ground of a potential unfairness, but only invalidates them to the extent they violate Art 100 or 101 CO, which apply by analogy.[155] As was seen above,[156] these mandatory provisions invalidate exemption clauses for intent and gross negligence. Even though in the case of unauthorized transactions the bank is not technically violating its duty of care against its customer (as the bank itself encounters the loss due to unauthorized transfers), the Supreme Court found that this rule can apply by analogy given that the risk is transferred to the customer by contract. It would therefore be necessary to check whether the bank took steps to avoid unauthorized transactions. That means the bank cannot transfer the risk for its intentional or grossly negligent behaviour, which allowed the fraudulent transaction to happen. If there is no risk transfer clause in the contract,[157] or it is found to be invalid, the Court needs to examine in a third step whether the client has culpably contributed to causing or aggravating the loss suffered by the bank.[158]

Two questions remain open: what if the unauthorized transaction was due to a slight negligence of the bank, or the bank was not at fault at all? The answer to the second question is easy: according to the Swiss Supreme Court, the banks can shift the risk of unauthorized transactions fully to the customer where they were not at fault.[159] Such one-sided risk distribution clauses are not controlled even where they are included in SCT. Regarding slight negligence, the issue is not clear-cut. Even though there are many cases that qualify banks as institutions carrying out commercial activities under an 'official licence'[160] and therefore apply the stricter regime of Art 100(2) and 101(3) CO, there are also newer cases in which the Court does not discuss this further.[161] All in all, this risk distribution regime of the Supreme Court is significantly different from that provided for in Art 73-74 PSD II, and can still not be considered as settled.

3 Kickback Commissions, Retrocessions, Finder's Fees

Since 2006, the Supreme Court has decided several times that investment advisors and asset managers have to pass on any fees, commissions, retrocessions, or other monetary or

[155] BGer 6.7.2020, 4A_161/2020, para 5.1.1; BGer 29.5.2018, 4A_81/2018, para 3.

[156] cf nn 138–40 and related text.

[157] The Court sometimes found by way of interpretation that a clause was not drafted in a manner to transfer the risk to the customer. BGE 146 III 387, para 5.3. ('In the present case, under article 1 of the bank's general terms and conditions of business (entitled "Examination of legitimacy"), the bank is obliged to check the legitimacy of the client and his authorised representatives with the care customary in the business world and to bear the damage resulting from such a failure if it, its employees or agents fail to comply with this obligation. By this clause, as the cantonal court held, the parties had not agreed on a clause transferring the risk to the client.')

[158] BGE 146 III 387, para 6.1; BGE 146 III 121, para 5.

[159] BGE 146 III 326, para. 6.2.1.1; BGer 6.7.2020, 4A_161/2020, para 5.1.1.

[160] cf n 140.

[161] eg BGE 146 III 326, para 6.3.1 (hackers had taken control of the customer's email account and had given fraudulent transfer orders).

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non-monetary benefits they receive from the issuers of financial products or other parties to their customers.[162] According to case law, the rules on agency apply to asset management contracts. Pursuant to Art 400 para 1 CO, the agent is obliged to return everything that he gained based on this management contract. This includes indirect advantages that the agent receives from third parties due to the execution of the mandate. The agent should neither gain nor lose from the mandate—apart from any fee; he must therefore surrender all assets that have an intrinsic connection with the execution of the mandate to the customer. The Supreme Court also decided that the principal can only 'validly' waive this claim if he has received full and truthful information on the expected inducements and if his willingness to waive these returns is expressly stated in the agreement with the agent.[163] However, the Supreme Court did not explain where it derives this validity requirement from.[164]

In a decision in 2020,[165] the Supreme Court found, for example, that a stipulation in the 'information notice' explaining that the 'remuneration on the assets held in investment funds, structured products, other bank products, or on contributions made by the client shall be within a range of 0% to 1% of the volume invested' did not meet the standards laid down, given that the clients were not informed of the size of the inducements and were therefore not in a position to know how much the management company was charging them for the asset management.

On 1 January 2020, the FinSA entered into force. Even though this piece of legislation serves—at least partially—to implement MiFID II, it does not follow the strict approach of Art 24(7)–(9) MiFID II on third-party benefits. According to Art 26 FinSA, financial service providers may accept compensation from third parties in connection with the provision of financial services if they have expressly informed the client in advance of the compensation and the client waives its rights. The information to the clients must include the type and scope of the compensation and must be supplied before the financial service is provided or before the contract is concluded. If the amount cannot be determined in advance, the financial service provider shall inform its clients of the calculation parameters and the ranges. Upon request, financial service providers shall disclose the amounts received.

