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paragraph issue

«Thinkabouts» in the use of general terms and conditions, particularly with a view to a judicial dispute.

The lawful use of general terms and conditions (GTCs) in everyday business life is advantageous for the GTC user in many respects. If, on the other hand, elementary rules are not taken into consideration in connection with their use, the contract relationship can quickly turn out to be a "Pandora's box". The GTC user may in many cases find himself in a significantly worse legal position than if he had consciously refrained from using GTCs.

INTRODUCTION

The central role played by GTCs in business dealings is due to the need for rationalization in the development of contracts as well as the GTC user's desire for a "standardized" better legal position in everyday business life. The GTCs fulfil the latter function, however, only if the substantive content of the GTCs forms an integral part of the contract and can also be enforced in court in the event of a dispute and if the GTCs, based on their content, are in the end actually suited to improve the legal position of the GTC user.

This article is intended, on the one hand, to shed light on the issue of the legally effective integration of GTCs and the handling of GTC conflicts ("battle of the forms") and to also point out the conditions under which GTCs can be amended during the ongoing contractual relationship. On the other hand, this article also highlights central GTC provisions that can decisively facilitate the judicial enforcement of contractual claims in the event of litigation.

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The designation of the competent court as well as the appropriate choice of the law to govern the contractual relationship can be decisive in connection with the enforcement of claims in the event of a dispute.

Philipp Känzig, Attorney-at-Law, lic. iur.

THE VALIDITY AND LIMITATIONS OF GTCS

Swiss legislation does not include hardly any provisions that specifically govern the validity of GTCs (for the special case under Article 8 of the Unfair Competition Act, see the subsequent article). Accordingly, a three-step GTC review system pursuant to which the validity of GTCs will be adjudged has developed under case law. This system consists of the consensus review, interpretation review and content review.

(1) The consensus review, in detail
GTCs are pre-formulated contract provisions. Like all other parts of contracts, GTCs between contractual parties are only valid if the parties have agreed that these provisions should form part of the content of the contract.

In connection with the type of integration of GTCs, a dogmatic distinction is drawn between the full adoption and the global adoption of GTCs by the consenting contractual parties. If the GTCs have been read, understood and accepted by the consenting contractual parties in full, a full adoption is deemed to have occurred. In everyday business life, however, the full adoption represents an exceptional case. As a rule, in business dealings, the consenting parties will adopt the GTCs "globally", i.e., without having carefully read and understood them. In this case, the GTCs are valid only if the following conditions are adhered to:

(a) Opportunity to take note of the GTCs
In the case of a global adoption, the GTCs will be covered by the consensus of the parties only if the consenting parties, prior to their declaration of acceptance of the contract, had an opportunity to reasonably take note of the content of the GTCs. Whether it was reasonable for the consenting party to take note of the GTCs is to be determined on a case-by-case basis. In connection with this assessment, the business experience of the contractual parties as well as the form of appearance of the GTCs will be taken into special consideration.

The extent to which it was possible to take reasonable note of GTCs that were handed over in paper form is adjudged, in particular, based on the kind and size of the typeface, the language used, the scope of the GTCs and their presentation.

If the GTCs can only be accessed "online", it must first be clarified whether the parties agreed to communicate in electronic form. If the parties already communicated via email prior to the conclusion of the contract, the consent of the parties to also use the internet or electronic means in order to take note of GTCs can basically be derived from this. In addition, a clear reference to the GTCs is required, as well as an ability on the part of the consenting party, by means of average information technology infrastructure, to readily download the GTCs, copy them to end-user devices or print them out. Otherwise, taking note of the GTCs will be deemed to be unreasonable and the GTCs will as a rule not form part of the contract.

The explanations above illustrate that particularly GTCs that have been "globally" adopted can provide cause for debate. In the event of a dispute, the party who would be disadvantaged by the GTCs will take the view that he was not reasonably able to take note of the GTCs. For evidentiary purposes, therefore, it is recommendable to ensure already in connection with the conclusion of the contract that it can be proven, in the case of a dispute that the contracting partner had knowledge of a specific version of the GTCs. The simplest possibility for avoiding this evidentiary issue is to have the contracting partner confirm in the contract itself, by way of signature, that he received and took note of a specific version of the GTCs.

