

Standard trade terms



Art. 1341, paragraph 1, CC - *Standard trade terms*

Standard trade terms that have been drafted in advance by one of the parties are effective towards the other if, at the moment of entering into the contract, that party **was aware** of them or **should have been aware** of them using ordinary diligence.

Example 1: If Bill takes a train, and is not aware that a supplement to the normal fare is payable on certain trains, provided Bill could have or should have known by using ordinary diligence that the State Railways require a supplement to be paid for travel on fast trains, then that is contained in the contract (= Bill is obliged to pay it).

Example 2: Paul leaves his car in a supermarket carpark. At the entrance a sign *clearly* states that the carpark management applies a penalty to car owners who leave the car in the carpark over night. In this case, Paul can't refuse to pay the penalty claiming that he didn't see/read the sign.

⇒ *What are the features of Art. 1341, paragraph 1, CC?*

Contractual autonomy implies that each contract has legal effects only as desired by the parties. An essential element of every contract is a “**genuine**” **agreement** between the parties (cf. Art. 1325 CC).

In this case, it is assumed that certain contents of the contract that the party was not aware of at the moment of entering into the contract, form part of the contract ... **so long as he/she could have been aware of them using ordinary diligence!**

N.B.:

In essence, it is assumed that certain contents form part of the contract even if one of the parties to it has **not** expressed his/her **will** about it.

In other words, the principle **ignorantia legis non excusat** (“*ignorance of [the existence of] a rule of law is no excuse*”), that usually applies to the law, also applies towards the party setting down the terms.



Example: I can't avoid a provision of the law that prohibits to build less than three metres from my neighbour by claiming ignorance of it. Similarly, I can't get out of paying the fare supplement on the grounds that I didn't know that a higher fare was payable on that type of train.

Art. 1341, paragraph 1, CC therefore clearly advantages the party setting down the terms, inasmuch as he/she can assert his/her **standard trade terms** provided that they have been adequately publicised (= that is, they have been made recognisable).

Art. 1341, paragraph 2, CC - *Standard trade terms* [Stt]

In any case, terms that establish, for the party who drafted them in advance, limitations of liability, the power of withdrawing from the contract or of suspending its performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise defenses, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses, or derogations from the competence of courts, are ineffective unless specifically approved in writing.

Example: An envelope which John had sent by courier is lost. It had contained a new Rolex. Paul seeks CHF 5.000 in compensation. The carrier objects that its standard trade terms limit his liability to CHF 100.

⇒ *Did the system of protecting the other party laid down by the law work?*

⇒ *Why not?*

Specific approval in writing of terms listed in Art. 1341, paragraph 2, CC

3. Salvo diverso accordo scritto tra le parti, la Banca ha facoltà di cedere a terzi i contratti conclusi con il Cliente. Salvo diverso accordo scritto tra le parti, il Cliente non può cedere a terzi i contratti conclusi con la Banca. Qualsiasi atto di disposizione del Cliente in merito non avrà alcun effetto per la Banca.

4. Cataloghi, offerte, pubblicità o altri documenti promozionali hanno valore puramente indicativo e, salvo diverso accordo scritto tra le parti, non possono considerarsi in alcun modo parti integranti e/o sostanziali dei contratti conclusi dal Cliente con la Banca, né derogare alle presenti Condizioni Generali.

5. La Banca si riserva la facoltà di anticipare la chiusura delle eventuali offerte promozionali relative ai propri prodotti e servizi naturalmente senza che ciò possa arrecare alcun pregiudizio al Cliente che abbia aderito all'offerta prima della revoca della stessa.

6. Salvo diverso accordo scritto, la Banca presta i propri servizi esclusivamente a soggetti residenti in Italia.

7. La mancata applicazione per uno o più periodi di liquidazione periodica delle spese o delle commissioni dovute in relazione ai servizi prestati dalla Banca non comporta rinuncia alle stesse da parte della Banca.

Art. 112 - Operazioni di Informazione

carico dello stesso Cliente, fatto salvo quanto diversamente indicato nelle condizioni che regolano i singoli servizi e/o prodotti.

