Swiss law is widely known for its liberal approach with respect to parties’ freedom of contract, as it imposes few statutory restrictions on the parties’ ability to shape their contractual relationship. Besides its ‘neutrality’, this business-friendliness is one of the main reasons why Swiss law is often chosen as the law governing international contracts in a wide range of fields, and in particular in the construction industry.

Changes to the Swiss law on general terms and conditions: what do construction practitioners need to know?

Recent statutory changes to the Swiss law on general terms and conditions have resulted in a stricter regime with respect to the review of the content of contractual clauses in order to assess whether they are abusive or unfair in nature. An analysis of these changes shows, however, that they will not have any impact on large construction projects: the relevant statutory changes are expressly restricted to consumer contracts, leaving contractual freedom between businesses unaffected.

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Unlike similar laws in some other jurisdictions, the Swiss law on general terms and conditions (‘GTCs’) is no exception to the liberal approach as parties to contracts between businesses enjoy significant contractual freedom.

On 1 July 2012, an amended version of the Swiss Federal Act on Unfair Competition (‘Bundesgesetz gegen den unlauteren Wettbewerb’ – the ‘AUC’) came into force. A major aspect of the amendment is a revised Article 8, which provides a more effective instrument to address unfair or abusive GTCs. However, in contrast to the ‘strict and far-reaching’ rules governing the use of standard terms and conditions in Germany, which were described in an article by Dr Jörn Zons in the March 2012 issue of CLInt (entitled ‘The German Law on Standard Terms and Conditions – a Dangerous Trap for Building and Engineering Contracts’), the amendment to the AUC will not affect the use of GTCs in construction contracts which are subject to Swiss law.

The liberal approach of Swiss law towards GTCs in other types of contracts, including construction contracts, continues to apply

A last-minute amendment by the legislators expressly restricted the scope of application of the new Article 8 AUC to consumer contracts. As a result, the liberal approach of Swiss law towards GTCs in other types of contracts, including construction contracts, continues to apply.

In this article, we will provide a brief summary of the impact of the amendment to Article 8 AUC on the review of GTCs under Swiss law, before detailing the stages of review which are unaffected by the statutory changes and which continue to apply to construction contracts between businesses.

The recent amendment of Article 8 AUC

Swiss law provides for three stages of review of standard terms and conditions. These were largely developed by way of jurisprudence and doctrine, given that there is no comprehensive codification of the law on GTCs in Switzerland. The first stage, which is referred to as a ‘review of the validity’, consists in verifying whether the parties in fact agreed to the GTCs; in other words whether they were incorporated into the contract. The second stage of review involves the interpretation of the GTCs. The third stage consists of a review of the content in order to assess whether they are abusive or unfair in nature.

Article 8 AUC relates to the third stage of review, or ‘Inhaltskontrolle’. Under the old version of Article 8, GTCs would be considered unfair if, to the disadvantage of one of the parties, the contractual provisions:

• significantly deviate from the default statutory provisions which would otherwise be applicable; or
• provide for an allocation of rights and obligations which is in substantial contradiction with the nature of the contract.

However, while the scope of the ‘Inhaltskontrolle’ under the provision has been considerably broadened, its scope of application has become much narrower. Contrary to the previous version, the amended version of Article 8 AUC expressly limits the review of the content of clauses to consumer contracts. This limitation was introduced by the Swiss legislator late in the legislative process, with the express intention of excluding contracts between businesses from the provision’s scope of application.

As a result, the amendment to Article 8 AUC has no effect on the use of GTCs in...
contracts between businesses, including construction contracts. Its limited scope of application means that Swiss law does not provide for a third stage of review for such contracts. Therefore, only the two first stages of review will apply to such contracts. These are described in more detail below.

The limitation of Article 8 AUC to consumer contracts has been the subject of much criticism and was hotly debated in the Swiss parliament when the amendment to the AUC was being drafted. In particular, it has been argued that the law as it now stands does not sufficiently protect small and medium-sized businesses, which are often considered, like consumers, to be the weaker party in contractual relations.

Such criticism raises the question of whether Swiss courts will adopt an approach similar to that of their German counterparts by applying Article 8 AUC by analogy to contracts between businesses. Indeed, while the text of Article 310 of the German Civil Code (the ‘Bürgerliches Gesetzbuch’) restricts the protection awarded under the German provisions on GTCs to consumer contracts, German courts have applied the ‘Inhaltskontrolle’ for which it provides to contracts between businesses.

So far, in the few months that the provision has been in force, the Swiss courts have not yet taken a position; however, it is highly unlikely that they would follow the same approach as the German courts. The intention of the legislators was clearly to exclude contracts between businesses from the scope of application of Article 8 AUC. In addition, such application by analogy would be contrary to the more liberal approach to parties’ freedom of contract which the Swiss courts have traditionally taken.

**Review of standard terms and conditions in contracts between businesses**

Given that the revised Article 8 AUC does not apply to them, GTCs between businesses are only subject to the first two stages of review outlined above, namely the review of the validity of the GTCs and their interpretation (‘Geltungskontrolle’ and ‘Auslegungskontrolle’). These stages of review, the content of which has been developed in the Swiss jurisprudence and doctrine, do however provide for some protection for businesses which agree to GTCs proposed by their counterparty. It is therefore important for users of GTCs in construction contracts subject to Swiss law to take them into consideration.

