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Swiss Commercial Contracts: Review of Recent Case Law

This review presents a selection of recent cases decided by the Swiss Federal Supreme Court about commercial contracts governed by Swiss law.

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1. Introduction

[1] The goal of this review is to present a selection of recent case law on commercial contracts governed by Swiss law (and thus by the *Swiss Code of Obligations*¹). By focusing on *commercial* contracts (whereby the concept of commercial contracts is not defined under Swiss law)², this review aims to present selected recent cases that deal with contractual issues that typically arise in business transactions.³ It focuses on selected cases decided by the Swiss Federal Supreme Court

¹ Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (classified compilation of Swiss Federal law, RS 220; See this link (<https://www.admin.ch/opc/en/classified-compilation/19110009/index.html>) which indicates that «English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force»; this review of the recent case law on Swiss commercial contracts is partly derived from the review (chronicles) on Swiss contract law that the author writes (in French) every year for the Swiss law journal «Journal des Tribunaux» (<http://journal-des-tribunaux.ch/>); these reviews/chronicles are available on the institutional open access archive of the author (<https://archive-ouverte.unige.ch/authors/view/16994>) (retrievable in the list of publications under the same title: «Droit des contrats: partie générale et contrats spéciaux»).

² The concept of commercial contracts is used in various contract law documents, and specifically in the UNIDROIT Principles on International Commercial Contracts (2016) (<https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>); the UNIDROIT Principles can have relevance under Swiss contract law and have for instance been referred to by the Swiss Federal Supreme Court in order to interpret legal concepts used in international commercial contracts that are not known as such under Swiss contract law, see the judgment of the Federal Supreme Court 4A_240/2009 of 16 December 2009 consid. 2.2 (admissible reference made by an arbitral tribunal to the UNIDROIT Principles in order to interpret the concept of «material breach» that the parties used in their agreement which was governed by Swiss law).

³ This focus consequently excludes contracts entered into by or with individuals in a non-business setting (and specifically excludes consumer contracts). In addition, in view of their specificities and of the volume of the case law, this article will not include contracts of the banking and financial industries; other sources are available for these

(*Bundesgericht*, Tribunal fédéral)⁴ and covers various types of commercial contracts (without claiming to offer an exhaustive review of the sometimes quite voluminous case law for which other – excellent – sources can be consulted).⁵

[2] The ambition of this review is not to provide an in-depth and critical analysis of the selected case law.⁶ It is rather (much more modestly) to offer a summarized overview of the selected cases⁷ and thus to make recent judicial developments about Swiss commercial contracts accessible (and hopefully understandable) in English.⁸ This is aligned with other projects and publications which analyze the role, influence and impact of Swiss law at the international level⁹, whereby this has a specific relevance with respect to Swiss contract law because Swiss law ranks very high in the selection of laws which are chosen by parties to international commercial contracts at the global level.¹⁰

contracts; for an annual review of Swiss banking case law, see LUC THÉVENOZ/CÉLIAN HIRSCH/SUSAN EMMENEGGER/MATINA REBER, *Le droit bancaire privé suisse 2018 = Das schweizerische Bankprivatrecht 2018*, Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht (SZW) / *Revue suisse de droit des affaires et du marché financier (RSDA) / Swiss Review of Business and Financial Market Law (RSDA) 2019*, vol. 91, n° 2, p. 190 (<https://archive-ouverte.unige.ch/unige:120314>). This article will similarly not present contracts in the real estate and construction industries which would (also because of their volume) deserve to be presented in a self-standing dedicated publication.

- 4 See the institutional website (<https://www.bger.ch/>); this review shall consequently not cover cases decided by other courts (specifically cantonal courts even if their judgments can also be relevant – particularly if they are final / not challenged before the Federal Supreme Court); the review shall present judgments that have either been published (or will be published) in the Official Collection of the main judgments of the Federal Supreme Court («Bundesgerichtsentscheid», BGE / «Arrêts principaux du Tribunal fédéral», ATF, cf. <https://www.bger.ch/fr/index/jurisdiction.htm>) or which are unpublished (unreported) judgments which are also available online in the database of the Federal Supreme Court for judgments rendered since 2000 (<https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr>); for a very useful introduction to the citation system of the case law of the Federal Supreme Court, see MARC THOMMEN, *Introduction to Swiss Law*, Zurich 2018 (Carl Grossmann Publishers), at 33-37 (https://www.open-ius.ch/literatur/thommen_introduction-to-swiss-law.pdf).
- 5 See e.g. the excellent annual reviews of the case law of the Federal Supreme Court on sales contracts of CHRISTOPH BRUNNER/DARIO GALLI/MARKUS VISCHER published in the Jusletter (<http://www.jusletter.ch/-paywall->): for 2018: CHRISTOPH BRUNNER/DARIO GALLI/MARKUS VISCHER, *Die Rechtsprechung des Bundesgerichts zum Kaufvertragsrecht im Jahr 2018*, in: Jusletter 11. November 2019 (https://www.walderwyss.com/user_assets/publications/Jusletter-Kaufrecht-2018.pdf); for 2017: CHRISTOPH BRUNNER/DARIO GALLI/MARKUS VISCHER, *Die Rechtsprechung des Bundesgerichts zum Kaufvertragsrecht im Jahr 2017*, in: Jusletter 24. September 2018 (https://www.walderwyss.com/user_assets/publications/2388.pdf); for 2016: CHRISTOPH BRUNNER/MARKUS VISCHER/DARIO GALLI, *Die Rechtsprechung des Bundesgerichts zum Kaufvertragsrecht im Jahr 2016*, in: Jusletter 20. November 2017 (https://www.walderwyss.com/user_assets/publications/2222.pdf); see also the numerous case comments on recent Swiss contract case law published in the dRSK (Digitaler Rechtsprechungs-Kommentar) / CJN (Commentaires de jurisprudence numériques) (<https://drsk.weblaw.ch/-paywall>).
- 6 For which reference can be made to various relevant on-line sources, specifically the dRSK/CJN (footnote 5).
- 7 Without presentation of all factual/legal elements that they contain so that the readers are invited to refer to the full and official judgments in order to get a comprehensive and precise understanding of these judgments.
- 8 The goal is not to make a general presentation of the principles of Swiss contract law, for which reference can be made to other publications, see e.g. EUGEN BUCHER, *Law of Contracts*, in: *Introduction to Swiss Law* (F. Dessemontet/T. Ansay eds), The Hague/Boston/London Kluwer/Schulthess 2004 (3rd ed.), Chapter 8 (<http://www.eugenbucher.ch/publikationen/privatrecht-schweiz/law-of-contracts-2>); TINA HUBER-PURTSCHERT, *Law of Obligations*, in: Marc Thommen (ed.), *Introduction to Swiss Law*, Berlin Carl Grossmann Verlag (2018), 305–331 (https://www.zora.uzh.ch/id/eprint/167336/1/Huber-Purtschert_Introduction-To-Swiss-Law_2018.pdf).
- 9 See JENS DROLSHAMMER/ROLF H. WEBER, *Das Recht auf Reisen geht: Eine Übersichtsdarstellung internationaler Rechtstransfers am Beispiel des schweizerischen Rechts- und Kulturraums*, Bern (Stämpfli) 2019; see also the (on-going) project: Thomas Cottier/Jens Drolshammer/Pascal Pichonnaz (eds.), *The Anthology of Swiss Legal Culture* (<http://www.legalanthology.ch/>).
- 10 French law and Swiss law were frequently chosen in the international contracts that were submitted to ICC arbitration in 2018 (these laws were selected in approximately 9% of the cases registered by the ICC Court of Arbitration in 2018), by comparison to English law which was the most selected *lex contractus* (16% of cases registered in 2018), followed by the laws of a US state (12% of cases), see the ICC Dispute Resolution 2018 statistics (ICC Publication No.: 898E, Paris 2019 (downloadable at: [3](https://iccwbo.org/media-wall/news-</div><div data-bbox=)