(b) Customary GTCs pursuant to the "unusual" precept
Furthermore, GTCs that are globally adopted must stand up against the "unusual" precept. In application of the unusual precept, clauses in globally adopted GTCs that are unusual and that were not specifically pointed out to the party consenting to the GTCs (e.g., through visual highlighting) will not form part of the contract. Provisions in the GTCs that are atypical in the context of the contract that was entered into and that therefore come as a surprise are deemed unusual.

(2) The interpretation review, in detail
To the extent that the contractual parties have consented to the GTCs and the GTCs, accordingly, form part of the contract, the meaning must be determined in case the GTCs have been unclearly formulated. In general, GTCs are to be interpreted based on the general principles of interpretation developed under case law and legal doctrine. The ambiguity precept is of special importance in this regard. According to the ambiguity precept, in case of doubt, clauses that are unclearly formulated will be interpreted to the detriment of the GTC user or drafter.

(3) The content review, in detail
Within the scope of the content review, the compatibility of the GTCs with applicable law will be reviewed. In particular, it is to be determined whether the content of the GTCs is unlawful because it violates mandatory law. This would result in their being null and void. In this case, the provisions of the GTCs that are null and void will be replaced by the mandatory legal provisions. During the content review, the GTCs will not be reviewed in terms of their compatibility with dispositive (i.e., non-mandatory) law. After all, the very purpose of the GTCs is to amend or

supplement dispositive law in favor of the GTC user. Dispositive law, however, will be referred to in order to fill in gaps in regulation.

The legally effective integration of GTCs into a contract often, as a matter of practice, poses an evidentiary problem that can be encountered with an appropriate contract model.

Legal situation in case of the integration of different GTCs that conflict with one another
In everyday business life, business partners are frequently confronted with so-called GTC conflicts. A GTC conflict is on hand, for example, if both the seller, upon the dispatch of his offer, as well as the purchaser, upon his acceptance, refer to their own GTCs and accordingly both contractual partners declare their respective GTCs as being applicable to the contract relationship. In practice, one also speaks in this case of a "battle of the forms".

There are diverging legal opinions as to how a GTC conflict is to be resolved. One part of Swiss legal doctrine (a minority) supports the theory of the "last shot rule". Based on this theory, the GTCs that were sent last (therefore, as a rule, the purchaser's GTCs) are determinative with respect to the contractual relationship, unless the GTCs that were sent first (thus, the GTCs of the seller) contain a so-called anticipated defensive clause, according to which the seller does not recognize any GTCs other than his own.

The prevailing legal doctrine prefers to assess GTC conflicts based on the "remaining validity" theory. Based on this, theory, only the provisions of the two GTCs that are consistent with each other are deemed valid. On the other hand, the GTC provisions that contradict each other are denied validity, and the corresponding gaps in regulation are supplemented by law that applies on a subsidiary basis. The scant Swiss case law that exists appears to go in the direction of this second school of thought.

Amendment to GTCs during the course of an ongoing contract
In practice, there are two alternatives as to how GTC users will reserve the right to amend the GTCs during the course of an ongoing contract. A distinction is drawn between the "unilateral right to amend" and "deemed consent". It would exceed the scope of this article to discuss further details in this regard. This question primarily plays a role in dealings between private individuals and financial service providers such as banks – which as a rule rely on the deemed consent approach – and is less important in the case of users in the industrial sector.

If elementary rules are not taken into consideration in connection with the use of GTCs, the contract relationship can quickly turn out to be a "Pandora's box".

Jonas Stüssi, Attorney-at-Law, lic. iur

CENTRAL ISSUES RELATING TO GTCS WITH A VIEW TO A JUDICIAL DISPUTE

The designation of the competent court as well as the appropriate choice of the law to govern the contractual relationship can be decisive in connection with the enforcement of claims in the event of a dispute. In international business dealings, the GTC user can reduce the risk by ensuring that a dispute is handled by the courts and/or handled under the law of a jurisdiction that disposes over a reliable legal system.

