Control of Price Related Terms in Standard Form Contracts
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Control of Price Related Terms in Standard Form Contracts in Switzerland—The Control of Standard Contracts Terms: The Swiss Approach

Thomas Probst

Abstract The Swiss legal and judicial control of price (related) terms in standard form contracts is fairly complex. For historical reasons and partially by coincidence, the legislator relies on a hybrid approach that combines elements of the law of obligations and the law against unfair competition. As a result, the control of standard contract terms lacks legislative coherence and raises challenging questions of interpretation for legal scholars and courts.

With regard to the law of obligations, standard contract terms are subject to control under three aspects: First, standard terms must be included in the contract by the parties’ mutual consent. Secondly, judicial guidelines have emerged as to the proper interpretation of standard contract terms and, thirdly, standard contract terms must comply with Swiss mandatory law, i.e. their content must neither be unlawful nor immoral.

As for the judicial review of standard contract terms pursuant to the law against unfair competition, Art 8 UCA (2011) states that the “use of general terms and conditions which, in contradiction to the principle of good faith, provide for a substantial and unjustified disproportion between the contractual rights and obligations to the detriment of the consumer” are deemed unfair. The practical bearing of this provision, which aims at the protection of consumers, remains unclear as it combines elements that are hard to reconcile. How and when can the use of “bad faith” standard contract terms be justified? The answer is far from clear and case law has not given any answer to date. Recent legal doctrine suggests that if a substantial disproportion of contractual rights and obligations is established, the court has to assess whether such disproportion violates the principle of good faith, i.e. whether the contracting party having supplied the standard terms could assume in good faith that the other party (consumer) would have accepted those terms without objection even if they had been subject to individual negotiation. In case a substantial disproportion of contractual rights and obligations turns out to be contrary to good
faith, the presumption arises that it is also unjustified. The burden of proof falls then on the party having supplied the (unfair) standard terms to provide conclusive evidence that the disproportion of contractual rights and obligations is adequately counterbalanced by concrete and material advantages granted by other contract terms. Although Art 8 UCA (2011) does not say so, the dominant opinion considers that unfair contract terms are null and void.

As regards the judicial control of contractual price terms, two aspects should be kept apart: on the one hand, the question whether and, if so, to what extent price (related) terms in standard form contracts are subject to judicial review and, on the other hand, whether price adjustment clauses in standard form contracts are valid.

1 Introduction

The present national report explains how and to what extent price terms in standard form contracts are subject to legislative and/or judicial control under Swiss law.

At the outset, two principles should be recalled, namely the principle of freedom of contract, which is a fundamental pillar of Swiss private law and a key element of the Swiss free market economy and the principle of pacta sunt servanda, which states that any person who freely enters into a contract—whether by a real or normative consent—will be bound by such agreement. As a corollary, at least in principle, a contracting party cannot modify contract terms later on without the other party’s consent. This is not surprising. If a party to a contract could unilaterally modify the contractual terms at its own discretion any time later, a contract would largely lose its practical utility as it would fail to provide a reliable framework (of mutual rights and obligations) for the parties’ future commercial or other relationship.

Nonetheless, the principle of pacta sunt servanda is not an absolute precept but remains subject to certain restrictions because, as the case may be, a contracting party may have a legitimate interest in unilaterally adjusting a contract term. Swiss statutory law, in particular the Swiss Code of Obligations (Swiss CO) endorses this approach as exemplified by certain provisions (Sect. 2.2, hereinafter).

It is also possible that the parties themselves anticipate a practical need for adjusting their contract to a future change of circumstances. To this effect, they may either specifically negotiate an adaptation scheme for future contract adjustments or a party may unilaterally supply (and possibly even impose) a standard clause providing for its right to modify the contract later on (Sect. 2.3, hereinafter).

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1 See Art 27 Swiss Constitution; Arts 1, 19(1) Swiss CO; BGE 15 March 2010, 136/2010 I 203 cons 4.4.1.
2 Such persons may be natural persons (cf. Arts 11–16 Swiss CC) or legal entities (cf. Arts 52–56 Swiss CC).
3 Arts 1, 18 Swiss CO.
4 Arts 1, 68, 97 Swiss CO.
5 By mutual agreement, the parties may modify their contract terms any time. Cf. Art 115 Swiss CO.
2 Unilateral Alteration of Contract Terms

2.1 In General

As mentioned before, statutory law may derogate from the principle of *pacta sunt servanda* by empowering a contracting party to modify contract terms unilaterally (Sect. 2.2, hereinafter). In the absence of statutory rules to this effect, freedom of contract prevails and the parties are free to determine on their own whether and, if so, under what conditions a unilateral modification of contract terms (*contractual adaptation scheme*) should be allowed (Sect. 2.3, hereinafter).

Any *a posteriori* (unilateral) modification of contract terms—whether based on statutory law or on a contractually agreed adaptation mechanism—can either relate to a party’s *main performance* that characterises the contract in question or to some *ancillary (less essential) term* that is common to other contracts as well. In the first case, the contractual modification concerns the *price* or the *counter-performance* therefor, whereas in the latter case some secondary contract term (e.g. place or time of performance) will be changed. Obviously, the latter modification constitutes a less serious derogation from the principle of *pacta sunt servanda* than the former.