2. Case law

[3] This review of the case law relating to Swiss commercial contracts follows the structure of the Swiss Code of Obligations («SCO»). The SCO is (with respect to contract law) composed of a so-called general part (which provides for the general principles governing contract law and more generally the law of obligations, Art. 1–183 SCO) and the so-called special part of the SCO (Art. 184–551 SCO), which regulates different types of standard contracts, that can be considered as regulated contracts and are called «nominate contracts»¹¹. Swiss contract law distinguishes between these «nominate contracts» which are regulated (in general – but not necessarily – in the SCO) and so-called «innominate contracts» which are not regulated (and can thus be considered as unregulated contracts) and are not governed by any specific set of statutory provisions (even if these contracts remain subject to the general principles of Swiss contract law).¹² Innominate contracts are admissible under Swiss contract law as a result of the basic principle of freedom of contract.¹³ On this basis, this review will start by considering case law relating to the application of general contract law principles (i.e. from the general part of the SCO, Art. 1–183 SCO) see below 2.1, before turning to case law relating to regulated (i.e. nominate) contracts (Art. 183–551 SCO), see below 2.2, and to unregulated (i.e. innominate) contracts, see below 2.3.

2.1. General contract law principles

2.1.1. Shareholder agreement unenforceable because of excessive restriction of the personal freedom of a shareholder

BGE 143 III 480 (Judgment of the Federal Supreme Court 4A_45/2017 of 27 June 2017)¹⁴

speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/); see ELLIOTT GEISINGER/NATHALIE VOSER/PHILIPPE BÄRTSCH/CHRISTOPHER BOOG (Schellenberg Wittmer), Newsflash Arbitration: Switzerland and Swiss law preferred choice according to 2017 ICC statistics (commenting the 2017 ICC statistics) (<https://www.swlegal.ch/en/publications/newsletter-detail/newsflash-arbitration-switzerland-and-swiss-law-pr/>) noting that «the substantive law of Switzerland is popular with users around the world for its business-friendliness, as reflected by extensive party autonomy, its very concise nature and accessibility, and governs international commercial contracts in a wide array of industries and sectors, from financial transactions over M&A and other sales contracts to large construction and engineering projects, licensing agreements and contracts in the energy sector»; it must be noted that the process of selection of the governing law by the parties in international contracts is complex and has (legitimately) attracted a lot of attention; on this very interesting issue, see the remarkable book of GUSTAVO MOSER, *Rethinking Choice of Law in Cross Border Sales*, Eleven International Publishing, 2018; see also GUSTAVO MOSER, *Cognitive Errors and Thinking Aids: Rationalising Choice of Law and Arbitration Clauses* (January 28, 2019), (<http://arbitrationblog.kluwerarbitration.com/2019/01/28/cognitive-errors-and-thinking-aids-rationalising-choice-of-law-and-arbitration-clauses/>).

¹¹ See e.g. HUBER-PURTSCHERT (footnote 8), at 310 and 321.

¹² For an analysis of the features and specificities of innominate contracts, see e.g. MARC AMSTUTZ/ARIANE MORIN, *Einleitung vor Art. 184 ff. OR*, in: Heinrich Honsell et al. (eds.), *Obligationenrecht I*, Art. 1–529 OR, Basler Kommentar (4th ed.), Basel (Helbing & Lichtenhahn) 2015; CLAIRE HUGUENIN, *Obligationenrecht allgemeiner und besonderer Teil*, Zurich (3rd ed), Zurich (Schulthess) 2019, at 1240; LUC THÉVENOZ/JACQUES DE WERRA, *Introduction à la partie spéciale du Code des obligations – Des contrats innommés*, in: *Commentaire romand – droit des obligations I*, Basel (Helbing & Lichtenhahn) 2013.

¹³ See e.g. HUBER-PURTSCHERT (footnote 8), at 322.

¹⁴ See the judgment of the Federal Supreme Court (in German) (http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F143-III-480%3Ade&lang=de&type=show_document); for a commentary, see MARTIN RAUBER, *4A_45/2017: Aktionärbindungsvertrag, übermässige Bindung* (amtl. Publ.) (https://swissblawg.ch/2017/07/4a_452017-aktionarbindungsvertrag-uebermaessige-bindung-amtl-publ.html); PATRICIA REICHMUTH/HANS CASPAR VON DER CRONE, *Übermässige Bindung im Aktionärbindungsvertrag*, *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht (SZW) / Revue suisse de droit des affaires et du marché financier (RSDA) / Swiss Review of Business and Financial Market Law* 2017 p. 703; MARKUS VISCHER,

[4] This case dealt with a shareholders' agreement entered into between the three founding shareholders of a Swiss company limited by shares (regulated by Art. 620 et seq. SCO). The agreement was entered into for an unlimited period of time and was declared to be non-terminable.¹⁵ The agreement provided for various obligations of the shareholders (including a right of each shareholder to be elected to the board of directors and a right of pre-emption). It further provided for a penalty clause of CHF 40'000 for each breach of the agreement.