It remains to be seen whether the Supreme Court will consider a stipulation in SCT to be an express information in the sense of Art 26 FinSA. Besides, it might still classify these types of terms in SCT as surprising, as in most of the cases the customers will not take notice of this stipulation, and if they do, they will not be able to judge the exact amount they are conceding to the agent.[166] Finally, it also remains to be seen whether the Supreme Court would conduct a fairness control of these terms via Art 8 UCA. The risk that the Court would not classify customers who are investing their savings in securities for, for example,

[162] eg BGE 132 III 460, para 4.2; BGer 13.5.2020, 4A_355/2019, para 3.4; BGer 8.9.2022, 4A_601/2021, para 7.2. cf on the penal implications of not passing on these amounts Martina Reber, Susan Emmenegger, and Marianne Johanna Lehmkuhl, 'Retro-Strafbarkeit nach Art. 158 StGB: Questions and (some) Answers' (2021) SZW 144, 144 ff.

[163] BGE 137 III 393, para 2.2; Thomas Probst, 'Bankgebühren und der Schutz des Kunden vor missbräuchlichen AGB' Jusletter, 24 April 2017, para 32 (hereafter Probst, 'Bankgebühren').

[164] Probst rightly criticizes this and explains that the only reason for the contract term not to be applied is dissent between the parties. There is no agreement which derogates from the default rules as the agent has not fulfilled the requirements set by the Supreme Court. Probst, 'Bankgebühren' (n 163) para 32. cf also BGer 8.9.2022, 4A_601/2021, para 7.2 where the Federal Supreme Court left the controversial question whether the duty to pass on any fees also applies to Execution-Only relationships open.

[165] BGer 13.5.2020, 4A_355/2019, para 3.4.

[166] Probst, 'Bankgebühren' (n 163) para 37.

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personal pension purposes as 'consumers' is very real.[167] Even though the purpose of the transaction lies outside of their trade or profession, the Court might not extend the scope of protection of Art 8 UCA to transactions which, in its eyes, do not serve ordinary consumption purposes.

4 Notice and Approval Fictions

The Supreme Court has had to decide several times (mostly in relation to investment decisions taken by the bank without client approval) on the validity of fictions in SCT regarding receipt of notices as well as approval of these notices, if they were not opposed to by the customer in the period defined in the SCT. Again, the Supreme Court addressed the issue from a general contract law angle and did not discuss the validity of any SCT.[168] According to the Court, such approval fictions are in principle permissible and indicate consent on the side of the customer if he does not object to the transaction carried out by the bank within the stipulated time limit.[169] However, if the parties have chosen the retained correspondence option, the Court may rule that the approval fiction is not binding in case it leads to an inequitable result that violates the abuse of rights prohibition stated in Art 2 CC.[170] Thus, the bank may not invoke the fiction of approval if it uses it to intentionally harm its client, or if it was aware of the actual non-approval of the client (eg when acting without instructions in the context of an execution-only relationship).[171] Also, the fiction of approval presupposes that the complaint must be objectively possible and reasonable for the customer.[172]

IV CONSEQUENCES OF UNFAIRNESS

As noted above, to date the Supreme Court has only practised limited 'consent control' based on the existence of a surprising standard term. If a term is found to be surprising, it is not incorporated in the contract. This is not a validity issue.[173] However, the consequences of violating Art 8 UCA are very different. Regarding the previous version of Art 8 UCA, there was a debate in the literature whether misleading SCT which trigger unfair competition can also be categorized as violating mandatory law and therefore be invalid. After the revision of Art 8 UCA, this discussion abated.[174] Today the majority view seems to be that

[167] See Section II 3.2.1 and BGer 28.10.2021, 4A_54/2021, para 6.4.2.

[168] eg BGer 6.7.2020, 4A_161/2020, para 5.4.5.

[169] BGer 15.1.2009, 4A_488/2008, para 5.1.

[170] BGer 9.11.2015, 4A_42/2015, para 5.2; BGer 6.7.2020, 4A_161/2020, para 5.4.5. For criticism of the line of argumentation of the Federal Court, see Susan Emmenegger, Luc Thévenoz, Martina Reber, and Célian Hirsch, 'Das schweizerische Bankprivatrecht 2018' (2019) SZW 190, 192; Tobias Aggteleky, 'Die fingierte Genehmigung pflichtwidriger Anlageentscheide' Jusletter, 9 November 2015, paras 10 ff.

