Dear clients and business friends,

After the previous issue of Legal News discussed the general amendments to the Federal Act on Unfair Competition (“UCA”), this issue focuses on those amendments which relate to general contract terms and conditions (“GTC”). The revised Art. 8 of the Federal Act on Unfair Competition (hereinafter “Art. 8 UCA”) governs the “use of abusive terms and conditions” anew and will therefore have an important impact in future on contractual relations between companies and consumers. Art. 8 UCA affords courts the possibility to review the contents of general terms and conditions in Business-to-Customer (“B2C”) contracts and to rescind provisions which are particularly one-sided and unjustified as well as disadvantageous for consumers. In practice, this specifically means that companies active on a B2C basis should subject their GTC to review, so that these meet the legal requirements of Art. 8 UCA and would withstand a substantive review by the courts. Otherwise, such companies could run the risk of finding themselves involved in court proceedings.

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Changes to the Act on Unfair Competition (“UCA”) – Part 2

Trailblazing changes to the Swiss law on general terms and conditions

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1. General Terms and Conditions

General terms and conditions (“GTC”) are pre-formulated standard contract terms drawn up with a view to a large number of similar contractual relationships. Their use in day-to-day business is of great importance. General terms and conditions can be particularly problematic in Business-to-Consumer (“B2C”) contracts, where companies, experienced in business, come face to face with inexperienced consumers. B2C contracts often involve situations where, as a general rule, the consumer has no possibility to negotiate with regard to these pre-drafted GTC. Where all the companies operating in a given sector use the same GTC, consumers have no choice to either accept such GTC or to refrain from entering into contractual relations entirely. In practice, such power asymmetries in B2C contracts resulted in consumers and consumer advocacy groups complaining of such GTC, because these were drawn up in a manner which one-sidedly and unjustifiably disadvantaged them. They demanded statutory rules which denied such GTC any validity.

2. Abusive General Terms and Conditions

2.1 The new GTC Article

Pursuant to the revised Art. 8 of the Federal Act on Unfair Competition (hereinafter “Art. 8 UCA”) GTC shall now be deemed to be abusive where they create a significant and unjustified disparity, between contractual rights and obligations to the detriment of consumers, in a manner which breaches the principle of good faith. This affords the courts the possibility to review the contents of GTC in B2C contracts and to deny validity to any provisions which do not meet the requirements of Art. 8 UCA (see points 2.2 to 2.4 below), because they are one-sidedly and unjustifiably drafted to the detriment of consumers.

2.2 Consumer

Art. 8 UCA only applies for B2C contracts which cause the consumer to be disadvantaged. A consumer is deemed to be any natural or juridical person, who as a consumer obtains a good or a service, provided that this is for private use and not for commercial or professional use.

2.3 Disparity

With the criteria of a significant and unjustified disparity between the contractual rights and obligations, Art. 8 UCA refers to the fact that GTC in B2C contracts may not be formulated in terms that are significantly and one-sidedly in favour of the company, because these were drawn up in a manner which one-sidedly and unjustifiably disadvantaged them. They demanded statutory rules which denied such GTC any validity.

2.4 Good Faith

There is a lack of clarity among legal scholars as to the meaning of the good faith criteria. The idea underlying Art. 8 UCA is to protect consumers from abusive GTC in B2C contracts, because as a rule, consumers do not have the possibility to negotiate GTC with companies. In light of
this background, the good faith criteria must be understood in such a way that any significant disparity in the allocation of contractual rights and obligations to the detriment of the consumer constitutes a breach of good faith.

3. Legal Consequences

A breach of Art. 8 UCA results in the corresponding provision of the GTC being null and void. With regard to the contract as a whole, the rule on partial nullity set forth in Art. 20 (2) of the Code of Obligations applies, pursuant to which the contract as a whole including all other provisions of the GTC remain intact. The contract lacuna which results from the nullity of the GTC provision in question is filled by means of the applicable optional statutory law. This provides for a balanced relationship between contract rights and obligations for companies and consumers.

4. Practical Relevance

In future, the following GTC provisions, in particular in B2C contracts could be deemed to be abusive and thus as invalid: One-sided and extensive liability exclusions, one-sided and exorbitantly high contract penalties, the one-sided possibility of amending or terminating GTC, unjustified limitations on performance entitlements or one-sided and exorbitant consequences of default. The EU Directive 93/13/EEC sets out a catalogue of examples of abusive GTC provisions. The Swiss courts will rely on this Directive as a basis for applying the unusual nature doctrine, which is why until now it has often not served its objective. On the basis of the new Art. 8 UCA and the associated expansion of consumer protection in the context of abusive GTC, the Federal Supreme Court might find that it needs to relax the requirements it places on the unusual nature doctrine in order to also afford contract partners in B2B contracts better protection against abusive GTC.

In the event such a paradigm shift in the case law of the Federal Supreme Court should take place, users of GTC in B2B contracts would also be well informed to review their GTC.


In light of the fact that the scope of application for Art. 8 UCA is limited to B2C contracts, users of GTC in B2B contracts will seem at first glance to have been placed in a better position than previously, since in future, their contract partners shall no longer have the possibility of having recourse to Art. 8 UCA in cases of abusive GTC. Nevertheless, users of GTC in B2B contracts should not let this cause them to become complacent. With the “unusual nature doctrine” developed by the Federal Supreme Court, it has, up to now, been possible to have GTC - both in B2C and B2B contracts - reviewed with regard to their substance. However, the Federal Supreme Court has placed stringent criteria on the unusual nature doctrine, which is why until now it has often not served its objective. On the basis of the new Art. 8 UCA and the associated expansion of consumer protection in the context of abusive GTC, the Federal Supreme Court might find that it needs to relax the requirements it places on the unusual nature doctrine in order to also afford contract partners in B2B contracts better protection against abusive GTC.

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6. Closing Remarks

Companies which enter into B2C contracts and thus make their GTC an object of the contract will have to pay attention in future, that their GTC are fair, i.e. are not one-sided, unjustified, and not drafted in a way that is to the detriment of the consumer. With regard to B2B contracts, the future practice of the courts shall demonstrate whether an effective substantive review can take place in application of the unusual nature doctrine, thereby resulting in strengthened control against abusive terms.

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