Before we turn to the stages of review, however, we will briefly address how GTCs are defined in Swiss law.

**Definition of GTCs under Swiss law**

No statutory definition of the concept of GTCs exists in Swiss law. Having said that, the Swiss Supreme Court as well as the legislators’ commentary on the AUC have defined them as standard terms which were ‘pre-formulated’, or formulated in advance, with a view to the conclusion of multiple contracts.

Clauses will not, however, be considered to constitute GTCs if they have been individually negotiated between the parties. In order to be considered to be individually negotiated, the terms must be the subject of serious negotiations, in which the party accepting the GTCs has an opportunity to influence them. It is not, however, necessary for the clauses to be amended by the parties. Indeed, clauses can be considered to be individually negotiated if the parties deliberately leave them untouched, for example, as a result of concessions made by one of the parties on other clauses of the contract.

**Review of the validity of GTCs (‘Geltungskontrolle’)**

The first stage of review of GTCs, which is referred to as a review of their validity, consists in verifying whether the parties have in fact agreed to them. In other words, it involves assessing whether the GTCs were indeed incorporated into the parties’ contract.

Under Swiss law, GTCs can be concluded implicitly by businesses (but not by consumers); however, this is unlikely to be the case in large construction contracts, which typically will contain all applicable GTCs. Swiss law also requires that the party agreeing to the GTCs must be able to reasonably determine their content before.
concluding the contract, although it does not require that the party review them. Again, however, this is unlikely to be an issue for construction contracts, which will typically clearly set out GTCs.

An important aspect of the review of the validity of GTCs is the ‘unusualness rule’ (‘Ungewöhnlichkeitsregel’), according to which unusual GTC clauses which are not separately brought to the attention of a weaker or less sophisticated party do not, in principle, become part of the contract. According to the Swiss Supreme Court, the rule is derived from the principle of good faith.

Both a subjective and objective test apply when determining whether or not a clause is unusual. First, it must be unusual from the point of view of the party accepting the GTCs (in other words, it must be inconsistent with what the accepting party could reasonably expect). Secondly, its content must objectively be alien to the type of contract or transaction to which the parties are agreeing. This is the case if the clause ‘leads to a fundamental change in the nature of the contract and falls significantly outside of the legal framework of that type of contract’.1 The more the clause diverges from the applicable statutory law or negatively affects the legal position of the accepting party, the more likely it will be found to be unusual.

It has been suggested that, in the absence of an effective tool to address abusive clauses through a review of the content of the clauses (‘Inhaltskontrolle’), the Swiss Supreme Court has in the past used the ‘unusualness rule’ to conduct a hidden review of the content of GTCs. It is unclear whether the Supreme Court will abandon this practice, now that Article 8 AUC has been amended to provide a stronger tool to address abusive clauses in consumer contracts and given the legislators’ express intention to exclude contracts between businesses from the scope of the provision.

In any event, the application of the ‘unusualness rule’ is subject to two important limitations. The first is that a party can rely on the rule only if its weaker status or less sophisticated nature is discernible. A significant imbalance between the parties may be less likely in the context of a large construction project. However, a party which may otherwise be considered a stronger party as a result of its financial position, market power or other circumstances can be characterised as a weaker party if it has no choice but to accept GTCs because it would not be able to find any other contractual counterparty. The second limitation is that the rule can be avoided if an unusual provision is brought to the attention of the other party, for instance through emphasis in the main contract. It is therefore advisable for GTC users to highlight unusual clauses to their counterparties in a manner that can subsequently be demonstrated, if necessary.

Interpretation of GTCs (‘Auslegungskontrolle’)

The second stage of review of GTCs involves the interpretation of the standard terms and conditions. Under Swiss law, GTCs are interpreted in accordance with the same rules of interpretation as other contracts. In particular, this means that GTCs will be interpreted according to the ‘real and common intention’ of the parties. If the real and common intention of the parties cannot be established, the principle of normative consensus (‘Vertrauensprinzip’) applies, pursuant to which a party that makes a declaration of intent addressed to another is bound by its declaration according to the meaning that the recipient can and must attribute to it in good faith based on all the circumstances.

However, three special rules of interpretation of GTCs have been developed in Swiss jurisprudence and doctrine. First, special clauses agreed to by the parties to a contract will prevail over GTCs. This general principle is often expressly incorporated in construction contracts containing general and special conditions. Secondly, if a clause of the GTCs remains ambiguous in light of the general rules of interpretation, in other words if it is capable of more than one interpretation, it will be interpreted against the party which proposed the GTCs (‘in dubio contra stipulatorem’). Thirdly, the Swiss Supreme Court has set out in several decisions that GTCs which deviate from the default rules of the applicable law must be interpreted restrictively, at least insofar as they are less favourable to the party accepting the GTCs than the default rules of law.
Conclusion
While the AUC has been amended to provide for a more effective tool to address unfair and abusive GTCs, the liberal Swiss regime which has applied so far to the use of GTCs in contracts between businesses, including construction contracts, remains unchanged. Nevertheless, in resorting to GTCs in construction contracts, parties should be conscious of the stages of review which continue to apply to contracts between businesses, in particular the ‘unusualness rule’, as well as the special rules of interpretation which are applicable to GTCs in addition to the general rules of interpretation applicable to all contracts.

Note

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