[171] BGer 26.5.2020, 4A_386/2019, para 4.3.2.

[172] BGer 9.11.2015, 4A_42/2015, para 5.2.

[173] According to the Supreme Court, if a summary procedure is applied, no in-depth interpretation of the contract can be carried out at that stage. This is also true for the surprisingness test applied to SCT. Only when a negative declaratory relief is sought may the Court go into such details (BGer 5.5.2020, 5A_397/2019, para 2.4.3). Whether the Court would also apply the same reasoning if the invalidity of a clause in SCT is alleged in a summary procedure remains to be seen. This would contradict the settled case law of the CJEU. cf, eg, Case C-49/14 *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others* [2015] ECLI:EU:C:2016:98, para 55.

[174] But cf Nicolas Kuonen, 'Le contrôle des conditions générales: l'envol manqué du phénix' (2014) SJ II 1, 30.

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an unfair term in the sense of Art 8 UCA is invalid according to Art 20 CO.[175] The judge would have to examine the invalidity of such clause of its own motion.[176] It is to be hoped that this will also happen in Swiss courts in the not-too-distant future.

According to Art 20(2) CO, if the invalidity is limited to some parts of the contract, only these parts are null and void as long as it cannot be assumed that the contract would not have been concluded at all without the void part. But the user of SCT should not have the right to invoke this defence as this would undermine the aim of Art 8 UCA to protect the consumer.[177] Either the contract will be kept alive without the particular clause, or the lacuna will be filled by the judge. This can be done by using the same statutory rule which was employed as a benchmark for determining a just and fair distribution of rights and obligations, or, in the absence of such default rule, the judge has to act *modo legislatoris* and fill the gap in the statute as well as in the contract.[178]

Another question is whether the judge can correct the unfair term himself by adapting it to the legally permissible level.[179] If, for example, an SCT is excluding liability for all types of faulty conduct, should the judge just invalidate the clause for intentional and gross negligent behaviour (mandatory rule, Art 100 CO) and keep it intact for slight negligence,[180] or strike out the clause in total and let the drafter of the SCT be liable for all negligent conduct? In one decision, the Swiss Supreme Court discussed the different views in the literature in detail and rejected such reduction to the permissible level as it would contravene the protective purpose of the mandatory norm.[181] However, when limiting the coverage of a right of lien for future claims in the SCT of a bank, it stated that 'if the pledge contract contains an excessive obligation, the cover provided by the pledge must be reduced to what is permissible, either by restrictive interpretation or by virtue of Art. 20 para. 2 CO'.[182] It remains to be seen whether the Supreme Court will follow the rather strict approach of the CJEU[183] once it starts employing Art 8 UCA more widely. In the literature, a right of the SCT user to ask for reduction to the permissible level is mostly denied. Also, terms like 'as far as legally allowed for', 'as far as possible' are deemed to be invalid.[184]

[175] Heiss, 'Art. 8 UWG' (n 35) para 244; Vischer, 'AGB' (n 39) para 974; Thouvenin, 'Art. 8 UWG' (n 110) para 144; Gauch, Schluep, and Schmid, 'Obligationenrecht' (n 117) para 1155; Kramer, Probst, and Perrig 'AGB' (n 40) para 507; Koller, 'Art. 8 UWG' (n 117) 34; Claire Huguenin, *Obligationenrecht, Allgemeiner und Besonderer Teil* (Schulthess 2019) para 636.

[176] Ahmet Kut and Christoph Bauer, 'Art. 19-20 OR' in Yeşim M Atamer and Andreas Furrer (eds), *Handkommentar zum Schweizer Privatrecht: Obligationenrecht Allgemeine Bestimmungen Art. 1-183 OR* (4th edn, Schulthess 2023) para 38; Pichonnaz, 'Art. 8 LCD' (n 112) para 170; Heiss, 'Art. 8 UWG' (n 35) para 245.

[177] Heiss, 'Art. 8 UWG' (n 35) para 246; BGer 18.12.2008, 4A_404/2008, para 5.6.2.

[178] Vischer, 'AGB' (n 39) 975; Thouvenin, 'Art. 8 UWG' (n 110) para 147; Pichonnaz, 'Art. 8 LCD' (n 112) para 172; Schwenzer and Fountoulakis, 'Obligationenrecht' (n 42) para 46.09.