[5] One of the shareholders (who was the majority shareholder who had built up the company and whose two sons were on the board of directors and one of whom had been managing the company for 16 years) claimed that he was not bound (anymore) by the agreement on the ground that the agreement restricted excessively his freedom in a way that made the agreement unenforceable under the general principles of Swiss contract law (Art. 19 SCO¹⁶ and Art. 27 para. 2 of the Swiss Civil Code, «SCC»¹⁷).

[6] The Federal Supreme Court held that an excessive restriction of the economic freedom of a shareholder can occur when the shareholder is limited in his freedom of action («Betätigungsfreiheit») and in his freedom to plan the transfer of his company to his heirs («Nachfolgeregelung», corporate succession planning). From a legal perspective, the Federal Supreme Court confirmed that the application of Art. 27 para. 2 SCC does not constitute a case of termination of a long-term contract for cause (which is a legally different legal issue under Swiss contract law).¹⁸ The party excessively bound by a contract within the meaning of Art. 27 para. 2 SCC has the right to refuse performance of the contract, whereby a unilateral termination of the agreement is not necessary. In this case, the Federal Supreme Court held that the shareholders' agreement that had been in force for a period of 30 years (at the time of the decision of the first cantonal court) excessively limited the freedom of the shareholder because the agreement significantly restricted his freedom to plan his own succession.

2.1.2. Enforceability of a «no oral modification clause»

Judgment of the Federal Supreme Court 4A_265/2018 of 3 September 2018¹⁹

[7] This case dealt with the enforceability of a «no oral modification clause» and with the validity of an extension of the term of a software contract between a service provider and its client. The

BGer 4A_45/2017: Aktionärbindungsvertrag: Übermässige Bindung, Qualifikation, AJP 2017, p. 112 (https://www.walderwyss.com/user_assets/publications/2139.pdf); SÉBASTIEN BETTSCHART/ PHILIPP FISCHER, Une convention d'actionnaires est jugée excessive par le Tribunal fédéral, in: CJNI (footnote 5) published on 24 October 2017.

¹⁵ In the original (German) text of the shareholders' agreement («unkündbar auf unbestimmte Dauer»).

¹⁶ Art. 19 para. 1 SCO provides that «[t]he terms of a contract may be freely determined within the limits of the law» and para. 2 provides that «[c]lauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms of wording or where deviation from the legally prescribed terms would contravene public policy, morality or rights of personal privacy [recte: rights of personality]».

¹⁷ Art. 27 para. 2 of the Swiss Civil Code of 10 December 1907 (<https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>) (in a non-official English translation) provides that « [n]o person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals »).

¹⁸ For cases of termination for cause of long-term contracts under Swiss law, see below 2.3.1 and 2.3.2.

¹⁹ See the judgment of the Federal Supreme Court (in German) (https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?lang=fr&type=show_document&highlight_docid=atf://143-III-480); for a commentary, see MICHAEL KÜNDIG/DARIO GALLI/MARKUS VISCHER, Willenserklärungen in GV- und VR-Protokollen, in: CJNI (footnote 5), published on 15 August 2019 (https://www.walderwyss.com/user_assets/publications/190815_4A-2652018_Kuendig-Galli-Vischer-Willenserklaerungen-in-VR-und-GV-Protokollen.pdf).

contract at issue which was entered into in 2006 provided for the right of each of the parties to terminate it with a 60-day notice (at the end of each quarter). The client notified to the service provider (by letter of 3 April 2013) that it was willing to continue working with the service provider until the end of 2017. The service provider never formally confirmed the extension to its client. The client subsequently terminated the contract before that date by letter dated 23 December 2014 and effective on 31 March 2015 – in compliance with the terms of the contract. The service provider objected to this termination by claiming that the parties had allegedly agreed on an extension of the term of the contract (until the end of 2017).

[8] The contract provided for a «no oral modification» clause²⁰ according to which all modifications of the agreement had to be done in writing and based on which a waiver to this formal requirement would be valid only if it were in writing.²¹ The Federal Supreme Court held that a valid contract – and consequently a valid amendment to a contract – presupposes that the parties express their *mutual* intent in accordance with the general principles of Swiss contract law.²² The requirement of *mutuality* means that the acceptance of the contract must be notified to the author of the offer as an answer to that offer (such that offer and acceptance relate to each other).

[9] In this case, this required that the service provider notified a written declaration of acceptance (of the amendment) to the client (which was the author of the offer to extend the term of the agreement) in order to validly extend the term of the agreement.

[10] The Federal Supreme Court however held that the service provider had not notified to the client any written acceptance of the offer in order to validly amend (i.e. extend) the term of the contract. The Federal Supreme Court referred to Art. 13 para. 1 SCO which provides that «[a] contract required by law to be in writing must be signed by all persons on whom it imposes obligation»²³ and held that the service provider was bound by this provision because it had contractual obligations resulting from the project agreement so that both the offer and the acceptance (of the amendment to the contract) had to be made in writing. The Federal Supreme Court noted that the statements made in certain corporate and legal documents of the service provider were not relevant (specifically a statement made in an annex to the 2013 annual report which indicated that the service provider benefitted from a certain planning certainty as a result of the confirmation of continued cooperation that was made by its most important client which would extend at least until the end of 2017²⁴). These statements of the service provider were not addressed to the client but to the shareholders of the service provider (whereby the client should

²⁰ See UNIDROIT Principles (footnote 3), Comment ad Art. 2.1.18.

²¹ Art. 16 para. 2 of the project agreement («Projektvertrag») provided that all modifications of the agreement had to be done in writing and that a waiver to this formal requirement could be agreed upon only in writing («Ergänzungen und Veränderungen dieser Vereinbarung bedürfen zu ihrer Gültigkeit der Schriftform und der Unterzeichnung durch beide Vertragsparteien. Auch dieses Schriffterfordernis kann nur durch schriftliche Vereinbarung aufgehoben werden»).

²² Art. 1 para. 1 SCO provides that «[t]he conclusion of a contract requires a mutual expression of intent by the parties».

²³ The Federal Supreme Court failed to indicate that Art. 13 para. 1 SCO not only applies to contracts for which the *law* imposes the written form, but also to contracts for which the contracting parties voluntarily agree to make their contract subject to the written form. See Art. 16 SCO (entitled «Form stipulated by contract») and specifically Art. 16 para. 2 SCO which provides that «[w]here the parties stipulate a written form without elaborating further, the provisions governing the written form as required by law apply to satisfaction of that requirement» (thereby making Art. 13 SCO applicable).