2.2 Statutory Provisions on Unilateral Alteration of Contract Terms

The Swiss CO contains relatively few provisions that permit a contracting party to change contract terms unilaterally. The following examples are noted:

- Certain statutory rules on the *lease of residential and commercial premises* allow the tenant to challenge the (contractually agreed) initial rent as unfair, if the landlord gains an excessive income from the leased property. Similarly, if a landlord exercises his right to increase the rent during the lease—with effect as of the next possible termination date of the lease—the tenant may challenge such increase as unfair. In both instances, the legislator takes the view that some limitation on *pacta sunt servanda* is necessary for the protection of tenants (of residential and commercial premises) from unfair rents. In such cases, the application of statutory law may result in a *unilateral reduction* of the rent.

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6Such statutory rules are usually mandatory law.
7Instances where a contracting party can claim a *price reduction* under the rules of *warranty* (for instance: *reduction of sale price* [Art 205 Swiss CO], *reduction of rent* [Art 259d Swiss CO], *reduction of price for work* [Art 368 Swiss CO]) are not considered here as in those cases the price reduction is a legal remedy for the *obligor’s failure to properly perform* his contractual obligations.
8Arts 269-269a Swiss CO.
9Art 270b Swiss CO.
although the rent constitutes a key element of any lease that must be determined by the parties

- Pursuant to Art 373(2) Swiss CO, a contractor who has undertaken to carry out work for a fixed price, may ask the judge to increase the price if, subsequently, performing his work has been seriously encumbered by unforeseeable and extraordinary new circumstances. This statutory provision grounds on the principle of clausula rebus sic stantibus which clause provides a more general basis for adjusting contract terms if extraordinary and unforeseeable circumstances have come to affect the execution of a contract to a degree that renders performance unbearable for the obligor.\(^{10}\) Strictly speaking, the legal basis for this ex post unilateral modification of contract terms resides in the principle of good faith.\(^{11}\) The key argument is that it would amount to an abuse of right if a contracting party could insist on the other party’s compliance with contractual obligations although a fundamental change in circumstances has profoundly undermined the contractual equilibrium after the conclusion of the contract.\(^{12}\)

- A last example worth mentioning is Art 21 of the Swiss CO. This statutory provision deals with the situation where a contracting party exploits the other party’s inexperience or thoughtlessness to gain an unfair advantage from contract terms that are excessively disadvantageous to the other party. Pursuant to the wording of this provision, the remedy available to the aggrieved party is the avoidance of the entire contract. However, the Swiss Federal Supreme Court has construed Art 21 Swiss CO to include—in majore minus—also a partial avoidance of the contract and, in particular, even the reduction of an excessive contractual advantage of the exploiting party.\(^{13}\) Such a reduction of an excessive contractual obligation to the legally permissible level (at least) results in a judicial adaptation of contract terms and insofar restrains the principle of pacta sunt servanda.

### 2.3 Contractual Provisions on Unilateral Alteration of Contract Terms

When two parties enter into a long-term contract, they will often anticipate some need for future adjustments of their contract. Accordingly, they may agree on a contractual mechanism as to when and to what extent an unilateral modification of the contract terms should be allowed. Depending on the circumstances, such an adaptation mechanism may either be the result of (more or less difficult) negotiations or it may be incorporated—often rather discreetly—in a standard clause of general

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\(^{10}\) BGE 24 April 2001, 127/2001 III 302 cons 5–6. – See also Art 19 OR2020.

\(^{11}\) Art 2 Swiss CC.

\(^{12}\) Kramer and Probst (2018), paras 293–295.

contract terms ("boiler plate") supplied by one of the parties as a condition precedent to its willingness to enter into a contract.

*Individually negotiated* adaptation schemes are often found in (long-term) *business contracts*\(^{14}\) but hardly ever in *consumer contracts*. Conversely, *standard clauses* empowering a party to modify contract terms unilaterally are found likewise in business contracts\(^{15}\) and consumer contracts.

3 

Control of Standard Contract Terms

3.1 

The Hybrid Approach of Swiss Law

Under Swiss law, the legislative and judicial control of general contract terms in standard form contracts is rather complex. This is due to the Swiss approach which seeks to control standard terms by combining elements from the *law of obligations* (Sect. 3.2, hereinafter) on the one side, and the *law against unfair competition*\(^{16}\) on the other (Sect. 3.3, hereinafter). A further difficulty arises from EU law\(^{17}\) that cannot reasonably be ignored by Switzerland.\(^{18}\)

3.2 

The Control of Standard Contract Terms Under the Swiss Law of Obligations

Unlike other countries,\(^{19}\) Switzerland has never enacted a specific statute for the control of standard form contracts. Therefore, the Swiss Federal Supreme Court had to apply the general rules of the law of obligations so as to secure some control of unfair contract terms. This judicial approach has given rise to three levels of review: First, the requirement of the parties' *mutual consent* to the standard contract terms (Sect. 3.2.1, hereinafter). Secondly, certain judicial guidelines as to the proper *interpretation* of standard contract terms (Sect. 3.2.2, hereinafter); and thirdly, the

\(^{14}\) Cf. for instance BGE 1 February 2016, 4A_428/2015 (para A).

\(^{15}\) Cf. for instance BGE 8 September 2014, 4A_234/2014, cons 3. Often times, one of the parties is a small or medium-sized enterprise that does not have the necessary bargaining power to negotiate a unilateral option for adapting contract terms.

\(^{16}\) Swiss Federal Act Against Unfair Competition 1986, Art 8.


