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## Articles (peer reviewed)

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# Revised Control of Unfair Terms in Swiss Law – Consumer Protection by Competition Law?

In Swiss law the control of unfair terms is located in competition law (Art 8 Unfair Competition Act). After the revision of Art 8 UCA in 2012 one can more than ever question this positioning which is quite unique in Europe. After a short presentation of the new Art 8 UCA which was inspired by Directive 93/13/EEC and for the first time provides for an unlimited content review of standard terms in Swiss law, the following contribution demonstrates the negative consequences of the positioning in competition law. The article shows that an interpretation of Art 8 UCA in line with the rules on unfair competition cannot achieve the unlimited content review which was intended by the legislator. On the other hand, the limitation of Art 8 UCA to consumer contracts contradicts the general purpose of the UCA to ensure fair and undistorted competition in the interest of all concerned. Also the classical sanctions of competition law must be adjusted in the case of unfair contract terms because they are only designed for the sanctioning of unfair behaviour in connection with the initiation of a contract but not for declaring an unfair general contract term void. Therefore the article argues that it is desirable to integrate the Swiss rules on term control into the general law of contract or to deal with this topic in a special act.

### I. Introduction

After the revision of the provision containing the control of standard terms in the Swiss Act against Unfair Competition (UCA), the question should be re-assessed whether the UCA is the correct location for the regulation of standard terms. Special focus should be given to the question whether this new provision yet increased the already existing typical difficulties. The revised provision concerning standard terms in Swiss law came into force in July 2012. The review of standard terms is located in Art 8 of the UCA. In fact, standard terms are a matter of contract law. Notwithstanding this classification, the Swiss legislator incorporated the only explicit provision concerning standard terms in the Unfair Competition Act<sup>1</sup>. This location is nearly unique comparing to other legislations in Europe<sup>2</sup>. The positioning of the provision in Swiss law is particularly remarkable since it was the intention of the Swiss legislator<sup>3</sup> to assimilate the new provision to Directive 93/13/EEC<sup>4</sup> being characterized by a contract law approach. The main intention of the legislator was to create a provision which stands for an unlimited content review of standard terms. The target behind this intention was to guarantee an effective protection of the weaker party against the user of standard terms which had not been possible under the former law demanding a misleading use of general terms to the detriment of the other party<sup>5</sup>. The question whether the revised Art 8 UCA will reach this target mainly depends on how courts will interpret the vague legal terms in this provision. Due to the similarity to Directive 93/13/EEC as regards wording, also decisions of the European Court of Justice can serve as a guideline for interpreting the

new provision in Swiss law<sup>6</sup>. This is a welcome opportunity due to the conceivable lack of sufficient Swiss case law in this field.

### II. The Former Provision and the Main Changes of 2012

Under the former Art 8 UCA, a clause was considered to be unfair if it deviated from the otherwise applicable law in a misleading way to the detriment of the other party. The criterion “*in a misleading way*” was considered to be fulfilled if the standard terms did not clearly show the significant deviation from the applicable law, for example if they were formulated ambiguously<sup>7</sup>. But the former Art 8 UCA was not applicable if the standard term was clear, but unfair. The court practice in Switzerland proved that an effective content review of standard terms was not possible under the former provision<sup>8</sup>. The reason for the inapplicability was further caused by the combination of formal and substantive aspects

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- 1 Such an integration has already been proposed by an expert commission in 1980 (Art 7 Draft text for a revised UCA of January 31, 1980, GRUR Int. 1981, 169, 170); see in depth Walter Sticher, Die Kontrolle Allgemeiner Geschäftsbedingungen als wettbewerbsrechtliches Problem (Mengis&Sticher 1981) 110 ff (with a concrete proposal for a UCA-provision at 215).
- 2 See for a comparative review Filippo Ranieri, *Europäisches Obligationenrecht* (3rd edn, Springer 2009) 376 ff; e.g. in Germany, the equivalent provision to Art 8 UCA is located in contract law (§ 307 German Civil Code) and a control of unfair general terms under unfair competition law is practised only in addition (see in depth Hajo Michael Holtz, Die AGB-Kontrolle im Wettbewerbsrecht, Nomos 2010, 109 ff); anyhow in Norway Art 22 ff of the Marketing Control Act (Act No. 2 of 9 January 2009 relating to the Control of Marketing and Contract Terms and Conditions; the text is available under: <http://www.forbrukerbudet.no/id/11039810.0>) provide also for a control of standard terms based on unfair competition law.
- 3 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, BBl 2009, 6151, 6171, 6173 and 6179.
- 4 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29 ff.
- 5 Thomas Probst, in: Peter Jung/Philippe Spitz (eds), *Bundesgesetz gegen den unlauteren Wettbewerb (UWG) – Kommentar* (Stämpfli 2010) Art 8 para 29; Vito Roberto/Marisa Walker, ‘AGB-Kontrolle unter dem neuen Art 8 UWG’ [2014] recht 53.
- 6 The intention of the Swiss legislator to create with Art 8 UCA a norm which is compatible with Art 3 Directive 93/13/EEC makes it necessary to take also into consideration the jurisprudence of the ECJ and the courts of the Member States concerning Art 3 of the Directive; see in general for these methodological questions Thomas Probst, ‘Die Rechtsprechung des Europäischen Gerichtshofes als neue Herausforderung für die Praxis und die Wissenschaft im schweizerischen Privatrecht’ [2004] BJM, 225, 246 ff, 258 and Peter Jung, ‘Das Argument der Europakompatibilität im schweizerischen Privatrecht’ [2010] ZSR 513, 538 ff.
- 7 Mario M. Pedrazzini/Frederico A. Pedrazzini, *Unlauterer Wettbewerb UWG* (2nd edn, Stämpfli 2001) paras 12.12 ff.
- 8 Carl Baudenbacher, *Lauterkeitsrecht – Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG)*, (Helbing Lichtenhahn 2001) Art 8 paras 27 ff; Ahmet Kut/Demian Stauber, ‘Die UWG-Revision vom 17. Juni 2011 im Überblick’, in: Jusletter vom 20. Februar 2012, para 109.