3. La Banca è autorizzata a provvedere, anche mediante addebito in conto corrente, alla regolazione di quanto ad essa dovuto.

Art. 114 - Legge regolatrice, lingua utilizzata, Foro competente

1. Il presente Contratto, le operazioni eseguite ed i Contratti conclusi a mezzo del Servizio sono regolati dalla legge italiana, salvo accordi specifici. Tutte le comunicazioni tra la Banca ed il Cliente avvengono in lingua italiana.

2. Per ogni controversia che potesse sorgere in dipendenza del presente Servizio, il Cliente e la Banca convengono che il Foro elettivo per chiamare in giudizio la Banca sia esclusivamente quello di Milano, mentre quest'ultima potrà chiamare in giudizio il Cliente a propria insindacabile scelta sia dinanzi al Foro di Milano che dinanzi ad uno dei Fori competenti ai sensi degli artt. 18, 19 e 20 c.p.c. (Foro generale delle persone fisiche, Foro generale delle persone giuridiche e delle associazioni non riconosciute, Foro facoltativo per le cause relative a diritti di obbligazione).

3. La disposizione di cui al comma precedente non si applica qualora il Cliente rivesta la qualità di consumatore ai sensi Codice del Consumo.

Signature

Il sottoscritto Cliente dichiara di aver preso atto e di accettare specificamente, anche ai sensi e per gli effetti degli artt. 1341 e 1342 del Codice Civile, degli artt. 118 e 126-sexies del TUB, le seguenti clausole: **ai sensi dell'art. 1341, secondo comma Cod. Civ. dell'Art. 118 le seguenti clausole:**