²⁴ The statement provided (in German) that «Aufgrund der Zusammenarbeitsszusage des wichtigsten Kunden, welche bis mindestens Ende 2017 läuft, besteht entsprechende Planungssicherheit».

have been the recipient of the declaration of acceptance of the offer in order to amend the term of the contract). Consequently, the Federal Supreme Court held that the extension of the term of the contract had not been validly agreed upon by the parties (contrary to what had been decided by the last cantonal court).²⁵

2.2. Regulated contracts

2.2.1. Contract of sale – no contract in case of ambiguous identification of the number of shares to be sold in a share purchase agreement

Judgment of the Federal Supreme Court 4D_71/2017 of 31 January 2018²⁶

[11] The Federal Supreme Court had to decide whether a share purchase agreement (SPA) was valid²⁷. This dispute arose from the interpretation of a provision of the SPA stating that «[B. – the buyer] will purchase from [A. – the seller] 45 shares, out of 450 registered shares (representing 10.0% of all shares in C. AG) for 45'000 CHF.»

[12] The dispute arose because when the parties entered into the SPA, the share capital of the company (C. AG) was CHF 250'000 and was supposed to be increased to CHF 450'000. However, the capital increase did not take place.

[13] The lower court held that the SPA provided that the complainant would transfer «45 or 10 % of the shares» to the buyer. This was contradictory since 10% of the share capital corresponded to only 25 shares. This contract wording anticipated the planned increase of the share capital to CHF 450'000 which did not take place. The lower court consequently proceeded to interpret of this provision by applying the usual methods of contract interpretation applicable under Swiss contract law. The lower court first held that the parties did not agree on the number of shares to be sold and so did not have a «true and common intention» on this issue based on the so-called *subjective* method of contract interpretation which must be applied first. The lower court then interpreted this contractual provision based on the *objective* method of contract interpretation which applies by default if the real and common intention of the parties cannot be established or if their respective real intentions conflict (i.e. if the subjective method cannot apply successfully). The relevant contractual provision must be interpreted objectively on the basis of the principle of trust («Vertrauenssprinzip») by determining how it could and should have been understood in good faith on the basis of its wording and context.

[14] In this case, the lower court held that it was not possible to clarify whether the relative definition of the shares to be sold made by reference to the percentage (i.e. 10% of the shares) or

²⁵ This decision resonates with the recent decision of the UK Supreme Court which similarly held enforceable a no-modification clause, see *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24; by comparison, it can be noted that Art. 2.1.18 of the UNIDROIT Principles (footnote 3) provides that «[a] contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct ».

²⁶ See the judgment of the Federal Supreme Court (in German) (https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?lang=de&type=show_document&highlight_docid=aza://31-01-2018-4D_71-2017); for a commentary, see YVES JAQUENOD/DARIO GALLI/MARKUS VISCHER, *Auslegung eines Aktienkaufvertrags*, in : CJN (footnote 5), published on 15 January 2019 (https://www.walderwyss.com/user_assets/publications/2522.pdf).

²⁷ The Federal Supreme Court had a limited jurisdictional power to review the challenged judgment and essentially had to decide whether the judgment was arbitrary or not (it was not a *de novo* review of the judgment with full jurisdictional powers).

the absolute definition of the shares (i.e. 45 shares) should prevail by application of the objective method of contract interpretation: a good faith interpretation of this provision does not make it possible to decide objectively how many shares were to be sold under the SPA resulting in a disagreement between the parties which cannot be resolved by contract interpretation. In a sale agreement governed by Art. 184 et seq. SCO, identifying the object of the sale (which must be identified or at least be objectively identifiable) is an essential element of the agreement and so must be agreed to by the parties.

[15] On this basis, the lower court concluded that since the object of the sale (i.e. the number of shares to be sold) was unclear, there was no agreement between the parties on an essential element of the sale. As a result, the lower court held that there was no valid contract. The Federal Supreme Court upheld this reasoning of the lower court and confirmed that such reasoning was not arbitrary. This case is an illustration of a so-called «hidden disagreement» («versteckter Dissent») which cannot be resolved by a good faith objective interpretation of the contract and cannot lead to a valid contract.

2.2.2. Contract of sale – default of the buyer of a software product (default of the obligee) in case of contractual obligation of the seller to repair the defective good

Judgment of the Federal Supreme Court 4A_446/2015 of 3 March 2016²⁸

[16] In this case, the parties to a contract relating to the supply of a new software product agreed on a contractual obligation to repair of the seller in case of defect of the software. Given that the software was defective, the seller solicited the buyer several times in order to remedy the defects affecting the software. The seller was however unable to carry out any repair or new installation of the software on the buyer's premises because of a lack of cooperation of the buyer. The Federal Supreme Court held that this lack of cooperation of the buyer prevented the buyer from claiming contractual remedies against the seller.

[17] The Federal Supreme Court reminded that the statutory rules on the guarantee of a seller are not mandatory (i.e. they can be amended by contract) subject to exceptions which were not relevant in this case. This means that the parties can validly derogate from the statutory rules and can (contractually) limit the remedies of the buyer in case of defect of the good to the right to obtain the repair of the good. If they do so, the parties are bound by their agreement so that the seller (debtor) shall have the obligation to repair the defective good and the buyer (creditor) cannot rescind the contract of sale or request a reduction of the sale price (Art. 205 para. 1 SCO). The buyer has the duty to assist the seller in the performance of the seller's obligation to repair. Failure to comply with this duty leads to the buyer's default (pursuant to Art. 91 SCO which regulates the default of the obligor)²⁹, which in turn excludes that the seller (who is the debtor

²⁸ See the judgment of the Federal Supreme Court (in French) (https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_446%2F2015&rank=1&azaclir=aza&highlight_docid=aza%3A%2F%2F03-03-2016-4A_446-2015&number_of_ranks=2); for a commentary, see ALFRED KOLLER, Bundesgericht, I. Zivilrechtliche Abteilung, Urteil 4A_446/2015 vom 3. März 2016, X. AG gegen Y. SA, Zeitpunkt des Leistungsverzichts (Art. 107 Abs. 2 OR) im Falle einer definitiven Leistungsverweigerung des Schuldners (Art. 108 Ziff. 1 OR). Leistungsverzicht eines Dienstleistungsschuldners wegen Mitwirkungsverzugs (Art. 91 OR) des Gläubigers: Haftungsfolgen (Art. 95 OR i.V.m. Art. 107 f. OR), Aktuelle Juristische Praxis (AJP) 2018 p. 912.