in this provision. Several aspects were already partially covered by the review according to contract law<sup>9</sup>.

The decisions of the Swiss Federal Supreme Court were not in favour of an unlimited content review before the revision of 2011 took place<sup>10</sup>. The Federal Supreme Court established a limited covert or indirect content review based on the question whether the standard terms were validly incorporated into the contract. According to this practice, standard terms were not validly incorporated if they were integrated as a whole into the contract and additionally were considered to be unusual. This was the case if an average party should not have expected this clause or if the clause surprised the other party due to its lacking business experience<sup>11</sup>.

Under the revised Art 8 UCA, the criterion of “*in a misleading way*” was replaced by the principle of good faith. Hence, the only criterion which established a link to the law against unfair competition – misleading acts being a typical category of unfair competition – was removed. The second major change concerns the scope of application of the provision: after the revision, only standard terms used in consumer contracts can be reviewed<sup>12</sup>. A parliamentary initiative was placed in September 2014 wishing for an extension of the scope of application of Art 8 UCA to all contracts<sup>13</sup>. Overall, the new Art 8 UCA led to a large amount of discussion in literature and it was also the reason for the well-nigh dismissal of the entire unfair competition reform act in the parliament in 2011<sup>14</sup>.

According to recent case law, the provision of Art 8 UCA is of a mandatory nature and therefore cannot be excluded by the parties<sup>15</sup>. An important question in practice concerning the relation of the former and the revised Art 8 UCA is whether the new provision should be applied also to standard terms agreed upon before 1 July 2012. The UCA itself does not answer this question. The Federal Supreme Court denied the retrospective application of the revised provision to a clause providing for an automatic prolongation of a contract which was called into action before the revision came into force<sup>16</sup>. Accordingly, the Federal Supreme Court argued that the legal basis of a claim cannot be withdrawn retrospectively<sup>17</sup>. If, however, a claim out of the standard terms arises when the revised law is already in force, the claim might be governed by this new provision<sup>18</sup>. The Federal Supreme Court explicitly left this very controversial question open.

### III. Elements of the New Art 8 UCA

According to the new Art 8 UCA, a term is considered to be unfair, if it establishes a significant and unjustified disproportion between contractual rights and obligations to the detriment of the consumer in contradiction with the principle of good faith.

#### 1. Significant and Unjustified Disproportion between contractual rights and obligations

The disproportion has to be both significant and unjustified<sup>19</sup>. Additionally, the disproportion must violate the principle of good faith. Unfortunately, although intending to assimilate the new provision to Directive 93/13/EEC, Art 8 UCA does not contain a catalogue of possibly unfair terms like the Directive does. Nevertheless, special focus has to be laid on exclusion clauses, choice of law clauses or dispute resolution clauses<sup>20</sup>. But like in the Directive 93/13/EEC, such clauses are not automatically inadmissible. On the contrary, all circumstances have to be taken into account and the overall situation has to be assessed. It is important to always

bear in mind the target of the revision: The legislator intended to create a clear and simple content review mechanism for standard terms. Therefore, some systematisation is necessary in order to prevent a shapeless content review<sup>21</sup>.