Art. 5 comma 1 (estinzione del rapporto su richiesta di uno solo dei coistestatori); Art. 7 commi 2, 4 e 5 (nomina, revoca, modifica e cessazione dei poteri di rappresentanza); Art. 10 comma 3 (sostituzione nell'esecuzione dell'incarico); Art. 11 (diritto di compensazione ed operatività dei diritti di compensazione e di garanzia nei confronti dei coistestatori); Art. 12 (diritto di pegno e ritenzione, cessioni di crediti e garanzie); Art. 13 (spese e oneri fiscali); Art. 14 Clausola risolutiva espressa; Art. 15 (scelta dell'organismo di mediazione); Art. 16 (foro giudiziario competente); Art. 17 (nullità parziale - esercizio di diritti e prove); Art. 18 Varie; Art. 19 (convenzione di assegno e responsabilità della banca); Art. 20 (compensazione e pagamento di assegni); Art. 23 (versamento in conto di assegni ed effetti sull'estero e bonifici da eseguirsi all'estero); Art. 25, comma 2 (non opposizione della clausola effettivo); Art. 26 Sconfinamenti in assenza di fido; Art. 27 Commissione di istruttoria veloce (eventi straordinari che comportano l'applicazione di commissioni a favore della Banca); Art. 28 commi 3, 4, e 5 (Modifica Unilaterale delle condizioni); Art. 30 (capitalizzazione degli interessi ed oneri); Art. 31 comma 4 (Condizioni approvazione dell'estratto conto); Art. 32 (Conto non movimentato); Art. 33 (recesso dal contratto di conto corrente e/o dalla convenzione d'assegno); Art. 34 (recesso della banca); Art. 35 (effetti del recesso); Art. 36 Esecuzione di operazioni tramite altri intermediari abilitati; Art. 39 (utilizzo delle somme accantonate); Art. 40 (estinzione del conto corrente); Art. 42 comma 6 (Spese per recupero dei fondi); Art. 43 comma 2 (Spese per la comunicazione di rifiuto obiettivamente giustificato); Art. 44 (operazioni di pagamento non autorizzate, non eseguite o eseguite in modo inesatto); Art. 45 commi da 1 a 4 e 6 (Modifica unilaterale delle condizioni contrattuali); Art. 47 (recesso dai servizi di pagamento); Art. 53 comma 1 (spese per la revoca di un ordine di bonifico effettuata oltre i termini); Art. 57 (domiciliazione e addebito di RID); Art. 58 comma 3, 4 e 5 (spese per la revoca di un singolo ordine di pagamento RID effettuata oltre i termini - Esclusione della facoltà di revoca nel caso in cui la Banca sia creditrice del relativo importo - rinuncia alla facoltà di revoca di un singolo ordine di pagamento RID); Art. 61 comma 3 (rinuncia al diritto di rimborso concordata con il creditore); Art. 63 comma 1 (spese per la revoca di un ordine di pagamento di RIBA, MAV, RAV, Bollettino Freccia effettuato oltre i termini); Art. 71 Operazioni di pagamento di pedaggi autostradali- FastPay; Art. 72 Servizio SMS Alert; Art. 73 Erogazione dei Servizi Bancomat/PagoBancomat; Art. 74 Rapporti con Esercenti Convenzionati; Art. 76 Condizioni economiche e autorizzazione all'addebito in Conto; Art. 80 Comunicazioni periodiche e condizioni contrattuali vigenti; Art. 81 Modifica unilaterale delle condizioni contrattuali; Art. 83 Recesso della Banca; Art. 85. Risoluzione del Contratto; Art. 86 Facoltà della Banca di bloccare la Carta; Art. 87 comma 4 (opponibilità della denuncia di smarrimento o di sottrazione); Art. 88 Responsabilità del Titolare per l'utilizzo non autorizzato della Carta; Art. 89 Operazioni non autorizzate o eseguite in modo inesatto; Art. 90 Rimborso a seguito di operazioni non autorizzate; Art. 91 Mancata o inesatta esecuzione di un'operazione; Art. 93 Solidarietà e indivisibilità delle obbligazioni assunte ed imputazione dei pagamenti; Art. 94 Reclami e risoluzione stragiudiziale delle controversie; Art. 95 Legge applicabile, interpretazione a favore del Consumatore e Foro competente; Art. 98 Ambito di applicazione; Art. 99 Conclusione ed efficacia del contratto; Art. 100 Oggetto del servizio; Art. 101 Utilizzo del Servizio in modalità Internet Banking; Art. 102 Disponibilità del Servizio; Art. 104 Rischi; Art. 105 Limiti operativi; Art. 107 Customer Service; Art. 108 Mobile banking e Phone Banking; Art. 109 Esecuzione degli ordini e comunicazioni - Elezione speciale di domicilio; Art. 110 Applicazione delle condizioni economiche e modifiche unilaterali; Art. 111 Nuovi Servizi e Varie; Art. 112 Operazioni di informazioni; Art. 113 Spese a carico del cliente; Art. 114 Legge regolatrice e lingua utilizzata - Foro competente.

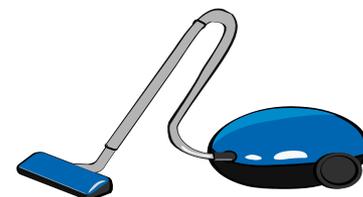
S
P
P
e
r
c
i
f
i
c
a
p
-
w
o
r
i
n
g

Signature

Let's consider a **vacuum cleaner**.

Imagine that, at the moment when the **vacuum cleaner** is sold, you sign a term which says that, should there be a fault in the machine, the purchaser undertakes to take it back to the nearest authorised centre. Repair is **free**.

In this way, the producer clearly makes the purchaser responsible for a cost (transporting the **vacuum cleaner** to the retailer) which would otherwise fall to the seller, since a fault in the **vacuum cleaner** represents non-performance of the contract (cf. Art. 1218 CC).



The prospective purchaser has the following choice:

1. - sign the contract without reading the *stt* set down by the other party;
2. - read and assess the *stt* and possibly seek a change.

⇒ Which of the two is the economically rational choice?