²⁹ Art. 91 («default of the obligee») SCO provides that «[t]he obligee is in default if he refuses without good cause to accept performance properly offered to him or to carry out such preparations as he is obliged to make and without which the obligor cannot render performance».

of the obligation to repair the defective good) can be in default (there is no «default of obligor» pursuant to Art. 102 SCO). In these circumstances and as long as the buyer's default continues, the buyer cannot assert his warranty claims against the seller.

2.2.3. Application of the CISG prevails over application of Swiss national contract law

Judgment of the Federal Supreme Court 4A_543/2018 of 28 May 2019³⁰

[18] This recent case dealt with various legal issues relating to the conditions of application of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG)³¹, to a contract entered into by a public institution established in Basel which ordered/purchased various electronic energy measuring devices (so-called three-phase meters) and a Slovenia-based company (seller 1) and its Swiss subsidiary (seller 2) for several years up to the last time on 8 December 2009. On 29 August 2012, seller 1 informed the buyer by e-mail about the possibility of measurement errors which affected a certain type of their three-phase meters. On 11 July 2013, the buyer declared to the sellers that it considered all contracts for the supply of the meters to be non-binding due to an error and requested them to reimburse the purchase price plus interest against restitution of the meters. The buyer wanted Swiss contract law to apply (and not the CISG) in order to be in a position to invalidate the sale contract on the basis of an error pursuant to Art. 24 SCO and raised various arguments in order to avoid the application of the CISG.³²

[19] *First*, the Federal Supreme Court had to decide whether the CISG applied at all knowing that two of the three contracting parties were based in Switzerland (i.e. the buyer and seller 2). Pursuant to Art. 1 para. 1 lit. a CISG, the CISG applies to contracts of sale of goods between parties whose places of business are in different contracting States. The Federal Supreme Court held that the CISG did apply in this case (and confirmed the decision of the highest cantonal court on this issue) by holding that the application of the CISG in a contract for which not all the parties have their place of business in different contracting States is required in order to have one single and uniform set of laws to apply (and in order to avoid legal fragmentation). The Federal Supreme Court approved the opinion expressed in the legal literature according to which the CISG can apply in case of multiplicity of sellers or buyers (here: two sellers) if at least one of them has its place of business in a contracting state which is different from the one of the other contracting party.

[20] *Secondly*, the buyer claimed that the CISG could not apply because the parties had allegedly chosen Swiss contract law (i.e. the SCO) and would have thus excluded the application of the CISG (pursuant to Art. 6 CISG, the parties may exclude the application of the CISG). The Federal

³⁰ See the judgment of the Federal Supreme Court (in German) to be published in BGE (https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?lang=de&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_543%2F2018&rank=1&aazacir=aza&highlight_docid=aza%3A%2F%2F28-05-2019-4A_543-2018); for a commentary, see MARTIN RAUBER, 4A_543/2018: Anwendbarkeit des CISG (amtl. Publ.) (https://swissblawg.ch/2019/07/4a_543-2018-anwendbarkeit-des-cisg-amtl-publ.html); see also NICOLA BENZ / DANIELA WÄLCHLI, Look out! Your Swiss law contract may unwittingly be subject to «Vienna Convention» rules (5 February 2019) (<https://blog.froriep.com/en/swiss-law-contract-may-unwittingly-be-subject-to-vienna-convention-rules>).

³¹ The CISG is part of Swiss law, given that Switzerland has ratified the CISG which is applicable for Switzerland since March 1, 1991 (<https://www.admin.ch/opc/fr/classified-compilation/19800082/index.html>).

³² The judgment is quite complex and extensive so that only selected aspects are presented in this summarized review.

Supreme Court reminded in this respect that the choice of the law of a Contracting State presumably does not constitute an implicit exclusion of the CISG, since according to prevailing case law and legal literature the CISG is an integral part of national law. Therefore, additional elements are necessary in order to admit an implied exclusion of the CISG by which the parties must have clearly and unambiguously excluded the application of the CISG. In this case, the general terms and conditions provided for the choice of Swiss law which was not sufficient, as such, to exclude the application of the CISG (because the CISG is part of Swiss law).

[21] Even if the parties pleaded their case before the cantonal courts on the basis of Swiss national contract law (i.e. the SCO) and not the CISG, this is not sufficient to admit that they would have agreed to exclude the CISG in the course of the proceedings. If the litigating parties plead their case on the basis of a certain national law (generally the *lex fori*), this can be regarded as a subsequent agreement to exclude the CISG only if it is established that the parties were aware of the applicability of the CISG and have nevertheless selected the (non-unified national) law for their case. Otherwise, their conduct cannot be considered as an expression of their common intention to exclude the CISG. In this case, the Federal Supreme Court held that the parties had not agreed to exclude the CISG.

[22] Thirdly, the buyer claimed that it should be entitled to invalidate the contract on the basis of a fundamental error within the meaning of Art. 24 para. 1 (4) SCO³³ which shall be applicable on the basis of Art. 4 lit. a CISG which provides that the CISG does not affect the validity of the contract or individual provisions of the contract, unless expressly provided otherwise. The buyer thus alleged that by refusing to rely on a fundamental error under the SCO, the cantonal court had violated Art. 4 lit. a CISG. The Federal Supreme Court rejected this argument by confirming that the CISG applies exclusively (and thus excludes the application of remedies under national contract law) to claims relating to the contractual quality of the purchased good. On this basis, the decisive factor is the existence of a sales contract subject to the CISG and for which the CISG exclusively defines the legal remedies that shall be available (which is the case with respect to claims of the buyer relating to the contractual quality of the purchased good). The Federal Supreme Court consequently confirmed the exclusive application of the CISG so that the buyer could not declare the contract as unilaterally non-binding due to a fundamental error pursuant to Art. 24 para. 1 (4) SCO which does not apply.

2.2.4. Legal nature of a M&A advisory agreement (payment of the success fees in case of early termination of the agreement)

BGE 144 III 43 (Judgment of the Federal Supreme Court 4A_269/2017 of 20 December 2017)³⁴

³³ Art. 24 para. 1 (4) SCO provides that an error is fundamental [and thus that it can lead to the invalidation of the agreement by the victim of the error] «where the error relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract».