The Federal Supreme Court has not decided yet what is meant by a significant and unjustified disproportion between contractual rights and obligations. In fact, the deviation from the applicable legal framework can no longer lead to the unfairness of standard terms *by itself*<sup>22</sup>. This is because this traditional reference point was dropped in the new provision<sup>23</sup>. But the question remains: How can we state a significant and unjustified disproportion of contractual rights and obligations without any reference to the applicable contract law? Since the rules proposed by the legislator serve as a justified and proportional default rule, they would serve as a sustainable guideline. Therefore, if a certain contract is governed by specific legal provisions, these provisions should still serve as a referral system to assess the fairness of the standard terms<sup>24</sup>. However, if a contract does not fall under a specific classification, the court has to establish which rule the legislator had created and which provision two equal parties had agreed upon<sup>25</sup>. Possible criteria to assess the disproportion are first the one-sidedness of the allocation of rights and obligations in the contract<sup>26</sup>, and second the purpose of the contract<sup>27</sup>.

The disproportion is significant if the one-sided allocation of contractual rights and obligations is of a certain intensity and if this allocation leads to considerable legal consequences for the disadvantaged party<sup>28</sup>. For example the waiver of the causality requirement of Art 38 (2) Insurance Contract Act (insurance exclusion for late notification) in the standard terms of an insurance company would lead to unacceptable consequences for the insured<sup>29</sup>. According to the new provi-

9 Thomas Probst (supra note 5) Art 8 para 52.

10 Carl Baudenbacher (supra note 8) Art 8 paras 20 ff.

11 Instead of many others DFT 135 III 227, C. 1.3. (Leading Decisions of the Federal Supreme Court; German: BGE; French: ATF; Italian: DTF); Carl Baudenbacher (supra note 8) Art 8 paras 12 ff.

12 Mario M. Pedrazzini/Frederico A. Pedrazzini (supra note 7) para 12.11.

13 Parliamentary Initiative Beat Flach of 23 September 2014 (Business Number 14.440).

14 Ahmet Kut/Demian Stauber (supra note 8) para 2.

15 Commercial Court Zurich of 17 December 2014, E. 2.3.1.

16 DFT (BGE/ATF/DTF) 140 III 404.

17 DFT (BGE/ATF/DTF) 140 III 404, C. 4.4.

18 Vito Roberto/Marisa Walker (supra note 5) 60 ff; Lorenza Ferrari Hofer/David Vasella, in: Marc Amstutz et al (eds), Handkommentar zum Schweizer Privatrecht (2nd edn, Schulthess 2012) Art 8 UWG para 63.

19 Andreas Furrer, ‘Eine AGB-Inhaltskontrolle in der Schweiz?’ [2011] HAVE 326.

20 Jörg Schmid, ‘Die Inhaltskontrolle Allgemeiner Geschäftsbedingungen: Überlegungen zum neuen Art 8 UWG’ [2012] ZBJV, 1, 12 ff.

21 Esther Widmer, Missbräuchliche Geschäftsbedingungen nach Art 8 UWG (Dike 2014) para 254.

22 Esther Widmer (supra note 21) para 264.

23 Markus Hess/Lea Ruckstuhl, ‘AGB-Kontrolle nach dem neuen Art 8 UWG – eine kritische Auslegeordnung’ [2012] AJP 1188, 1197.

24 Jörg Schmid (supra note 20) 11.

25 Florent Thouvenin, in: Reto M. Hilty/Reto Arpagaus (eds), Basler Kommentar UWG (Helbing Lichtenhahn 2013) Art 8 para 128.

26 Markus Hess/Lea Ruckstuhl (supra note 23) 1199; Florent Thouvenin, ‘Art 8 UWG: Zur Strukturierung eines strukturlosen Tatbestandes’, Jusletter vom 29. Oktober 2012, para 46.

27 Ahmet Kut/Demian Stauber (supra note 8) para 120; Thomas Koller, ‘Art 8 UWG: Eine Auslegeordnung’, in: Susan Emmenegger (ed), Das Bankkonto. Policy – Inhaltskontrolle – Erwachsenenschutz (Helbing Lichtenhahn 2013) 40.

28 Markus Hess/Lea Ruckstuhl (supra note 23) 1199 and 1201.

29 Andrea Eisner-Kiefer, ‘AVB und der revidierte Art 8 UWG’ [2015] HAVE 28; see also Volker Pribnow/Barbara A. Möri, ‘Adäquanz im Gefechtsstand – Tinnitus nach Knalltrauma und anderen Unfällen’ [2015] HAVE 48, 56 considering an exclusion of indemnity in standard terms of an insurance company to be a significant disproportion of rights and obligations; but the Federal Supreme Court held a different view in its decision FT (BGer/TF/TF) 5C.55/2005 cons. 2.3.

sion which should provide for a stricter review, not only the intensity of the discrepancy, but also the essentiality of the involved rights and obligations are decisive to determine the significance of the disproportion. Accordingly, a slight deviation from a fundamental provision can be equal to a substantial deviation from an insignificant provision<sup>30</sup>. Corresponding to this opinion, the German Supreme Court decided that a provision in standard terms stands for unfair business conduct if it violates the fundamental principles the applicable law is based on. A provision is also considered to be unfair if it provides for obligations which do not exist in the respective legal framework<sup>31</sup>. The German Supreme Court further raised the question whether or not the legally required situation could also be reached without allocating significantly more obligations to one party.