1. In terms of **opportunity cost (OC)**, then, assuming that the time needed to take the vacuum cleaner to the nearest retailer is 15 minutes:

$$1\text{h} = 16 \text{ CHF}$$

$$15 \text{ min.} = 4 \text{ CHF} \quad \text{OC} \approx 4 \text{ CHF} \quad [\text{includes cost of transport by car}]$$

The probability that a **vacuum cleaner** is faulty is: $P(x) = 1:100$

If the **vacuum cleaner** is bought without the *stt* being read, the current value of the **opp. cost** is: $E(\text{OC}) = \text{OC} \times P(x) = 4 \times 1/100 = \text{CHF } 0.04$

2.

Suppose that the potential purchaser reads the term and then succeeds in being relieved by the retailer of the obligation to return the faulty **vacuum cleaner** to the point of sale. Reading *all* the standard trade terms, and then negotiating, requires the “investment” of 15 minutes by the potential purchaser.

1h = 16 CHF

15 min. = 4 CHF OC = 4 CHF

Since it is an expense that the potential purchaser always has to bear: $P(x) = 1$

The **opportunity cost**, in this second hypothesis, is always: $E(OC) = OC \times P(x) = OC$

$E(OC) = 0.04 \text{ CHF}$ \Leftrightarrow ~~$E(OC) \approx 4 \text{ CHF}$~~

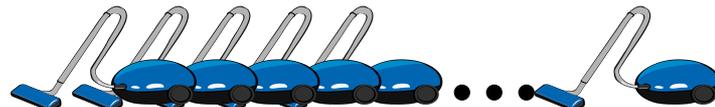
Agreeing to a contract drafted in advance by others without even reading it is, therefore, **economically rational**.

Consider the situation of *the party drafting the terms in advance*.

Supposing that the the party setting down the terms also needs 15 minutes to take back a faulty **vacuum cleaner**, an **opportunity cost** $OC = 4 \text{ CHF}$ is involved for every faulty **vacuum cleaner**.

This is a cost that the party setting down the terms passes on to the consumer, introducing some *stt* that burden the consumer with the transport costs. The overall “saving” (**OS**) can be considerable.

If, hypothetically, 20,000 vacuum cleaners are sold, then:



$OS = OC \times Q \times P(x) = 4 \text{ CHF} \times 20.000 \times 1/100 = \text{CHF } 800$



⇒ Why does the law (Artt. 1341 and 1342 CC) favour the party setting down the standard trade terms, who is nearly always a business person?

⇒ Is the law perhaps biased?

The system laid down by the law didn't work because it's based on the unrealistic assumption, that the other party **actually** reads the **stt** drafted in advance.

In fact, in Art. 1341, paragraph 2, CC, the regulations on standard trade terms provide for only one **formal** check, **not** of the content of the contract (**substantial** check):

ie, if there is the **double signature**, the contract is valid in any case!

⇒ Why doesn't the vacuum cleaner manufacturer offer more favourable **stt** with the objective of gaining a larger market share?

N.B.:

Essentially, the party setting down the terms takes advantage of a market failure inherent in the unilateral contract provisions to the exclusive advantage of that party. This is contrary to the notion of **good faith**.

→ **objective good faith**

Directive on unfair terms



Art. 33 ff. Consumer Code give effect in Italy to EU Directive 93/13 on **unfair terms**.

EU Directive 93/13 on **unfair terms** provides for a court scrutiny of the terms which is **not** (solely) **formal**, but extends to the «balance» of rights and duties flowing from such term (**substantial** check).

→ The same regulations exist, with some variations, in **all European Union** countries!



In the UK: *Unfair Terms in Consumer Contracts Regulation 1999*



Art. 33 Consumer Code - *Unfair terms in Consumer contracts*

In contracts between consumers and businesses, terms which, contrary to the requirement of **good faith**, cause a **significant imbalance** in the parties' rights and obligations under the contract to the detriment of the consumer shall not be binding on the consumer.

Example: A term which provides for limited liability exclusively in favour of the party which drafted the contract in advance is, *in principle*, considered unfair **even if** it is specifically approved in writing.



Unfair Terms

5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of **good faith**, it causes a **significant imbalance** in the parties' rights and obligations arising under the contract, to the detriment of the consumer.