(1) Choice of jurisdiction clauses in GTCs
Through a choice of jurisdiction clause in GTCs that is lawfully adopted, the consenting party will be deprived of the jurisdiction at the place of domicile that is guaranteed to that party, even under the constitution. Therefore, the legislators and the Swiss Federal Supreme Court impose strict standards on the form and structure of such clauses in the GTCs and view the clauses as invalid in the event that such standards are not met.

First, it must be taken into consideration as a general matter that the clause on jurisdiction requires a specific form. As a rule, the clause on jurisdiction must be made in writing or in another form of transmission that makes it possible to evidence the agreement via text. Further, in the clause on jurisdiction, the competent court must be sufficiently defined or capable of being defined. Finally, the scope of the clause on jurisdiction in terms of the subject matter for which the designated court should have jurisdiction (for example, all disputes arising under a specific agreement) must be designated.

The permissibility of a clause on jurisdiction in GTCs is, in turn, to be adjudged based on the three-step GTC control system (cf. above). The standards that must be met in terms of the clause on jurisdiction in the GTCs depend to a significant extent on the business experience of the consenting party. Depending on the business experience of the consenting party, it will suffice if the clause on jurisdiction is merely added in a conspicuous position within the GTCs and clearly emerges – this is the case as a rule in business dealings. Depending on the circumstances, it may also be necessary, in addition, for the attention of the consenting party to be specially drawn to the clause on jurisdiction and for its significance to be clarified in advance of the GTCs in order to become legally effective. The standards in terms of the formulation and the efforts to be used to draw attention to the clause are to be assessed based on the circumstances of the individual case.

(2) Arbitration clauses in GTCs
Through an arbitration clause in the GTCs, jurisdiction over a prospective legal dispute between the parties will be taken away from the

state courts and placed with the designated arbitration tribunal. Even though this is basically possible, it is recommended that the arbitration clause be governed directly in the agreement itself, on a case-by-case basis. Such clauses are – within certain exceptions – not suited for general dealings. It must also be taken into consideration that arbitration clauses are only recommendable in cases in which potential disputes could involve major claims.

(3) Choice of law clauses in GTCs

As a rule, contractual partners intend to conclusively regulate the contractual rights and obligations, at the least the most important ones, in the contract. To the extent that there are gaps in regulation and a conflict breaks out in this regard between the contractual partners, gaps in regulation will be adjudged, among other things, based on the applicable subsidiary law. Especially in the case of very complex contractual relationships in which it is scarcely possible to anticipate all eventualities in the contract, the subsidiary law will, sooner or later, have to be at least consulted.

Often, GTC users think that the agreement on a clause on jurisdiction also works to govern the law applicable to the contract or – conversely – that the choice of law also governs the place of jurisdiction. This is not the case and can lead to situations that turn into a legal catastrophe. For example, if a GTC user agrees with a supplier from India that Swiss law shall govern the contractual relationship, the courts in India would eventually nonetheless have jurisdiction with respect to a legal action against the supplier. If no choice of law but instead merely a place of jurisdiction in Switzerland were agreed upon with the same supplier, the legal action would possibly have to be conducted before and be decided by a Swiss court, with application of substantive Indian law.

The parties are basically free to choose the law of any country, a substantive uniform law such as, for example, the Vienna Sales Convention or instead legal rules (such as SIA standards). In special cases, limits are imposed on the autonomy to choose the applicable law: thus, for example – as non-exclusive examples – in terms of the requirements as to form that apply to contracts relating to real estate in Switzerland, in the case of consumer contracts and in the case of employment contracts.

Particularly since, depending on the circumstances, the parties may be able through the choice of substantive law to exert a considerable influence on the assessment of a legal dispute, it is advisable to pay special attention to the choice of law in the run-up to the formulation of the contract. Based on the case law, a choice of law, or a choice of law in favor of a specific law, with the renunciation of the application of another law, can be assumed to legally effective only if the consenting party was aware that the question of the determinative law had been posed in the first place. Therefore, particularly in connection with inserting a choice of law clause into the GTCs, close attention should be paid to whether the choice of law clause stands up to the three-step GTC review system. Consequently, the choice of law clause in the GTCs should be formulated and highlighted in a manner such that the consenting party, to the extent he was able to reasonably take note of the content of the GTCs, has consciously subjected himself to the law that had been chosen.