The disproportion further needs to be unjustified. It is challenging to determine the independent meaning of the term “unjustified”<sup>32</sup>. In fact, the disproportion of contractual rights and obligations of the parties already indicates an unjustified situation<sup>33</sup>. It is worth noting that only the German version of Directive 93/13/EEC contains the term “unjustified”, whereas this term is missing in other languages. Nevertheless applying the present wording, the different interests of the parties and the possibility of risk governance should be taken into account to assess whether or not the discrepancy is justified<sup>34</sup>. Additionally, the power relationship between the parties and the characteristics of the specific contract play an important role in answering the question whether the disproportion is reasonable<sup>35</sup>. Therefore, the disproportion might be justified if the consumer had a real chance to conclude the contract without the standard terms and if the nature of the contract normally leads to a certain disadvantage for one party<sup>36</sup>. For example it is common business practice to exclude liability in standard terms governing the sales of used cars<sup>37</sup>.

## 2. Violation of the Principle of Good Faith

The second innovation in the wording of the new Art 8 UCA is the reference to the principle of good faith which replaced the so-called „misleading criterion”, in the old version. First of all, it has to be clarified whether Art 8 UCA refers to the general principle of good faith in private law or to the autonomous definition of good faith in competition law which equals unfairness according to Art 2 UCA<sup>38</sup>.

In the context of the law against unfair competition, the focus is not on the content of the agreement, but on the positions and the behaviour of the parties before and during the conclusion of the contract. Furthermore, Art 8 UCA is located amidst special provisions against unfair behaviour which have the objective to protect the fairness and functioning of competition itself in the collective interest of all stakeholders and not to protect consumers as individual contractual parties<sup>39</sup>. This is why, in the light of competition law, the content review would be of an abstract nature, not taking into account the specific situation of the parties. Accordingly, the content review would only be a mechanism to protect the consumers in their entirety as important market participants. Furthermore, Art 8 UCA would have to be applied in line with one of the case groups pointing out the unfair behaviour under Art 2 UCA, like for example misleading, aggressive and blocking behaviours<sup>40</sup>. For example, the case law concerning aggressive behaviour would only be applicable if several customers only agreed to the incorporation of standard terms due to excessive psychological pressure. At least, it should also be possible in Swiss law like in German law<sup>41</sup>

to consider the fairness rules concerning general terms to be relevant for competition. Accordingly, the breach of these rules should be regarded as an unfair act of competition falling under the omnibus clause (Art 2 UCA) aiming also to ban an unfair advantage in competition by a breach of law relevant for competition<sup>42</sup>.

From a teleological perspective, it was the objective of the revision to provide for an unlimited content review according to the principles of contract law. Also from a European point of view, the reference goes towards the general principle of good faith allowing for an unrestricted weighting up of parties' individual interests.

## 3. Consumer Detriment

It is doubtful what the third new element of Art 8 UCA “to the detriment of the consumers” shall mean. It is not yet clear if the disadvantage for the consumer should be the result of an overall assessment of the whole individual contract<sup>43</sup> or if one can just focus on the rights and obligations established in the standard terms themselves. This abstract point of view is the predominant opinion in Switzerland relating to the new version of Art 8 UCA. The content review of the standard terms should no longer be made looking at one individual case<sup>44</sup>. However, the European Court of Justice considers all circumstances upon contract conclusion<sup>45</sup> and also has a

30 Thomas Koller (supra note 27) 17.

31 German Supreme Court (BGH) 8 October 2013 (XI ZR 401/12) BGHZ 198, 250 (the bank's standard terms provided for an obligation of successors to prove their inheritance rights even in clear situations and at the bank's own discretion); see for a commentary on this decision in the light of Swiss law Oliver Arter/Fabian Klaber, 'Deutscher Bundesgerichtshof, Urteil vom 8. Oktober 2013 (XI ZR 401/12)' [2014] AJP 1124. If one criticizes the legal provisions as a reference system under the new Art 8 UCA because exactly this part was dropped, the parallel to this argument of the German Supreme Court does not work (especially since the German provision does still consider a term to be generally not appropriate if it disregards the essential principles of the applicable law).