\(^{18}\) For further details: Probst (2016), Art 8 paras 1–4.

\(^{19}\) Cf. the German AGBG (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen) of 2 December 1976, which was later incorporated into the German BGB (§§ 305–310 BGB). For further details: Kramer et al. (2016), paras 25 ff.
conformity of standard contract terms with Swiss mandatory law (Sect. 3.2.3, hereinafter).

3.2.1 The Control of Consent to Standard Contract Terms

Standard Contract Terms are binding upon the parties if, and only if, the parties have agreed that the terms form an integral part of their contract. Any consent to standard terms (having been supplied by the other party) presupposes that the consenting party had a fair opportunity to take note of them. If a party reads and understands the standard terms made available to it before accepting them, the terms are fully incorporated into the contract. By contrast, if a party neither reads nor understands the standard terms before accepting them, such uninformed acceptance amounts to a so called global incorporation. The distinction between full incorporation and global incorporation of standard terms into a contract is relevant because a global incorporation does not extend to clauses that, in good faith, are too singular or surprising to be covered by the party’s uninformed consent.

3.2.2 The Control as to the Interpretation of Standard Terms

As a matter of principle, standard terms—which have been fully or globally incorporated into a contract—are governed by the same rules of interpretation as terms that have been individually negotiated. Nonetheless, two particular rules have emerged from case law regarding the interpretation of standard terms. First, individually negotiated terms take precedence over conflicting standard contract terms. This is rather evident since, otherwise, it would be pointless for the parties to negotiate certain contractual issues in derogation from the standard terms. Secondly, if the application of the classical tools of interpretation does not reveal a conclusive meaning of a standard term, this lack of clarity will be interpreted contra proferentem, i.e. against the party who has supplied the standard term in question. The rationale of this rule of interpretation is fairly straightforward: a party who supplies ambiguous standard terms should bear the risk of such uncertainty and should not be allowed to gain any advantage thereof.

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20 For further details: Probst (2016), Art 8 paras 157–161.
21 For further details: Probst (2016), Art 8 para 156.
22 This instrument of judicial control is generally referred to as the “unusualness rule” (“Ungewöhnlichkeitsregel”, “règle dite de l’inhabituel”) and was adopted by the Swiss Federal Supreme Court in BG 6 December 1983, 109/1983 II 456 cols 4–5. For more details: Probst (2016), Art 8 paras 167–181.
23 See also Probst (2016), Art 8 para 206.
24 See also Probst (2016), Art 8 para 207.
3.2.3 The Control of the Content of Standard Contract Terms

Like any contract term, standard terms must comply with mandatory law, i.e. their content must neither be unlawful nor immoral. Standard terms that fail to conform to mandatory law have no legal effect because they are considered null and void.

3.3 The Control of Standard Contract Terms Under the Swiss Federal Act Against Unfair Competition (Unfair Competition Act)

3.3.1 Historical Genesis of Art 8 Unfair Competition Act

In practice, the general rules of the law of obligations turned out to be insufficient for providing effective protection against unfair standard terms. Therefore in 1986, the Swiss legislator took advantage of the then pending revision of the Unfair Competition Act (hereinafter UCA) to introduce the new provision of Art 8 UCA (1986); but unfortunately, this article failed to have any notable effect. The flaw of Art 8 UCA (1986) was that it required standard terms to be misleading for their use to constitute an act of unfair competition. That is why, in 2011, the legislator revised the UCA anew and adopted a modified version of Art 8 UCA (2011), which is still in force to date.

A synoptic comparison of Art 8 UCA (1986) and Art 8 UCA (2011) reveals three differences:

<table>
<thead>
<tr>
<th>Art 8 UCA (1986)</th>
<th>Art 8 UCA (2011)</th>
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<tr>
<td>Shall be deemed to have committed an act of unfair competition, anyone who, in</td>
<td>Shall be deemed to have committed an act of unfair competition, anyone who in</td>
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<td>particular, makes use of pre-formulated general terms and conditions that, to</td>
<td>particular, uses general terms and conditions which, in contradiction to the rule</td>
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<td>the detriment of a contracting party, misleadingly:</td>
<td>of good faith, provide for a substantial and unjustified disproportion between</td>
</tr>
<tr>
<td>(a) Deviate considerably from the statutory provisions that apply either directly</td>
<td>the contractual rights and obligations to the detriment of the consumer.</td>
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<td>or by analogy;</td>
<td></td>
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<tr>
<td>(b) Provide for an allocation of rights and obligations in substantial</td>
<td></td>
</tr>
<tr>
<td>contradiction with the nature of the contract.</td>
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25 Art 19–20 Swiss CO; for further details and provisions of mandatory law see Probst (2016), Art 8 paras 186–203.
26 Art 20(1) Swiss CO. The argument that a standard contract term is void can be raised by a contracting party at any time because this objection is not subject to the statute of limitations. Moreover, a judge has to consider whether a term is void ex officio, i.e. regardless of whether or not a party has raised this objection.
First, the requirement that the standard contract terms be misleading for their use to constitute an act of unfair competition has been substituted by the prerequisite that the standard terms need to be in contradiction to the principle of good faith. This rephrased condition has a broader scope than the former did because standard terms may be against good faith even though there is no misrepresentation involved. Insofar, the scope of application of the revised Art 8 UCA (2011) has been expanded.