[179] cf in detail Alessia Dedual, *Geltungserhaltende Reduktion: Richterliche Ersatzregelbildung im schweizerischen Vertragsrecht* (Mohr Siebeck 2017) 261 ff.

[180] However, given that the Supreme Court mostly classifies banks as commercial actors conducting their business under an 'official licence' an exclusion of liability, even for slight negligence, can be invalid. cf nn 138–39.

[181] BGer 18.12.2008, 4A_404/2008, para 5.6.3.2.1.

[182] BGer 1.4.2016, 4A_540/2015, para 2.3.1.

[183] cf Joined Cases C-154/15 and C-307/15 *Francisco Gutiérrez Naranjo vs Cajasur Banco SAU, Ana María Palacios Martínez vs Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA v Emilio Irles López, Teresa Torres Andreu* [2016] ECLI:EU:C:2016:980, para 60.

[184] Heiss, 'Art. 8 UWG' (n 35) para 249; Thouvenin, 'Art. 8 UWG' (n 110) para 146; Pichonnaz, 'Art. 8 LCD' (n 112) para 172; Koller, 'Art. 8 UWG' (n 117) 34 f; for a more nuanced view, see Alessia Dedual, 'Geltungserhaltende Reduktion' (2017) AJP 844, 852 f.

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V PROCEDURAL ASPECTS

Under Swiss law the invalidity of a contractual term happens *eo ipso* and can be invoked at any time without being subject to a limitation period.[185] Judges must assess the grounds for invalidity of their own motion. The party invoking such invalidity has to prove the factual conditions from which he seeks to derive the illegality of the contract. However, the assessment of whether the established facts trigger invalidity is a legal question to be clarified *ex officio*. The claims for restitution of any payments made based on invalid SCT will be subject to a limitation period. This claim is mostly qualified as an unjust enrichment claim[186] which is time-barred three years after the date on which the person suffering a loss learned of his claim, and in any event ten years after the date on which the claim first arose. As such, the present situation in Switzerland does not meet the standards set by the CJEU.[187]

Article 10(1) UCA provides that actions for infringement of the UCA may also be brought by customers whose economic interests are threatened or harmed by an act of unfair competition. Thus, any consumer affected by an unfair term has standing to sue. According to Art 9 UCA, the consumer can demand an injunctive or declaratory relief regarding the unfair term at issue, combined with a claim for damages under the Code of Obligations.

More important is the right granted to consumer associations[188] and also the Federal State (represented by the State Secretariat for Economic Affairs—SECO[189]) to sue for the continued use of unfair terms in SCT.[190] This action for an injunction and elimination of the unfair term is independent of the claims of individual consumers.[191] As the parties of the claims are different, no *lis pendens* effect occurs.[192] Even if a consumer organization succeeds in the action, the *res judicata* does not extend beyond the parties of the action. There is also no requirement in Swiss law to consider *ex officio* any judgment annulling a certain unfair term. But there is certainly an indirect effect as the consumer association has the right to ask for the unfair term to be excluded from all SCT used by the party losing the

[185] Ernst E Kramer, 'Art. 19-20 OR' in Arthur Meier-Hayoz (ed), *Berner Kommentar, Inhalt des Vertrages, Art. 19-22 OR* (Stämpfli 1991) para 311 (hereafter Kramer, 'Art. 19-20 OR').

[186] Kramer, 'Art. 19-20 OR' (n 185).

[187] cf, eg, Joined Cases C-776/19 bis C-782/19 *VB et al v BNP Paribas Personal Finance SA and AV et al v BNP Paribas Personal Finance SA, Procureur de la République* [2021] ECLI:EU:C:2021:470, paras 48 and 89.

[188] Art 10(2)(b) UCA: 'Associations of nationwide or regional significance that are dedicated to consumer protection in accordance with their articles of association.'

[189] Pichonnaz, 'Art. 8 LCD' (n 112) para 180.

[190] See, for more detail, Lucy Gordon-Vrba, 'AGB-Kontrolle durch Verbandsklagen der Konsumentenverbände' in Alexander Brunner, Anton K Schnyder, and Andrea Eisner-Kiefer (eds), *Allgemeine Geschäftsbedingungen nach neuem Schweizer Recht* (Schulthess 2014) 265 ff.