THREE REAL-LIFE CASES

1. A GTC user agreed in his GTCs upon a time-bar period that was longer than the statutory limitations period in force at the time of the drafting of the GTCs. In connection therewith, however, the GTC user neglected to review ongoing legislative changes. Subsequently, the statutory limitations period was prolonged, with the result that the GTCs worsened the legal position of the GTC user.

2. A GTC user, in everyday business life, used various GTCs (conditions of purchase, general conditions, etc.) that had similar but not identical names. The contracts of the GTC user then referred, in part, to the wrong GTCs or referred at various places to two contradictory GTCs. As a result, it was not possible to identify which GTC was intended to apply.

3. The head of sales of a GTC user travelled around the entire globe and entered into contracts that he “adjusted” according to the wishes of the relevant purchaser. Result: the set of agreements as a whole no longer constituted a uniform structure, and the GTCs were no longer consistent with the contracts that had been concluded. Accordingly, based on the precedence given to individual agreements, important aspects of the GTCs no longer applied.

RECOMMENDATIONS IN TERMS OF CENTRAL ISSUES

1. In general, the place of jurisdiction and the choice of law should be set out in the individual contract to be signed, and not be governed by the GTCs. Should this not be possible in particular cases, it is recommendable to include in another contractual document (e.g., order confirmation or purchase order) a written cross-reference, in highlighted form, to the place of jurisdiction or choice of law clause in the GTCs

2. Each company should designate a central team or person to be responsible for contract administration. All contracts should be required to be presented to this team or person for purposes of final approval before being sent out to the counterparty. §

Philipp Känzig, Jonas Stüssi

The new Article 8 of the UCA poses great implementation difficulties for companies, even three years following its entry into force.

Stephanie Volz, Attorney-at-Law, Dr. iur.

Article 8 of the Unfair Competition Act – Initial conclusions based on the case law

Three years ago, revised Article 8 of the Unfair Competition Act ("UCA") entered into force, an article intended to facilitate more efficient and successful proceedings against abusive general terms and conditions. Because this provision, however, contains numerous undefined legal terms, it was hoped that the courts would fill the gaps and speedily provide definitions. This has not occurred to date, so it continues to be necessary to use special care in connection with the formulation of general terms and conditions.

THE UCA REVISION

For a long time, there was no rule in Switzerland for purposes of a comprehensive review of general terms and conditions ("GTC"). Although certain principles for the review of GTC had developed under case law, based on the application of general contact law, these principles were limited to questions as to the validity of the inclusion of GTC or individual provisions thereof in the agreement (validity review) and as to how these were to be interpreted (interpretative review). One spoke in this regard of a "disguised" review of content. A review of the substance of the GTC, a so-called "open" review of content, was not possible.

The revised Article 8 of the UCA is intended to provide consumers a more effective protection against abusive terms and conditions.

Although former art. 8 UCA did state that the use of abusive GTC was unfair, this was only the case if the GTC were "misleading". Because it was relatively easy, through the use of bold type or separate signature, to avoid a provision's being characterized as "misleading", this rule remained to a great extent a dead letter.

Therefore, calls for the creation of an effective protection against abusive GTC became increasingly loud. The legislators tackled this problem within the scope of the UCA revision and subjected art. 8 UCA to a comprehensive update. After lengthy deliberations, the new art. 8 UCA entered into force on July 1, 2012.

THE GTC REVIEW, FOLLOWING THE REVISION

The new provision

As a result of the revision, art. 8 UCA was changed to delete the "misleading" requirement. Accordingly, under art. 8 UCA, it is an act of unfair competition to use general terms and conditions that, to the detriment of consumers, contrary to the requirement of good faith, provide for a significant and unjustified imbalance between contractual rights and contractual obligations.