Secondly, Art 8 UCA (2011) does not protect anymore any contracting party but only consumers. This implies a notable restriction of its scope of application because, in particular, small and medium-sized enterprises are ever since excluded from the protection against unfair standard terms under this provision.

Thirdly, in order to decide whether the use of standard contract terms represents an act of unfair competition, Art 8 UCA (2011) does not refer anymore to a considerable deviation from the applicable statutory provisions nor to an allocation of rights and obligations in material contradiction with the nature of the contract in question. Instead, it relies on the criterion of a substantial and unjustified disproportion between contractual rights and obligations. This new criterion is hard to interpret coherently.

3.3.2 Challenging Construction of Art 8 UCA (2011)

Art 8 UCA (2011) is difficult to construe not least so because its wording is ill-conceived. Relying on the erroneous German text of Art 3(1) Directive 93/13/EEC on unfair contract terms, the Swiss legislator has accumulated conditions that are difficult to reconcile. If and when standard contract terms provide, in bad faith, for a substantial disproportion between contractual rights and obligations, how should such male fide conduct yet be justified?

Although Art 8 UCA (2011) entered into force on July 1, 2012, the interpretation of this provision is still fraught with considerable uncertainty and the Swiss Federal Supreme Court has not yet been able to clarify the legal situation.

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27Typically, this is the case when a standard clause, which is abusively disadvantageous to the customer, is couched in clear and intelligible terms. See also Probst (2013), pp. 250-251.
32To date, the only decision rendered by the Swiss Federal Supreme Court was BGE of 15 July 2014, 140/2014 III 404 cons 3-4, which dealt with the issue of intertemporal application of Art 8 UCA (2011). The Court held in this case that the legal dispute (regarding the validity of a clause providing for an automatic extension of a fitness studio contract) was governed by the old Art 8 UCA (1986). In an obiter dictum, the Court added that, under the new Art 8 UCA (2011), such
Consequently, legal doctrine has attempted to provide some guidance as, for instance, by suggesting to apply Art 8 UCA (2011) in four steps33: At first, in line with the rules on filling contractual lacunae as a reference basis, the judge needs to establish whether or not one or several standard terms provide for a disproportion between the contractual rights and obligations. Secondly, if such disproportion exists, the judge has to determine whether or not it is substantial. Thirdly, if there is a substantial disproportion of contractual rights and obligations, the court is to assess whether or not such disproportion violates the principle of good faith, i.e. whether or not the contracting party having supplied the standard terms was entitled to assume, in good faith, that the other party would have accepted the terms without any objection had they been subject to individual negotiation. Fourthly, if the substantial disproportion of contractual rights and obligations is deemed to be in contradiction to good faith, the presumption is established that, by the same token, the disproportion is also unjustified. In this event, the burden of proof falls on the party having supplied the (unfair) standard terms to adduce conclusive evidence that the substantial disproportion of contractual rights and obligations is adequately counterbalanced by concrete and material advantages granted by other terms of the contract.

If the use of one or several standard contract term turns out to be an act of unfair competition pursuant to Art 8 UCA (2011), the legal claims available to the aggrieved (contracting) party under Art 9 UCA34 are hardly appropriate for establishing the (in)validity of standard contract terms. In fact, Art 9 UCA aims at safeguarding fair competition rather than at protecting consumers from unfair contract terms. Nevertheless, according to the dominant opinion unfair contract terms are deemed to be null and void, i.e. they are not binding upon the aggrieved party (consumer).35

As for potential legal consequences under criminal law, it should be noted that criminal sanctions do not apply to the use of unfair contract terms because Art 23 UCA does not mention Art 8 UCA.36

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33For further explanations: Probst (2016), Art 8 paras 293–297.
34The following claims are provided by Art 9 UCA: request for prohibition of (imminent) infringement; request for removal of ongoing infringement or request for establishing unlawfulness of infringement.
35For further details: Probst (2016), Art 8 paras 290–291.
36Probst (2016), Art 8 para 292.
3.3.3 Action for Abstract Control by Consumer Protection Organisations

In practice, consumers rarely take legal action against companies that use unfair contract terms because they deem the financial risk of legal proceedings too high in consideration of the limited benefit they would gain if they won their case.

However, pursuant to Art 10(2)(b) UCA, Swiss Consumer Protection Organisations (of national or regional significance) are entitled to bring action, in their own name, against companies that use unfair contract terms. Such legal actions aim at an abstract control of unfair contract terms and have the advantage that, if the court declares a standard contract clause to be unfair and prohibits its further use, that ruling has a broader effect than a judgment rendered upon an action brought by a single consumer.\(^{37}\)

Despite this advantage of an abstract control of standard contract terms the hopes put in Art 10(2b) UCA have not materialised. Mainly two reasons explain for this unsatisfactory outcome: Firstly, the application of Art 8 UCA (2011) to legal actions brought by Consumer Protection Organisations in pursuit of an abstract control of standard contract terms, is a problematic undertaking since this provision has been designed for *individual claims*.\(^{38}\) Secondly, the Consumer Protection Organisations lack the necessary *financial resources* to bring promising actions against users of unfair contract terms.\(^{39}\)

3.3.4 Relevance of the Law of the European Union

There is no doubt that Art 8 UCA (2011) has been inspired by Art 3(1) Directive 93/13/EEC.\(^{40}\) Insofar, Art 8 UCA (2011) may be conceived as a unilateral (= autonomous) adoption of EU law by the Swiss legislator. At the same time, further provisions of the Directive 93/13/EEC, in particular Art 4(2), have neither been discussed nor (autonomously) adopted by the Swiss legislator.\(^{41}\) Consequently, when interpreting Art 8 UCA (2011), the Swiss Federal Supreme Court is under no (national nor international) obligation to follow case law handed down by the CJEU on this Directive but decides at its own discretion whether or not to consider such case law.