³⁴ See the judgment of the Federal Supreme Court (in German) (https://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?lang=de&type=highlight_simple_query&page=1&from_date=&to_date=&from_year=1954&to_year=2019&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=4A_269%2F2017+%&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=1&highlight_docid=atf%3A%2F%2F144-III-43%3Ade&number_of_ranks=15&aazclir=clir); for a commentary of this case, see MARTIN RAUBER, 4A_269/2017: Auftragsvertrag, Erfolgshonorar (amtl. Publ.) (https://swissblawg.ch/2018/01/4a_269-2017-auftragsvertrag-erfolgshonorar-amtl-publ.html); MARKUS VISCHER, Bundesgericht, I. zivilrechtliche Abteilung, Urteil 4A_269/2017 vom 20. Dezember 2017 (zur Publikation bestimmt), A. und B. AG

[23] This case dealt with the determination of the legal nature of a merger and acquisition (M&A) advisory agreement. The legal issue was essentially to assess which statutory rules apply between those governing agency contracts under Art. 394 et seq. SCO and those governing brokerage contracts under Art. 412 et seq. SCO. The agreement was entered into by a company providing exclusive advisory services and a corporate client for the sale of that client to a third party (exclusive M&A advisory services). The contract provided for various types of fees for the advisory firm, some of which depended on the success of its activities and thus on the sale of the client company. The contract was terminated with immediate effect by the client company, which, a few months later, was acquired by another company. The contract provided that the remuneration of the service provider (the advisory firm) which was dependent on the success of its activities was due if the transaction took place within one year of the termination of the contract.

[24] The advisory firm pleaded that the contract was a brokerage contract (under Art. 412 et seq. SCO) in order to obtain the part of its remuneration that depended on the success of its activities (i.e. the sale of the client company). The Federal Supreme Court held that the agency contract and the brokerage contract differ by the conditions of remuneration of the agent / broker and by the greater freedom of action that characterizes the activities of a broker by comparison to those of the agent who is required to follow the instructions of the principal. These contracts also differ depending on the activities that must be carried out on the basis of the contract at issue. If these activities extend beyond the obligation to indicate to the other party opportunities to enter into a contract or to act as an intermediary for the negotiation of such a contract (which are typical of a brokerage contract under Art. 412 et seq. SCO), such additional activities, including advisory services to the client, lead to the conclusion that the elements of the agency contract dominate. Contrary to the decision of the cantonal court, the Federal Supreme Court held that the contract at issue, in light of the issue that had to be decided (i.e. the remuneration of the service provider), had to be viewed as an agency contract. According to its clauses, the contract did not expressly include an obligation to act as an intermediary for the identification of a buyer of the client company. The contract also included obligations that were not limited to acting as an intermediary for the client company's sale transaction, since it also provided for support services during the execution of the transaction. Extensive contractual support and advisory services for the planning, preparation and execution of the sale of the company as well as the obligation to follow the instructions of the principal therefore excluded the application of the rules of brokerage contracts.

[25] The qualification of the agreement as an agency contract does not mean however that the success fee would be invalid as such: a contractually agreed success fee does not in principle constitute a circumvention of the right of free revocation or termination of the agency contract provided for by Art. 404 para. 1 SCO.³⁵ The success fee could thus remain payable if the service provider had prepared the transaction in such a way that it could be successfully concluded by the client company without further action because the client cannot avoid to pay the success fee by terminating the agency contract after a transaction ready for signature has taken place. In this respect, the question arises as to whether the termination of the agency contract was untimely

gegen C. AG, Auftrag, Erfolgshonorar, materiellrechtlicher Informationsanspruch des Beauftragten gegenüber dem Auftraggeber, AJP 2018 p. 517.

³⁵ Art. 404 para. 1 SCO provides that «[t]he agency contract may be revoked or terminated at any time by either party».

within the meaning of Art. 404 para. 2 SCO³⁶ and whether the service provider was entitled to damages. Although the claimable damages generally cannot cover lost profits (to the extent that this would impermissibly impede the free right of revocation of agency contracts), the Federal Supreme Court held that the damage claim can exceptionally include lost profits if the agent had to turn down other activities because it would have had to direct his business towards a specific mandate which was subsequently revoked or terminated at an inopportune time. The loss of profit from a terminated contract could be exceptionally owed if the party terminating the contract did so at a time when all preparations for the successful conclusion of the business had been made and only the successful conclusion was still outstanding.

2.3. Unregulated contracts

2.3.1. Just cause of immediate termination of an exclusive distribution agreement (not admitted because the alleged contractual breach was governed by another – ordinary – contractual remedy)

Judgment of the Federal Supreme Court 4A_484/2014 of 3 February 2015³⁷

[26] This case dealt with the unilateral termination of an exclusive distribution agreement covering Switzerland and Austria in the medical instrumentation industry. The supplier terminated the agreement allegedly for just cause and the exclusive distributor challenged the validity of such termination which led to litigation. In its judgment, the Federal Supreme Court reminded that long-term contracts (such as exclusive distribution agreements) can be terminated immediately for just cause and that there is a just cause for termination when a contracting party can no longer reasonably be expected, according to the rules of good faith, to continue the contractual relationship until the agreed term or until the next ordinary term of termination of the agreement. In this case, the Federal Supreme Court confirmed the cantonal judgment and held that the supplier was not entitled to terminate the contract with immediate effect due to the absence of a just cause for termination. The Federal Supreme Court held that the fact that the exclusive distributor allegedly violated its obligation to promote the marketing of products was not relevant (this was not reflected in the cantonal judgment). In addition, the exclusive distribution agreement expressly provided that the failure of the exclusive distributor to achieve the turnover targets constituted a ground for ordinary termination of the contract (and thus did not constitute a just cause of immediate termination of the agreement). The exclusive distributor had generally reached the contractual turnover targets for the years 2009 and 2010 (though the contractual target for Austria in 2010 may have not been achieved). However, as the contracting parties had

³⁶ Art. 404 para. 2 SCO provides that «[h]owever, a party doing so [i.e. revoking or terminating the contract] at an inopportune juncture must compensate the other for any resultant damage».