32 Thomas Koller (supra note 27) 46, who denies the own meaning of the supplement “unjustified”.

33 Hubert Stöckli, 'Der neue Art 8 UWG – offene Inhaltskontrolle, aber nicht für alle' [2011] Baurecht 184.

34 Esther Widmer (supra note 21) paras 270 ff.

35 Esther Widmer (supra note 21) paras 270 ff.

36 Cf. Esther Widmer (supra note 21) paras 272 ff.

37 Markus Vischer, 'Zur generell-abstrakten AGB-Kontrolle nach UWG' [2014] AJP 964, 973.

38 See for the differences between Art 2 UCA and Art 2 Swiss Civil Code Jürg Müller, Einleitung und Generalklausel (Art 1–2 UWG), in: Roland von Büren/Lucas David (eds), SIWR V/1 (2nd edn, Helbing Lichtenhahn 1998) 47 ff and Carl Baudenbacher (supra note 8) Art 2 paras 16 ff.

39 Peter Jung, in: Peter Jung/Philippe Spitz (eds), Bundesgesetz gegen den unlauteren Wettbewerb (UWG) – Kommentar (Stämpfli 2010) Introduction para 15 and Art 1 para 45.

40 See in depth for these case series Peter Jung (supra note 39) Art 2 paras 33 ff.

41 According to the German Supreme Court (BGH), GRUR 2010, 1117 paras 26 ff (with further references to case law and doctrine remaining divided also after the ruling of the Court) the use of unfair contract terms falls under § 4 number 11 German UCA (unfair advantage in competition by a breach of rules relating to competition); see in depth for the controversial discussion in German law Hajo Michael Holtz (supra note 2) 130 ff.

42 See for this case group which is not yet recognised by the Swiss legislator, but only by two decisions of the Federal Supreme Court (BGE 71 II, 233, 234 ff; BGE 4C.338/1997 sic! 1999, 156 – Kamov) in general Carl Baudenbacher (supra note 8) Art 2 paras 300 ff and Peter Jung (supra note 39), Art 2 paras 107 ff; for the applicability of this case group to the professional use of unfair contract terms Walter Sticher (supra note 1) 180 ff and Peter Jung (supra note 55) 144 ff.

43 Mario M. Pedrazzini/Frederico A. Pedrazzini (supra note 7) para 12.11; Thomas Probst (supra note 5) Art 8 para 66. This opinion was especially common when the old version of Art 8 UCA was in force.

44 Markus Vischer (supra note 37) 964, 968.

45 ECJ at 15.3.2012, ECLI:EU:C:2012:144, Case C-453/10 (Pereničová and Perenič), para 44.

look at other clauses in the individual agreement. Contrarily, according to the abstract view, the compensation for the disadvantages on the side of the consumer, e. g. a price reduction, is only decisive if it is located in the standard terms, too<sup>46</sup>. In order to have a valid compensation for the disadvantage, the customer must have the possibility to choose between the reduced price and paying the full price for the uncompromised performance<sup>47</sup>.

In order to be detrimental in the sense of Art 8 UCA, the standard terms must impair the position of the consumer in comparison to the position of the user of the standard terms<sup>48</sup>. Nevertheless, an effective disadvantage does not have to be proved, it is sufficient that the allocation of rights and obligations is suitable to impair the position of the consumer<sup>49</sup>.

The UCA also does not contain a definition of the term consumer. Therefore, one part of the doctrine<sup>50</sup> refers to the definition of consumer contracts established in Art 32 (2) Civil Procedure Code and Art 120 (1) Federal Statute on Private International Law defining consumer contracts as contracts on supplies 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 other part of the doctrine refers to the broader definition of Art 2 (b) Directive 93/13/EEC and of Art 3 Swiss Consumer Credit Act (SCCA) defining the consumer as any natural person who is acting for purposes which are outside his trade activity, business or profession<sup>51</sup>. Although this second definition is closer to Art 8 UCA, bearing in mind that the Swiss legislator intended to assimilate the new provision to Directive 93/13/EWG, the definition in the Consumer Credit Act is too narrow and too broad at the same time. On the one hand, Art 8 UCA should not only be applied to natural persons because the addressee of the standard terms needs not to be protected because it is a natural person but due to its inferiority and inexperience compared to the user of the standard terms<sup>52</sup>. Additionally, the applicability of Art 8 UCA should not be limited to end consumers as long as the resale is not a professional one. On the other hand, a considerable professional use should already exclude the applicability of Art 8 UCA<sup>53</sup>. An employee acting in the field of his professional activities should also not to be considered as a consumer in the sense of Art 8 UCA because of his expertise<sup>54</sup>.

#### IV. Control of General Terms by Competition Law?

As mentioned above, the new wording of Art 8 UCA is not only vague, but its interpretation is also aggravated by the unclear nature of a provision deemed to be a provision of contract law but located in the law against unfair competition. There are various problems to deal with from a contract law perspective as well as from a competition law point of view<sup>55</sup>.