In practice, the Swiss Federal Supreme Court will refer to EU case law if this helps in finding the proper interpretation of Art 8 UCA (2011). Insofar, the Swiss

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\(^{37}\) Probst (2016), Art 8 para 301.

\(^{38}\) For further details: Probst (2016), Art 8 para 299.

\(^{39}\) Probst (2016), Art 8 para 299.

\(^{40}\) Probst (2016), Art 8 para 153.

\(^{41}\) Probst (2016), Art 8 para 189.
Federal Supreme Court may also refer to the indicative and non-exhaustive list of potentially unfair terms of the Directive.\footnote{Probst, \textit{Bankgebühren und der Schutz des Kunden vor missbräuchlichen AGB} (2017b), paras 20–21.}

4  The Judicial Control of Price (Related) Terms in Standard Form Contracts

4.1 Recent Developments in the European Union

As a matter of principle, the definition of the \textit{main subject matter} of a contract—i.e. the good or service promised by a party in consideration of some remuneration—appears to be outside the scope of \textit{pre-formulated standard terms} since each party’s contractual main performance needs to be defined by individual \textit{negotiations} between the parties.\footnote{See annex to the Directive 93/13/EC.} Insofar, it does not come as a surprise that Art 4(2) Directive 93/13/EEC\footnote{This provision reads as follows: “Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.”} exempts the “main subject matter of the contract […] and […] the adequacy of the price and remuneration” from judicial control. This exemption makes sense because—in a free market economy—the objectively essential elements of a contractual agreement are to be defined by the \textit{parties themselves} and cannot be delegated to the judge’s personal discretion.

However, upon closer consideration, this approach is \textit{less straightforward} than it appears at first sight, for it relies on a theoretical distinction that is difficult to draw in practice. Unmistakably, there is some tension between Art 4(1) and 4(2) Directive 93/13/EEC: When Art 4(1) states that the unfairness of standard terms is assessed in consideration of “\textit{all the other terms of the contract}”, this implies that the (individually negotiated) price or remuneration is a \textit{possible factor} of that assessment.\footnote{See recital 19 Directive 93/13/EC (‘… whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms…’).} For example, a low purchase price may compensate for the buyer’s disadvantage resulting from a liability waiver clause, to the effect that such clause is ultimately not unfair under Art 3 Directive 93/13/EEC. But by the same token, Art 4(2) Directive 93/13/EEC states that the assessment of the unfair nature of standard terms does not include the “main subject matter of the contract” nor the “adequacy of the price”. Nevertheless, as the case may be, the adequacy of the price can play a role when a court is to determine whether a standard clause is unfair.
This incoherence helps to explain why National Courts of EU Member States have rendered divergent judgments on the interpretation of national provisions, which had been adopted to transpose Art 4 Directive 93/13/EEC.\footnote{In BGHZ 13 May 2014 (XI ZR 405/12), the German Bundesgerichtshof held, first, that a standard term charging a one-time processing fee of 1% for a loan granted by a bank to a consumer is subject to judicial control under § 307 BGB and, secondly, that this processing fee is unfair and invalid. – In The Office of Fair Trading v Abbey National plc & Others, [2009] UKSC 6, the English Supreme Court dealt with the question of whether charges levied by banks for unauthorised overdrafts from holders of personal current accounts were subject to judicial control under the Unfair Terms in Consumer Contracts Regulations 1999 S.I. 1999/2083. The Court held that such overdraft charges were not subject to judicial control under the Regulations 1999 because “there is no possible basis on which the court can decide that some items are more essential to the contract than others” (para 39). In other words, the English Supreme Court rejected the idea of a sufficiently reliable test to distinguish “essential” contract terms (exempt from judicial control) and “ancillary” contract terms (subject to judicial control).} A further factor that has favoured the emergence of incoherent case law resides in the nature of this Directive, which does not aim at a full harmonisation of national laws (as to unfair standard terms in consumer contracts) but merely pursues a minimum harmonisation which allows EU Member States to adopt more stringent national provisions than EU law does.\footnote{Art 8 EU Directive 93/13/EEC (“Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.”).}

Against this background, the case law of the CJEU is of interest also for Swiss lawyers. It can be summarised as follows:

– In Käslar v Jelzálogbank, the CJEU stated that by the term ‘main subject-matter of the contract’ Art 4(2) Directive 93/13/EEC meant to define the essential and characteristic obligations of a contract as opposed to merely ancillary terms. While the former terms are exempt from judicial control, the latter are not.\footnote{CJEU Judgment of 30 April 2014, Käslar and Käslerné Rábai, C-26/13, EU:2014:282, paras 49–50.} With regard to contract terms that refer to “... the quality/price ratio of the goods or services”,\footnote{See recital 19 of Directive 93/13/EEC.} the CJEU held that this category of terms is limited in scope and precludes the judge only from examining the adequacy of the price or remuneration promised for the services or goods to be supplied. The underlying rationale for this exclusion, which should be construed restrictively, resides in the fact that there is no legal criterion at hand that could reasonably and objectively guide such a judicial review.\footnote{CJEU Käslar (n 47), paras 54–55. – In the CJEU Judgment of 26 April 2010, Invitel, C-472/10, EU:C:2012:242, para. 23, the Court had previously held that a standard clause providing for a mechanism to amend the prices for the services supplied to the consumer was open to judicial review because the exemption of Art 4(2) was not applicable.}

– In Matet v SC Volksbank România SA, the CJEU held that the exemption from judicial control pursuant to Art 4(2) Directive 93/13/EEC did not, in principle,
apply to a consumer credit contract containing a standard term that permitted the lender to alter the interest rate unilaterally as well as to ask for a 'risk charge'.