³⁷ See the judgment of the Federal Supreme Court (in German) (https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_484%2F2014&rank=1&aazalir=aza&highlight_docid=aza%3A%2F%2F03-02-2015-4A_484-2014&number_of_ranks=8); the legal issues relating to the termination of unregulated long-term contracts (including exclusive distribution agreements) are complex under Swiss contract law; in this context, reference can be made to the interesting article analyzing selected legal aspects relating to the termination of distribution contracts under Swiss contract law of MARIO STREBEL/FABIAN KOCH, *Besondere Aspekte bei der Beendigung des Vertriebsvertrages*, in: Jusletter 15 October 2018 (https://www.mll-legal.com/uploads/tx_x4epublication/Strebel_Koch_Besondere_Aspekte_bei_der_Beendigung_des_Vertriebsvertrages__Jusletter_20181015__01.pdf).

agreed (in Art. 8.1 of the exclusive distribution agreement) on an ordinary termination mechanism for the contract in the event that the turnover targets were not achieved, this could not justify an immediate termination of the agreement for just cause.³⁸

2.3.2. Just cause of termination of an exclusive distribution agreement (admitted in case of breach of the exclusivity by the supplier)

Judgment of the Federal Supreme Court 4A_241/2017 of 31 August 2018³⁹

[27] This case dealt with the validity of the termination of an exclusive distribution agreement notified by the exclusive distributor resulting from contractual breaches committed by the supplier. The termination of the contract for just cause by the exclusive distributor was considered valid by the Federal Supreme Court because of the contractual violations committed by the other party (i.e. the supplier) which violated the territorial exclusivity (covering the Swiss territory) granted to the exclusive distributor by selling products directly in Switzerland on several occasions in spite of the distributor's objection, and by sending a letter to certain customers located in Switzerland suggesting that, from a certain amount of order, it was no longer necessary to rely on the exclusive distributor (even though this did not comply with the exclusive distribution agreement). These elements led to the breach of the relationship of trust necessary for the continuation of the contract and consequently constituted a just cause for termination of the agreement by the exclusive distributor.

2.3.3. Insufficient proof of damage for the financial claims of the (ex-)distributor resulting from the unjustified termination of the exclusive distribution agreement

Judgment of the Federal Supreme Court 4A_27/2018 of 3 January 2019⁴⁰

[28] The dispute arose as a result of the termination of an exclusive distribution agreement entered into between a Spanish company (the supplier) – which terminated the agreement – and its exclusive distributor in Poland for selected grocery food products (lollipops and mint dragées). Under the terms of the agreement, the parties determined the annual sales volume for the next calendar year and established a budget for advertising and promotion. The agreement was entered into for an indefinite duration. According to Clause 2(B) of the agreement, either party had the right to terminate the agreement if, at the end of the current calendar year, no agreement was reached on marketing strategy, sales objectives and price structures for the following year. In

³⁸ The same reasoning was adopted in the judgment of the Swiss Federal Supreme Court 4A.435/2007 of March 26, 2008.

³⁹ See the judgment of the Federal Supreme Court (in French) (https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_241%2F2017&rank=1&azaclir=aza&highlight_docid=aza%3A%2F%2F31-08-2018-4A_241-2017&number_of_ranks=1); for a commentary, see MARKUS VISCHER, Bundesgericht, I. zivilrechtliche Abteilung, Urteil 4A_241/2017 vom 31. August 2018, A._BVBA gegen Z._Sàrl, Alleinvertriebsvertrag, AJP 2019 p. 130 (https://www.walderwyss.com/user_assets/publications/2019_AJP-1-2019_Entscheidspredung-BGer-4A_241_2017.pdf).

⁴⁰ See the judgment of the Federal Supreme Court (in German) (https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_27%2F2018&rank=1&azaclir=aza&highlight_docid=aza%3A%2F%2F03-01-2019-4A_27-2018).

such case, the agreement should expire automatically three months after the end of the calendar year.

[29] In the last two months of 1999, the parties negotiated marketing plans, sales targets and price structures and no agreement was reached for the lollipops by the end of 1999. By letter dated 2 March 2000, the supplier informed its exclusive distributor that it would be replaced and that from 2 May 2000 the distribution of the products would be transferred exclusively to another company. This led to the initiation of a legal action by the exclusive distributor before the Zurich District Court in which it sought damages from the supplier for breach of contract (Art. 97 et seq. SCO) and an indemnity for goodwill (under Art. 418u SCO). The supplier was found to be in contractual breach for having unduly terminated the agreement.⁴¹

[30] The Federal Supreme Court had to decide whether the distributor had sufficiently established the damages that it claimed to have suffered as a result of the termination of the agreement. The cantonal court held that the evidence submitted by the distributor in the proceedings was insufficient to establish its damage, given that it only partially provided product-specific financial data and that it based its calculations on average financial data at the company level as a whole. The distributor further did not claim in a timely manner in the proceedings that the products at issue (which were covered by the agreement) were representative of all the products that it commercialized so that the company-wide financial figures could also apply to the products at issue.

[31] The Federal Supreme Court reminded that, as a matter of principle, the damage must be proved by the injured party (Art. 42 para. 1 SCO). If this is not possible, the damage must be assessed by the judge «with regard to the normal course of events» (Art. 42 para. 2 SCO). An application of Art. 42 para. 2 SCO however presupposes that strict proof is not possible or unreasonable due to the nature of the matter. In this case, the distributor had submitted an estimate of its damages based on concrete information. However, this does not change the fact that the court can only use such a calculation as the basis for an estimate of damage if the circumstances put forward are suitable for drawing a sufficiently reliable conclusion as to the existence and magnitude of the damage. The distributor therefore had to show that the calculation of the damage that it submitted in the proceedings satisfied these requirements, with regard to the information that can be required from the distributor as well as with regard to the calculation method.

[32] The distributor based its damage calculation on the basis of its total *company-wide* financial figures (without providing *product-specific* financial figures). The Federal Supreme Court held on this point that an award of damages requires to prove that the alleged damage that was suffered (i.e. the reduction of net income) was caused by the conduct that was committed in breach of contract, i.e. in this case the damage was caused by the non-delivery of the relevant products (resulting from the disputed early termination of the agreement). The Federal Supreme Court held that the distributor had not submitted *product-specific* accounting documents and had not established either why it could not be reasonably expected to provide such documents. For this

⁴¹ An appeal before the Federal Supreme Court against the cantonal decision finding the supplier to be in contractual breach was rejected on procedural grounds, see Judgment of the Federal Supreme Court 4A_125/2016 of 11 April 2016. (https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_125%2F2016&rank=1&azaclir=aza&highlight_docid=aza%3A%2F%2F11-04-2016-4A_125-2016&number_of_ranks=2).

reason, it was not possible for the distributor to rely on financial documents which did not relate specifically to the products previously covered by the agreement.