##### 1. The Misplacement of Content Control from a Contract Law Perspective

The location of Art 8 UCA in the Unfair Competition Act leads – if taken seriously – to some restrictions of the scope of application which are not appropriate in the eyes of a contract lawyer. First of all, the UCA is only applicable if an act of competition in the sense of Art. 2 UCA is concerned. The behaviour of the user of the standard terms must therefore be able to appreciably influence competition<sup>56</sup>. Nevertheless, it is not required that the user of the standard terms intends to affect competition nor that he wants to make profit<sup>57</sup>. An

actual impact on competition does not have to be proved, either<sup>58</sup>. However, there remain some cases in which an effective content review is not possible: first, the requirement of an economic purpose forbids the content review in cases where the standard terms are exclusively subject to private or sovereign use. Second, the control pursuant to unfair competition law is questioned if the standard terms are used in illegal markets. Third, the applicability of the UCA is disputed if a monopolist drafted the standard terms or if all relevant market participants use the same version. From the perspective of contract law, especially in this constellation, the weaker party should be protected. Fourth, the content review pursuant to competition law is not possible in cases where the potential influence on competition is not appreciable<sup>59</sup>.

However, if the UCA is not applicable due to these restrictions, the review of standard terms can still be accomplished through the before-mentioned limited indirect content review established by the Federal Supreme Court<sup>60</sup>.

Another main problem of the new provision is the qualification of the Art 8 UCA in Swiss International Private Law. The question arises whether we have to determine the competent jurisdiction and the applicable substantive law according to the rules of international unfair competition law<sup>61</sup> or according to the rules of international contract law<sup>62</sup>. If the invalidity of the incorporation of standard terms is consid-

46 In this sense, Andrea Eisner-Kiefer (supra note 29) 28.

47 Andrea Eisner-Kiefer (supra note 29) 28 (concerning the causality requirement in insurance company's standard terms); in general Markus Hess/Lea Ruckstuhl (supra note 23) 1188, 1206.

48 Laurent Bieri, 'Le contrôle judiciaire des conditions générales – Réflexions sur le nouvel article 8 LCD', in: François Bohnet (ed), *Le nouveau droit des conditions générales et pratiques commerciales déloyales* (Helbing Lichtenhahn 2012) 47.

49 Dominique Junod Moser, *Les conditions générales à la croisée du droit de la concurrence et du droit de la consommation, Etude de droit suisse et de droit européen* (Helbing Lichtenhahn 2001) 226.

50 Andreas Furrer (supra note 19) 326; Eugénie Holliger-Hagmann, 'Artikel 8 – das Kuckucksei im UWG', in: Jusletter 20. Februar 2012, para 9; Ahmet Kut/Demian Stauber (supra note 8); Sylvain Marchand, 'Art 8 LCD: un léger mieux sur le front des intempéries' [2011] *Habe* 328, 330.

51 Guido Sutter/Florian Lörtscher, 'Klagerecht des Bundes gegen missbräuchliche AGB' [2012] *recht* 93, 100.

52 See also Pascal Pichonnaz, 'Le nouvel Art 8 LCD – Droit transitoire, portée et conséquences' [2012] *BR* 140, 141; see for the prevailing opposite view Jörg Schmid (supra note 20) 8 and Florent Thouvenin (supra note 25) Art 8 para 82.

53 For a broader application of consumer protection rules in cases of a mixed usage for private and professional purposes however Melania Lupi Thomann, *Die Anwendung des Konsumkreditgesetzes auf Miet-, Miet-Kauf- und Leasingverträge* (Schulthess 2003) 32 ff and Marlis Koller-Tumler, in: Jolanta Kren Kostkiewicz et al (eds), *Schweizerisches Obligationenrecht (OR) – Kommentar* (2nd edn, Orell Füssli 2009) Art 40 a para 7.

54 See however for the prevailing opposite view Mikael Schmelzer, *Der Konsumentenvertrag* (Rüegger 1995) 185.

55 See in depth Peter Jung, 'Die systematische Stellung der offenen AGB-Inhaltskontrolle im UWG – Vertrags- und wettbewerbsrechtliche Folgeprobleme', in: Alexander Brunner/Anton K. Schnyder/Andrea Eisner-Kiefer (eds), *Allgemeine Geschäftsbedingungen nach neuem Schweizer Recht* (Schulthess 2013) 129 ff.