- In Van Hove v CNP Assurances SA, Mr. Van Hove had taken out insurance to secure the repayment of two bank loans in the event of his incapacity to work. The insurance terms stated that provision of cover was conditional upon the insured person being in a state of total incapacity for work. This standard term was challenged by Van Hove as unfair. The CJEU reaffirmed its previous position on the construction of Art 4(2) Directive 93/13/EEC and restated that the exemption from judicial control under this provision could only apply to terms that encompassed an essential and characteristic component of the contract in question.

- In the latest case of Andriciuc et al. v Banca Românească SA, the CJEU had to deal with a standard contract term in a loan agreement according to which the borrower had to repay his loan in the same foreign currency in which it had been disbursed by the lending bank. Regarding the interpretation of Art 4(2) Directive 93/13/EEC, the Court distinguished the present case—on the ground that the loan was disbursable and repayable in the same foreign currency—from Käslé v Jelzöödbank in which case a foreign currency loan was repayable in the borrower's national currency at the selling rate of exchange applied by the lending bank. Based on this distinction the CJEU concluded that—unlike a clause regarding a loan disbursable in a foreign currency and repayable in national currency—the clause regarding a loan that both was disbursable and repayable in foreign currency was exempt from judicial control under the exception of Art 4(2) Directive 93/13/EEC provided that the clause was couched in plain intelligible language.

The above summarised case law of the CJEU illustrates that the distinction between standard contract terms that characterise the "main subject matter" of a contract on the one hand, and standard terms that are of an "ancillary nature" on the other, is rather subtle and delicate one. Insofar, it should not surprise that opinions differ as to whether a foreign currency clause for a loan represents a component of the loan's "main subject matter", whereas a clause defining the rate of exchange (of the foreign currency) that serves for calculating the loan repayments is an ancillary contractual term. It is difficult to identify a conclusive test which would allow to draw a clear line between the two fact-situations.

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51 CJEU Judgment of 26 February 2015, Matei, C-143/13, EU:C:2015:127, paras 54–60, 64, 78.
54 CJEU Andriciuc and others (n 52), para 41.
4.2 Judicial Control of Price (Related) Terms in Standard Form Contracts Under Swiss Law

What is the position of Swiss law regarding judicial control of price terms in standard form contracts? For the sake of clarity, two aspects should be distinguished. A first issue is whether and, if so, to what extent price(related) terms in standard form contracts are subject to judicial review (Sect. 4.2.1, hereinafter). A second question is whether price adjustment clauses in standard form contracts are valid (Sect. 4.2.2, hereinafter).

4.2.1 The Control of Price (Related) Terms in Standard Form Contracts

Under Swiss law, the conclusion of a contract requires the contracting parties’ agreement on all (objectively and subjectively) essential terms. By contrast, secondary terms may be left open since the resulting contractual lacunae will be completed by the applicable non-mandatory rules of the Swiss CO or by the judge.\(^{55}\)

As a matter of principle, the price constitutes an essential term of all non-gratuitous contracts and needs to be defined by the parties themselves. Strictly speaking, a price agreement includes two aspects: firstly, the "an", i.e. whether any remuneration is owed at all, and secondly, the "quantum", i.e. the specific amount to be paid. As a rule, for the conclusion of a contract the parties need to agree on both aspects. However, if the parties have agreed—under a (non-gratuitous) contract—on the principle that a monetary consideration is owed but have not (yet) determined the quantum to be paid, statutory law may provide that the amount will be fixed according to the concrete circumstances.\(^{56}\)

These considerations foster the conclusion that the obligation to pay a remuneration (price as an essential contract term) has to be negotiated individually by the contracting parties and cannot be fixed by a (unilaterally pre-formulated) standard clause. For instance, this is the case of sale contracts,\(^{57}\) non-commercial loans,\(^{58}\)

\(^{55}\)See Arts 1(1) in conjunction with Art 2(1) Swiss CO. Cf. also Art 1 Swiss CC. – For further details: Probst, Bankgebühren und der Schutz des Kunden vor missbräuchlichen AGB (2017b), paras 20–25.

\(^{56}\)See Art 184(3) Swiss CO, which states that the "price is deemed sufficiently determined where it can be determined from the circumstances". For example, if traded goods are bought by the buyer without any indication of the purchase price, the goods are presumed to be sold at the current market price at the time and place of performance (Art 212(1) Swiss CO). Likewise, if a loan agreement does not stipulate the interest rate, it is presumed that the customary rate for such loans at the time and place when the loan was received applies (Art 314 (1) Swiss CO). – By analogy, the same rationale may apply to other contracts.