Art. 3 Consumer Code - *Unfair terms in Consumer contracts*

In relation to contracts, in the first paragraph, the **consumer** is the natural person who acts for purposes which are outside his **business**.

Businesses include a natural person or corporate identity, public or private, who uses the contract within the sphere of his trade or professional activity.

The regulations on unfair terms apply **exclusively** to contracts between **businesses** and **consumers**



A term which provides for limited liability exclusively in favour of the party which drafted the contract in advance **cannot** be considered unfair if it occurs in a contract between **two businesses** (two business people) or between **two consumers**.



Example 1: A term which provides for limited liability *exclusively* in favour of a carrier can be asserted – if specifically approved in writing - towards a company that had sent documents to a branch abroad. The company **cannot** claim that the term is not binding.

Example 2: You sell your mobile phone to a colleague. The term you lay down include a provision that your colleague pay for the phone before raising objections. Such a term is **never** unfair according to Art. 33 Consumer Code.



Terms to which these Regulations apply

4. - (1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer.

Interpretation

3. - (1) In these Regulations:

“**consumer**” means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession;

“**seller or supplier**” means any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned;

⇒ *What actually happens if a term is unfair?*

Art. 36, paragraph 1, Consumer Code – Nullity of protection

Terms considered unfair pursuant to arts. 33 and 34 are **void**. The remaining contract is **valid**.

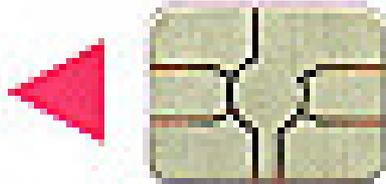


N.B.:

Generally, the consumer does **not** want the whole contract **not** to be binding, but rather that the **unfair term** is **not** binding.

e* TXC 02 08/08

10 €



Das Guthaben
verfällt 4 Jahre nach
der Erstinutzung.

Bitte PIN hereintippen:



An öffentlichen Telefonen in Deutschland wie
gewöhnlich per Guthaben telefonieren oder von
jedem anderen Telefon und im Ausland per PIN:

1. PIN hereintippen
2. Kostenlose Zugangsnummer wählen -
in Deutschland: 0500 33 0022
3. Beginn der Ansage abwarten
4. PIN eingeben
5. Bei Wählen gewünschte Rufnummer
inkl. Vorwahl eingeben

Aktuelle Länder- und Preislis-ten:
www.telekom.de/telefonkarte

Seriennummer

8110808080050 91920

Das Guthaben verfällt 4 Jahre nach der Erstinutzung.

The credit expires 4 years after first use.



Example: In a contract of sale, the consumer does not want to obtain **nullity** of the (whole) contract, with the consequent obligation of giving back the asset bought and the money. Rather, the consumer wants an unfair term to be declared **not** binding.



Art. 34, paragraph 2, Consumer Code – *Determination of the unfair character of clauses*

The evaluation of the unfair character of a clause has **no** relation to the **determination of the subject matter** of the contract or to the **adequacy of the compensation** payable for the property and services, provided that such elements are identified in a clear and comprehensible manner.

Art. 34, paragraph 3, Consumer Code - *Verification of the unenforceability of terms*

Terms that reproduce legal provisions or that are **reproductions of legal provisions** or implementations of principles contained in international conventions to which all member states of the European Union or the European Union are parties, are not unfair.

Example: Sect. 19 - Duty of disclosure – German Insurance Contract Act (“GICA”)



(1) The policyholder shall disclose to the insurer before making his contractual acceptance the risk factors known to him which are relevant to the insurer’s decision to conclude the contract with the agreed content and which the insurer has requested in writing.

If, after receiving the policyholder’s contractual acceptance and before accepting the contract, the insurer asks such questions as are referred to in the first sentence, the policyholder shall also be under the duty of disclosure as regards these questions.

(2) If the policyholder breaches his duty of disclosure under subsection (1), the insurer may **withdraw from the contract**.

⇒ Why is a term that were to grant to the insurer the right to withdraw from the contract in the cases of a breach of the duty of disclosure pursuant to Sect. 19 GICA not unfair?