56 Peter Jung (supra note 55) 132.

57 DFT (BGE/ATF/DTF) 120 II, 76, 78; FT (BGer/TF/TF) sic! 2001, 317, 318.

58 DFT (BGE/ATF/DTF) 82 II 544, 548; DFT (BGE/ATF/DTF) 117 IV 193, 197 ff; FT (BGer/TF/TF) sic! 1999, 576, 578.

59 Peter Jung (supra note 55) 133 ff.

60 Jörg Schmid (supra note 20) 17 ff; Hubert Stöckli (supra note 33) 187; Thomas Probst, 'Die richterliche Inhaltskontrolle Allgemeiner Geschäftsbedingungen im schweizerischen Recht: Ein rückblickender Ausblick in die Zukunft', in: Peter Jung (ed), *Richterliche Eingriffe in den Vertrag* (Sellier 2013) 223, 258 und Eugénie Holliger-Hagmann (supra note 50) para 33.

61 Art 129 and Art 136 Swiss PILA.

62 Art 112 ff Swiss PILA.

ered to be a claim under unfair competition law, it would be principally governed by the law of the state in whose market the distortion of competition occurred (Art 136 (1) Swiss Private International Law Act – Swiss PILA). In addition, according to Swiss international private law, a choice of law could only be made after the damage occurred and only in favour of the law of the forum (Art 132 Swiss PILA). In contrast, if the control of unfair contract terms is considered to be a question of contract law as in most other countries, it would be governed by the law chosen by the parties (Art 116 (1) Swiss PILA). However, there are some exceptions. A choice of law clause is for example not permitted in consumer contracts (Art 120 (2) Swiss PILA). Failing a valid choice of law, contracts would be governed by the law of the state to which they have the closest connection (Art 117 Swiss PILA). This is of course the more adequate solution.

## 2. The Misplacement of Content Control from a Competition Law Perspective

The misplacement of the control of unfair contract terms in the law against unfair competition does not only give rise to conflicts with contract law, but also with competition law. As already mentioned, the UCA according to its Art 1 shall protect competition in its entirety in the interest of all stakeholders and not only protect the specific interests of consumers<sup>63</sup>. That is why the restriction of the control to consumer contracts might be in line with contract law and Directive 93/13/EEC. However, it is certainly not in line with the principles of competition law. It must be seen as the result of a political compromise obtained last minute in the Swiss Parliament in order to enable the enactment of the whole reform act<sup>64</sup>.

However, standard terms can still be unfair in the light of Art 2 UCA which is the omnibus clause aiming to ban any kind of unfair competition having an impact on the market<sup>65</sup>. Therefore, if the general terms are misleading or if their usage represents aggressive business practice, they could be considered as void according to Art 2 UCA even in a business-to-business relation. But if the unfairness of standard terms is only due to their imbalanced content, it will be difficult to bypass and counteract the restriction of Art 8 UCA expressly wanted by the legislator by applying Art 2 UCA in the business-to-business area<sup>66</sup>. At best, the omnibus clause may apply if the other party is as worthy to be protected as a consumer is<sup>67</sup>. A small business entity, for example, can be in the described position due to its structural dependence<sup>68</sup>. It is doubtful whether the disproportion of contractual rights and obligations should be assessed in a less strict way if the standard terms are solely used towards professionals<sup>69</sup>. This question is also well known and very much discussed in German law<sup>70</sup>.

Other substantive restrictions of Art 8 UCA, which can only be explained by referring to contract law, lead to problems from a competition law perspective as well. There is a limitation to the effective use of the standard terms. Accordingly, the mere advertising of standard terms or the giving of advice to other companies to make use of the standard terms can represent an act of competition but do not fall under Art 8 UCA<sup>71</sup>. Furthermore, a significant and unjustified disproportion of the contractual rights and obligations has to be present according to Art 8 UCA. Thus, the question whether or not other specific provisions of the UCA or the omnibus clause should be applied will be asked in various cases where Art 8 UCA is not applicable due to the mentioned restrictions resulting from contract law.

The last problem caused by the misplacement of the control of standard terms in competition law is linked to the sanctions. The UCA provides for several possible sanctions<sup>72</sup>. If a behaviour is considered to be unfair pursuant to the omnibus clause or one of the special provisions which Art 8 UCA is part of, the consumers, the competitors, the business organisations, the consumer organisations and – under additional circumstances – also the Swiss state can sue<sup>73</sup>. They may request to prohibit an imminent infringement, to remove an ongoing infringement or to establish the unlawful nature of an infringement if its consequences still subsist (Art 9 (1) UCA). They can also require that a rectification or the judgement shall be communicated to third parties or be published (Art 9 (2) UCA). Apart from this, actions for damages, moral compensation and the disgorgement of profit are available under the UCA for consumers and competitors (Art 9 (3) UCA). Compared to other special provisions in the UCA<sup>74</sup>, there are no criminal consequences if a behaviour is against Art 8 or Art 2 UCA.