\(^{57}\)Art 184 Swiss CO.

\(^{58}\)Art 313(1) Swiss CO; cf. BG 3 March 2010, 136/2010 III 308 cons 3.2.1.
employment contracts,\textsuperscript{59} and contracts for work.\textsuperscript{60} By contrast, the situation differs if statutory law itself stipulates that a consideration (price, remuneration) is owed by one of the parties. Examples are contracts for services,\textsuperscript{61} commercial loans\textsuperscript{62} and contracts of bailment.\textsuperscript{63} In these instances, an individually negotiated price term is not a necessary condition to the conclusion of a contract. What does this entail for the judicial review of price (related) contract terms? The answer requires some distinctions.

In cases where a statutory provision (Swiss CO) does not only stipulate the principle that a party owes some consideration (price, remuneration) under a specific type of contract but also provides the criterion to fix the amount to be paid (for example, the "customary" price), inevitably both issues are subject to judicial review when a dispute arises between the contracting parties on the amount to be paid by the obligor. To resolve such a dispute, the judge will have to decide on the "if" (an) as well as on the "how much" (quantum). More specifically, he will first decide whether a remuneration is owed at all, and if so, he will determine the amount due by the obligor. In this event, standard contract terms will usually not be relevant to the determination of the price.

If the contract itself stipulates the amount to be paid—be it in form of a standard clause or an individually negotiated term—the judge is bound to observe the principle of freedom of contract and cannot review whether the amount stipulated by the parties is "customary" or "adequate". In fact, the parties are free to agree on a remuneration that is higher than a "customary" or "adequate" price would be. Nevertheless, the judge is entitled to review a contractual price term based on the general rules of contract law such as the provisions on unfair advantage (gross disparity)\textsuperscript{64} or on defects of consent (mistake, fraud, duress).\textsuperscript{65} Furthermore and more relevant in the present context, if the amount owed by the obligor is stipulated in a standard contract clause, the judge can review this clause pursuant to the rules of the law of obligations that govern standard contract terms,\textsuperscript{66} and if the obligor is a

\textsuperscript{59}Art 319 Swiss CO.
\textsuperscript{60}Art 363 Swiss CO.
\textsuperscript{61}Art 394(3) Swiss CO ("Remuneration is payable where agreed or customary") [emphasis added]. See also Probst, Bankgebühren und der Schutz des Kunden vor missbräuchlichen AGB (2017b), paras 16 and 23.
\textsuperscript{62}Art 313(2) Swiss CO ("In commercial transactions, interest is payable on fixed-term loans even where this has not been [... I agreed"] [emphasis added].
\textsuperscript{63}Art 472(2) Swiss CO ("The bailee may claim remuneration only where this has been expressly stipulated or was to be expected in the circumstances") [emphasis added]. See also Probst, Bankgebühren und der Schutz des Kunden vor missbräuchlichen AGB (2017b), paras 15 and 24.
\textsuperscript{64}Art 21 Swiss CO.
\textsuperscript{65}Art 23–31 Swiss CO (error, fraud and threat).
\textsuperscript{66}See supra, Sect. 3.2. For a detailed analysis of price-related standard terms in banking contracts: Probst, Bankgebühren und der Schutz des Kunden vor missbräuchlichen AGB (2017b), paras 26–74.
consumer, the judge can also review the standard contract clause from the perspective of unfair competition on the grounds of Art 8 UCA.67

The above considerations on judicial review of price (related) terms in standard form contracts under Swiss law explain why the case law handed down by the English Supreme Court, the German Bundesgerichtshof and the CJEU on Art 4 (2) Directive 93/13/EEC or on the national provisions having transposed Art 4(2),68 respectively, has not had any noteworthy impact on Swiss law so far. In particular, the controversial distinction between terms that define the "main subject matter" of a contract on the one hand, and merely "ancillary terms" on the other, has not been the object of significant discussion. The main reason for the lack of interest in this debate resides in the fact that the Swiss legislator did not adopt any provision akin to Art 4 (2) Directive 93/13/EEC. Failing any autonomous incorporation of the rationale of Art 4(2) into Swiss law, no practical need arose for looking for guidance in the case law of the CJEU. Moreover, even though comparative law is a widely accepted source of inspiration for Swiss legal scholars and courts,69 the above-summarised case law has not received much attention from legal scholars nor left any traceable marks on the Swiss Federal Supreme Court’s case law.

4.2.2 The Control of Price Adjustment Clauses in Standard Contract Terms

Apart from the question whether and, if so, to what extent standard contract terms may define price (related) terms and if such terms are subject to judicial control, another matter that is more relevant to Swiss practice needs to be addressed briefly. There is a growing tendency of commercial sellers and suppliers to include in their standard form contracts a clause that gives them the right to alter unilaterally the contractual terms at some later point in time (so called "contract adaptation or adjustment clauses"). Often, such clauses extend, be it expressly or implicitly, to price (related) terms. Under Swiss law, such clauses are subject to review under the CO70 and the UCA.71

In the first place, the judicial review of the parties’ consent applies.72 The general rule is that any later modification of a contract requires the parties’ (previous or concomitant) mutual consent. If a standard clause aims at conferring upon the seller/supplier the right to alter the contract unilaterally at his own discretion at some later time, such a clause represents an offer to the customer that he should grant the seller/supplier a non-defined unilateral option to modify the contract terms. Such “carte-