[33] The Federal Supreme Court further held that the distributor had not submitted the evidence which could have established that the disputed products are *representative* of the distributor's entire business activities. If the distributor wanted to base its damage calculation for the specific products on the profit margin and on the fixed costs applicable to the general average values for all the distributor's products, it would have to specifically point out why it can be assumed that these general values are decisive for the specific disputed products by either establishing that proof and why these values do not vary from product to product or why it can be assumed that these value with respect to the disputed products would correspond to the average value of the entire range of products commercialized by the distributor.

[34] The Federal Supreme Court also challenged the calculation of the *fixed costs* that was submitted by the distributor and specifically the fact that the discontinuation of the disputed products (as a result of the termination of the agreement by the supplier) did not lead to a reduction of the fixed costs. The distributor did not submit sufficiently the required evidence in order to support its allegations.

[35] The distributor also claimed the payment of an indemnity for goodwill pursuant to Art. 418u SCO (which can apply by analogy for the benefit of exclusive distributors under certain conditions as a result of the case law of the Federal Supreme Court)⁴². Such indemnity is calculated on the basis of the «net annual earnings».⁴³ In this case, the Federal Supreme Court held, as a result of its finding about the damage claim for which it found that the damage had not been sufficiently established, that the distributor was not entitled to claim an indemnity for goodwill under Art. 418 SCO.

2.3.4. Trademark license agreement not opposable to a third party without registration in the Swiss trademark register

Judgment of the Federal Supreme Court 4A_317/2016 of 15 September 2016⁴⁴

[36] The dispute originated from an Asset Purchase Agreement (APA) concluded on 9 December 2009 by which the seller (A AG) that was active in the field of the publishing industry transferred a «D» trademark (and other intellectual property assets) together with its publishing activities in the field of architecture and design to a Spanish company (E S.L). The seller (A AG) however retained a publishing activity in the fields of «Science, Technology, Medicine» (STM) for which

⁴² BGE 134 III 497 (https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&from_year=1954&to_year=2019&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=ATF+134+III+497&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=1&highlight_docid=atf%3A%2F%2F134-III-497%3Afr&number_of_ranks=1&azaclir=clir).

⁴³ Pursuant to Art. 418u para. 2 SCO, «[t]he amount of such claim must not exceed the agent's net annual earnings from the agency relationship calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract».

⁴⁴ See the judgment of the Federal Supreme Court (in German) (https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_317%2F2016&rank=1&azaclir=aza&highlight_docid=aza%3A%2F%2F15-09-2016-4A_317-2016&number_of_ranks=1); for a comment on this case, see JACQUES DE WERRA, *Contrat de licence et faillite: quelle protection du preneur de licence*, Expert Focus 2017, vol. 17, no. 8, p. 474 (<https://archive-ouverte.unige.ch/unige:96219>).

it obtained an exclusive license without time limit for the use of the designation «D» only in connection with publications in the STM fields. For this purpose, Art. 12.2 of the APA («Business Name, Trademarks and Domain Names») provided that «[t]he Purchaser [E S.L.] herewith grants an exclusive and royalty free license to the Vendor [A AG] entitling the Vendor to use the trade name «D», however, only within the scope of the publishing of STM publications for an unlimited period of time».

[37] E S.L. subsequently transferred all its rights and obligations under the APA (including the «D» brand) to a subsidiary (F GmbH which changed its corporate name into D GmbH) which subsequently went bankrupt (on March 6, 2012). By contract dated 24 April 2012, the «D» brand was acquired in the bankruptcy proceedings of D GmbH by another company («C GmbH») together with the publishing activities in the field of architecture and design. Two days after the conclusion of this contract (i.e. on April 26, 2012), the company that had initially sold the «D» trademark (A AG) filed for the registration of the exclusive license resulting from the APA in the Swiss trademark register with the Swiss Intellectual Property Office («IPI»)⁴⁵. The application for registration of the license was rejected by the IPI by a decision of January 21, 2013. On May 23, 2013, C GmbH (the new owner of the «D» trademark) brought a legal action against A AG before the courts of the City of Basel for infringement of its trademark rights on the «D» trademark, by which it essentially sought to prohibit A AG from using the «D» trademark in connection with its publishing activities. A AG objected to this action by claiming (among other legal arguments) the benefit of its rights on the «D» trademark resulting from the APA.

[38] The Federal Supreme Court ruled in C GmbH's favour and held that, based on an interpretation of Art. 12.2 of the APA (cited above), A AG had obtained a license on the «D» trademark under Art. 18 of the Swiss Trademark Act («STA»)⁴⁶. It rejected the argument raised by A AG according to which the APA would have granted to A AG an usufruct over the «D» trademark under Art. 19 STA.⁴⁷ The Federal Supreme Court further held that a license agreement only confers a relative right in favour of the licensee against the licensor and thus does not confer on the licensee any property right in the trademark that would be enforceable against third parties. Only a registration of a license in the trade mark register can protect the licensee against a third party acquirer of the trademark and make the license binding on the acquirer of the trademark pursuant to Art. 18 para. 2 STA.⁴⁸ Given that the trademark license granted to A AG in the APA had not been entered in the trade mark register, the license granted to A AG in the APA could not be opposed to the company which had subsequently acquired the «D» trademark (i.e. C GmbH).

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⁴⁵ See the institutional website (<https://www.ige.ch/en.html>).

⁴⁶ Federal Act on the Protection of Trade Marks and Indications of Source of 28 August 1992 (classified compilation of Swiss Federal law, RS 232.11 (<https://www.admin.ch/opc/en/classified-compilation/19920213/index.html>); Art. 18 para. 1 STA (<https://www.admin.ch/opc/en/classified-compilation/19920213/index.html#a18>) provides that «[t]he proprietor of a trade mark may permit others to use the trade mark for the goods or services for which it is claimed, in whole or in part, and for the whole territory or a part of Switzerland only».

⁴⁷ Art. 19 para. 1 STA (<https://www.admin.ch/opc/en/classified-compilation/19920213/index.html#a19>) provides that «[a] trade mark may be subject to usufruct, pledge or compulsory enforcement measures».

⁴⁸ Art. 18 para. 2 STA provides that «[t]he licence shall be entered in the Register at the request of one of the parties. It then becomes binding on any rights to the trade mark subsequently acquired».