But it is not explicitly regulated in the UCA what happens with the standard terms if they violate Art 8 UCA. Agreement prevails to a large extent that the appropriate consequence is partial invalidity of the respective terms<sup>75</sup>. The invalidity results from Art 20 (1) of the Swiss Code of Obligations which states that if a contract is against the law, it should be void. This legal consequence is in fact not typical for the unfair competition law which normally does not deal with the question of the validity of a contract concluded in violation of the UCA<sup>76</sup>. The legislator would have been better advised to clarify the legal consequences of Art 8 UCA on the occasion of the revision. At least at one point, the placement of the content control in competition law provides for some clarity: It is inadmissible to reduce an unfair term to its legally permitted core<sup>77</sup> since that would violate the transparency rule established under unfair competition law. This is because the reduced interpretation at a later time would not correspond with the recognizable meaning the clause had at the conclusion of the contract.

63 Peter Jung (supra note 39) Art 1 paras 22 ff.

64 See for Art 8 as a political compromise Markus Hess/Lea Ruckstuhl (supra note 23) 1188 ff.

65 Peter Jung (supra note 39) Art 2 paras 7 and 9 ff.

66 Isabelle Wildhaber, 'Inhaltskontrolle von Allgemeinen Geschäftsbedingungen im unternehmerischen Verkehr' [2011] SJZ 537, 544.

67 Peter Jung (supra note 55) 155.

68 Botschaft zu einem Bundesgesetz gegen den unlauteren Wettbewerb (UWG) vom 18. Mai 1983, BBl. 1983 II, 1009, 1073 and Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, BBl 2009, 6151, 6179.

69 Botschaft UWG BBl 2009, 6151, 6179.

70 See in depth Reinhard Lutz, AGB-Kontrolle im Handelsverkehr unter Berücksichtigung der Klauselverbote (C.H. Beck 1991) 3 ff.

71 Peter Jung (supra note 55) 157.

72 Art 9 paras 1 and 2 UCA.

73 Philippe Spitz, in: Peter Jung/Philippe Spitz (eds), Bundesgesetz gegen den unlauteren Wettbewerb (UWG) – Kommentar (Stämpfli 2010) Art 9 paras 8 ff.

74 Art 3, 4, 4 a, 5 or 6 according to Art 23 (1) UCA.

75 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, BBl 2009, 6152 and 6179; Jörg Schmid (supra note 20) 16 and Ingeborg Schwenzer, Schweizerisches Obligationenrecht – Allgemeiner Teil (6th edn, Stämpfli 2012) para 46.05; concerning Directive 93/13/EEC: ECJ at 26.6.2000, ECLI: EU:C:2000:346, Case C-240/98 to C-244/98 (Océano), para 30.

76 Peter Jung (supra note 55) 160.

77 FT (BGer/TF/TF) 4A\_404/2008 E. 5.6.3.2.1; Arnold F. Rusch/Philip R. Bornhauser, 'Korrektiv zur Freizeichnung von der Hilfspersonenhafung' [2010] AJP 1228, 1237 ff; Ernst A. Kramer, in: Arthur Meier-Hayoz (ed), Berner Kommentar, t. IV/1/2/1 a (Inhalt des Vertrages) (Stämpfli 1991) Art 19/20 para 377.

## V. Conclusion

Art 8 is a real cuckoo's egg in the UCA – more than ever since the revision of 2012<sup>78</sup>. With the removal of the „*misleading criterion*„<sup>79</sup>, the sole characteristic attribute relating to unfair competition law has been eliminated and replaced by an ambiguous principle of good faith. The Swiss placement of the content review of general contract terms in the Act against Unfair Competition is not an example to follow<sup>80</sup>. The aim and the underlying concept of the provision is a contractual one and should therefore be classified accordingly. But a contractual interpretation would completely ignore the embedding of the provision in the Act against Unfair Competition. However, if the location of Art 8 UCA in unfair competition law is taken seriously, this would not be in line with the intent of the legislator and the need for an effective and unrestricted content control of standard terms.

In the perspective of contract law, the provision is also incomplete due to neither defining the notion of “*standard*

*terms*” nor the notion of “*consumer*” and not containing a black- or at least a grey list of unfair clauses. The only advantage of the location in the UCA consists in the possibility of a preventive and collective legal protection for example by consumer organisations or even the Swiss state. Also striking a balance between aspects related either to contract or to competition law is not a feasible approach because this would be inconsistent and increase legal uncertainty. Therefore, the lively debate on an adequate provision concerning the content review of standard terms in Swiss law will only come to rest if the provision will be integrated into the general contract law or will be dealt with in a special act. ■

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78 Eugénie Holliger-Hagmann (supra note 50).

79 To cancel this criterion was one of the main subjects of the revision because it led to the inapplicability of Art 8 UCA, Ahmet Kut/Demian Stauber (supra note 8) para 109.

80 See in depth Peter Jung (supra note 55) 129 ff.