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67 See supra, Sect. 3.3.
68 See supra, Sect. 4.1.
69 Cf. Art 1(3) Swiss CC.
70 See supra, Sect. 3.2.
71 See supra, Sect. 3.3.
72 See supra, Sect. 3.2.1.
blanche"-clauses are not valid because they lack a sufficiently determinable content the customer could validly consent to.73

However, when a contract adjustment clause—couched in plain and intelligible language—specifies under which conditions and to what extent the contract may later be altered by the seller/supplier, such a clause can validly be agreed to by the customer under the law of obligations. In that event, and provided that the customer is a consumer, the review according to the rules against unfair competition (Art 8 UCA) will apply.74 Under this provision, unilateral adjustment clauses for price (related) terms regularly involve a substantial disproportion between the contractual rights and obligations to the detriment of the consumer because the seller/supplier is able to increase the consumer’s obligations under the contract without the latter’s concomitant consent.75 Consequently, the question arises whether a substantial disproportion between the contractual rights and obligations infringes the principle of good faith because the seller/supplier could not reasonably assume that the consumer would have accepted the terms altered to his detriment without any opposition if the new terms had been subject to individual negotiation. As a matter of common rational behaviour, it is unreasonable for a consumer to accept a higher price—or an increase of some other price related term of the contract—without asking for any consideration in exchange. Hence, to insert a price adjustment clause in a standard form contract that is not subject to negotiation between the contracting parties runs counter to the principle of good faith and thus is presumably unjustified unless the seller/supplier proves that the substantial disproportion of contractual rights and obligations has been adequately counterbalanced by concrete and material advantages granted to the consumer by other (favourable) terms of the contract.76

5 Particular Statutory Provisions

Apart from the law of obligations and the law against unfair competition, further legal bases for a judicial review of price (related) contract terms—whether related to standard contract terms or to individually negotiated terms—may be found in statutory provisions. For the sake of illustration, two examples are mentioned:

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74See supra, Sect. 3.3.2.
75Without the contract adjustment clause, the consumer could reject the seller/supplier’s offer for a modification of their contract at his free discretion. See also Probst, Bankgebühren und der Schutz des Kunden vor missbräuchlichen AGB (2017b), para 53.
76For further details: Probst, Bankgebühren und der Schutz des Kunden vor missbräuchlichen AGB (2017b), para 54.
First, Art 14 of the Consumer Credit Act (CCA)\(^7\) provides for a maximum interest rate of 15% p.a. payable by the consumer.\(^8\) This limit applies likewise to standard contract terms and individually negotiated contract terms.

Secondly, Art 7 of the Swiss Cartel Act\(^9\) prohibits unlawful practices by a dominant undertaking. An undertaking\(^8\) has a dominant position in a determined market if it is able to behave to an appreciable extent independently of other market participants.\(^8\) As a rule, such independence exists if the other market participants do not have any reasonable alternative but to deal with the dominant undertaking.\(^2\) The dominant position of an undertaking has to be established with regard to the relevant market, i.e. the market in which the dominant undertaking is active by supplying or consuming goods or services.\(^3\) This market needs to be determined substantively (i.e. in light of the specific goods and services offered and in view of their substitutability) as well as geographically (territorial area of commercial activity).\(^4\) An unlawful practice presupposes that the dominant undertaking abuses its market position by either hindering other undertakings from competing or by disadvantaging trading partners.\(^5\) Pursuant to Art 7(2)(b) Cartel Act, an abuse of a dominant market position may involve the imposition of inadequate prices or other contract terms. Insofar, Cartel law provides a legal basis against abusive price (related) standard terms. However, in practical operation, this avenue has not led very far because, in most cases, no causal link can be established between the dominant market position of an undertaking and the customer’s decision to accept the relevant standard terms of contract. Indeed, experience shows that undertakings without any dominant market position have no difficulty to impose standard contract terms on their customers.\(^6\)

\(^7\)Federal Act on Consumer Credits (2001), SR 221.214.1.
\(^8\)Pursuant to Art 14 CCA, the Federal Council is vested with the power to determine the applicable maximum interest rate for consumer credits in light of the current financial market conditions. For the year 2017, the maximum interest rate was fixed at 10% and 12% respectively depending on the type of consumer credit (cf Art 1 of the Ordinance of the Federal Department of Justice and Police 2016, SR 221.214.111).
\(^8\)An "undertaking" is any supplier or buyer of goods or services that is active in commerce regardless of the specific organizational or legal form (cf Art 2 par. 1\(^{st}\) Cartel Act).
\(^1\)Art 4(2) Cartel Act.
\(^3\)Cf. Art 2(1\(^{st}\)) Cartel Act.
\(^4\)BGE 23 May 2013, 139/2013 II 318 cons 5.
\(^5\)Art 7(1) Cartel Act.
\(^6\)For further details: Kramer et al. (2016), paras 601–608.
6 Conclusion

Under Swiss law, the legal and judicial control of price (related) terms in standard form contracts is rather complex. For historical reasons and, to some degree, by coincidence, the Swiss legislator has endorsed a hybrid approach to control unfair terms in standard form contracts, which combines elements of the law of obligations and the law against unfair competition. The result is a system that lacks legislative coherence and raises challenging questions of interpretation for legal scholars and courts. As a result, the effectiveness of legal protection against unfair terms in standard form contracts lies largely within their control.

References