Unlike under former law, the GTC provision now only applies to agreements with consumers. The term "consumer" is not defined under the Act. However, it can be assumed that art. 8 UCA only applies in the case of agreements that are concluded between businesses and private consumers, and not in agreements between businesses. It is doubtful, though, whether this makes sense from a practical perspective because particularly small and medium sized enterprises (SMEs) are often unable, in business dealings with larger enterprises, to engage in negotiations on specific provisions in the GTC and may therefore potentially be in need of protection. In this respect the Cartel Act nevertheless offers a certain amount of protection since it prohibits dominant undertakings from imposing unfair terms and conditions (art. 7 paragraph 2(c) of the Cartel Act).

Due to the legal uncertainty that prevails, special care should be taken in the formulation of general terms and conditions.

In terms of content, a GTC provision is deemed to be unfair if it provides for a significant imbalance between the contractual rights and contractual obligations of the parties. Such an imbalance exists if a clause is misleading, unclear, confusing or non-transparent or exploits a party's commercial or legal inexperience. It is to be assumed that the courts will rely on the dispositive statutory rules as a yardstick for assessing the significant imbalance. In the case of innominate contracts, i.e., those not falling under a specific classification, the nature of the contract can serve as the framework. Therefore, the more that the contractual GTC deviate from the dispositive statutory provisions, the more likely they are of being adjudged "abusive".

In contrast to European law, however, the UCA does not include any list of examples to flesh out abusive clauses. Therefore, it is up to case law to further specify the scope of this provision.

The list of particular cases deemed to be abusive that are specified under European law, however, will no doubt serve as at least a reference point for the courts. This is especially so since the formulation of the Swiss rule relies closely on the EEC directive on the use of unfair terms in consumer contracts. Even though, based on case law of the Swiss Federal Supreme Court, foreign case law will not be adopted under Swiss law without closer scrutiny; it is to be applied as at least an aid in construction and interpretation, within the meaning of a simplification of European business dealings. With respect to the potential cases of application of art. 8 UCA, for example, a GTC term that provides for the automatic and considerable renewal of contracts that are entered into for a limited period would no doubt be viewed as a violation of art. 8 UCA.

Legal consequences in the event of a violation

The UCA itself does not include any provision regulating the legal consequences of the use of an abusive term in the GTC. It is widely recognized by legal commentators, however, that the only possible legal consequence is nullity. Nonetheless, it is unclear as to whether the nullity applies only to the individual term or to the entire GTC. If the courts decide on the second alternative, this could occasionally have unforeseen consequences for the affected parties because the nullity would extent to provisions that are basically permissible, such as agreements on the applicable law or jurisdiction.

It should be noted that the unfair nature of GTC can be asserted not only by the affected consumers themselves, but also by consumer protection organizations, which also have a right to demand the judicial review of individual GTC provisions. It remains to be seen whether and to what extent consumer protection organizations will avail themselves of this possibility.

INITIAL EXPERIENCES BASED ON CASE LAW

Due to its open-ended formulation and the numerous undefined legal terms in art. 8 UCA, the scope of the new provision was to a large extent unclear when it entered into force. While numerous articles have been published in this regard, the opinions as to most of the interpretative questions are nearly as numerous as the articles themselves.

For this reason, it was hoped that the courts would quickly clarify the open issues. The Swiss Federal Supreme Court also had an opportunity last year, for the first time, to express an opinion on the new provision. Unfortunately, the decision is unable to contribute much in the way of clarity because the court, with a view to art. 8 UCA, limited itself to the finding that the article did not apply to the agreement under review. No substantive review took place. Similarly, no path-breaking cantonal decisions relating to the provision appear to have been issued to date either.

Last year, the Swiss Federal Supreme Court was able for the first time to express a view on the new UCA provision.

Therefore, the scope of art. 8 UCA remains unclear, even three years following the UCA revision. The only thing certain is that the revised version represents a tightening in the law governing GTC in Switzerland, which had been relatively liberal prior to the revision. This means that provisions that had formerly been unproblematic from an unfair competition perspective could be deemed impermissible and be declared null and void by a court. For companies, this could lead to the potentially less favorable dispositive statutory provision applying to a contractual relationship in lieu of the unfair provision. §

Stephanie Volz