[191] To date, associations have only had the right to raise non-monetary claims like those for injunctive or declaratory relief. As of 10 December 2021, the Federal Council presented a new proposal on collective legal protection, which recommends that Parliament adopt a proposal granting associations an additional right to claim compensation. The reparative collective action requires that the claims for compensation are based on similar facts and legal grounds and that there is mass or dispersed damage. Furthermore, at least ten persons must be affected. In other words, at least ten opt-ins or authorizations are required for a claim to be admissible. In the explanatory notes to the proposed Art 307d CCP it is stated that 'only if and to the extent that affected persons expressly grant an association their authorization to conduct legal proceedings, shall the action brought by the association have effects for and against them'. However, for the time being the proposal is not expected to be discussed again before the second quarter of 2023, Press release of the Parliament, 24 June 2022 <https://www.parlament.ch/press-releases/Pages/mm-rk-n-2022-06-24.aspx>.

[192] Tanja Domej, 'Art. 10 UWG' in Reto Heizmann and Leander D Loacker (eds), *UWG: Bundesgesetz gegen den unlauteren Wettbewerb: Kommentar* (Dike 2017) para 34 (hereafter Domej, 'Art. 10 UWG').

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case. Additionally, in a consumer action, the previous decision obtained by the consumer association will serve as a non-binding precedent.[193]

One of the main reasons for placing the provision on the control of SCT in the Unfair Competition Act was exactly this right of associations to challenge unfair terms. However, there has not been a single Swiss Supreme Court decision based on such an action to date. The dauntingly high court fees are not just discouraging individuals from suing SCT users, but often consumer associations as well.[194] The SECO itself seems never to have made use of its right to file a claim against unfair terms.[195]

An out-of-court alternative dispute resolution (ADR) mechanism is offered by the Swiss Banking Ombudsman, which acts as a mediation body for clients (consumer as well as non-consumer) of the member institutions of the Swiss Bankers Association. The Banking Ombudsman presents itself as a neutral institution acting as an independent mediator. Instead of a judgment, it submits a negotiated solution to the parties of the dispute. The parties are free to decide whether to follow this solution or to initiate a legal action. According to the available statistics, the central claims office dealt with 2,006 applications in 2022.[196]

VI CONCLUSION

When looking at Swiss law, a split picture can be observed: on one side, the doctrine, which is almost unanimously in favour of SCT control similar to that provided in the UTD, and perhaps going even further;[197] on the other hand, the courts' practice, which to date, cannot convince themselves to accept the reality of SCT as an obstacle to a free market economy and therefore of the need to control them. Even though the Swiss Supreme Court tries to conceal this lack of control by way of excluding 'surprising terms', interpreting SCT in favour of customers, or applying general contract law limits, it is striking to see that as of 2023 there is not a single decision in which a term in SCT has been found to be unfair according to Art 8 UCA. However, given the constant pressure from the academy, one can only hope that the floodgates will open soon.

[193] Kramer, Probst, and Perrig 'AGB' (n 40) para 524; Domej, 'Art. 10 UWG' (n 192) para 34.

[194] Probst, 'Price Related Terms' (n 32) 662. See also Arnold F Rusch and Andreas Schirrmacher, 'Konsumentenorganisationen im AGB-Streit' [2013] ZBJV 683, 689 ff. There are four main organizations which get limited financial support from the Federal State. However, as of 2022, even that level of support has been reduced.

[195] In 2016 SECO seems to have threatened several banks with such a claim if they do not reduce their charges for the transfer of a securities accounts to another financial institution. cf Alfred Koller, 'Die Bepreisung des Depottransfers in AGB, Banken im Streit mit dem SECO' (2018) 154 ZBJV 561 ff.

[196] Annual Report 2022: <https://bankingombudsman.ch/wp-content/uploads/2023/05/Jahresbericht-2022.pdf>. According to the statistics for 2022, the Ombudsman dealt with and closed a total of 2006 cases, of which 1302 were oral and 704 written. The Ombudsman contacted the financial institution in 257 cases (previous year 236), which corresponds to 37 per cent of the total number of cases or 44 per cent of the cases with requests for mediation. In 170 cases, or two-thirds of these interventions by the Ombudsman, the Ombudsman considered a correction by the financial institution to be appropriate after an in-depth factual analysis. In 95 per cent of these cases, the financial institution agreed with the Ombudsman's opinion and accommodated the client.

[197] In favour of limited control, also in B2B relations, especially if the customer is an SME, see Loacker, 'Preisanpassungsklauseln' (n 128) 160; Isabelle Wildhaber, 'Inhaltskontrolle von Allgemeinen Geschäftsbedingungen im unternehmerischen Verkehr' (2011) 107 SJZ 537, 545; Kramer, 'Konzeptionsfragen' (n 131) 323.

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