ATF 148 III 57 (05.01.2022) Abtract, original text in German, summary of facts and title added.

In August 2018, a restaurant in the canton of Aargau took out "SME business insurance", which included property insurance. This covers loss of income and additional costs arising from an epidemic.

The *risks excluded from cover in the event of an epidemic* are listed under *"Not insured" and "Epidemic*". Among *other things, this excludes damage caused by pathogens for which the World Health Organisation (WHO)pandemic phases* 5 *or 6 are applicable at national or international level*.

Following the closure of restaurants and bars ordered by the Federal Council from 17 March 2020 until the end of April 2020, the restaurant has suffered an estimated loss of income of CHF 75,397. The restaurant asked the insurer to provide the insured benefits, but the insurer refused.

Claim of the restaurant dismissed.

Definition of GTC

2. General terms and conditions (GTCs) are contractual provisions that have been formulated in a general way with a view to the future conclusion of a large number of contracts (cf. judgments 4A_47/ 2015 of 2 June 2015, para. 5.1; 4C.282/2003 of 15 December 2003, para. 3.1; 4P.135/2002 of 28 November 2002, para. 3.1).

Integration into the contract

2.1 General terms and conditions have no intrinsic validity between the parties. They apply only insofar as the parties have expressly or implicitly included them in their contract(BGE 118 II 295 para. 2a; judgments 4A_47/2015 of 2 June 2015 para. 5.1; 4A_548/2013 of 31 March 2014 para. 3.3.1; 4C.282/2003 of 15 December 2003 para. 3.1). As a first step, therefore, it must be ascertained whether the general terms and conditions form an integral part of the contract.

Priority of specific agreements

2.1.1 If this is the case, the general terms and conditions apply only if there are no individual agreements derogating from the general terms and conditions (primacy of the individual agreement; BGE 135 III 225, para. 1.4; BGE 125 III 263, para. 4b/bb; BGE 123 III 35, para. 2c/bb; judgment 4A_503/2020 of 19 January 2021, para. 5.3 with other references).

Accessibility rule

2.1.2 General terms and conditions can only be agreed if, at the time the contract was concluded, the party who agreed to them had at least a reasonable opportunity to become acquainted with their content (the so-called accessibility rule; cf. BGE 139 III 345 rec. 4.4; 77 II 154 rec. 4 p. 156; judgment 4A_47/2015 of 2 June 2015, para. 5.4.1). For insurance contracts , art. 3 para. 2 of the LCA (RS 221.229.1) also stipulates that the policyholder must be in possession of the general terms and conditions of insurance when offering or accepting the insurance contract.

Global acceptance : unusual clauses

2.1.3 If the party has accepted the general terms and conditions in their entirety, i.e. without reading them, reading them or understanding their scope (so-called global acceptance; BGE 119 II 443 rec. 1a; BGE 109 II 452 rec. 4; judgment 4C.282 /2003 of 15 December 2003, para. 3.1), the validity of general terms and conditions is limited by the "unusual" rule: By virtue of the principle of trust, the drafter of general terms and conditions must assume that the other party will not accept unusual clauses (judgment 4A_499/2018 of 10 December 2018, para. 3.3.3). Consequently, all unusual clauses whose existence has not been notified separately to the party giving its agreement are excluded from the acceptance declared globally(ATF 138 III 411 consid. 3.1; ATF 135 III 1 E. 2.1, ATF 135 III 225 E. 1.3; ATF 119 II 443 consid. 1a). Unusualness is assessed from the point of view of the person who gave consent at the time the contract was concluded(ATF 138 III 411, para. 3.1; ATF 135 III 1, para. 2.1; ATF 119 II 443, para. 1a), taking into account the circumstances of the case(ATF 135 III 1, para. 2.1; ATF 119 II 443, para. 1a).

Scope of application of the unusual clause rule

2.1.3.1 The rule of the unusual is an instrument of the doctrine of consent (judgment 4A_499/2018 of 10 December 2018, recital 3.3.2). It embodies the principle of trust(BGE 138 III 411, para. 3.1; BGE 135 III 1, para. 2.1, p. 7). The purpose of this principle is to protect good faith in commercial relations and is not primarily intended to protect the weaker or inexperienced party against the stronger or more experienced party. It is not therefore necessary for the author of the consent to be a weaker or inexperienced party for the rule of the unusual to apply. Even a contracting party who is stronger and more experienced in business or the industry may be surprised by a clause contained in general terms and conditions and invoke the unusualness rule (judgment 4A_499/2018 of 10 December 2018, para. 3.3.2, with further references). Nevertheless, the position and experience of the person giving consent are not irrelevant, but play a role in the subjective unusualness.

Subjective test

2.1.3.2 The clause in the general terms and conditions must first of all be subjectively unusual for the party giving its agreement. In particular, account must be taken of the consenting party's knowledge of the business and the sector: the less experience the

consenting party has of the business or sector, the more likely it is that a clause will be unusual for him or her (judgment 4A_499/2018 of 10 December 2018, para. 3.3.3). For example, clauses that are customary in the industry may be unusual for a person outside the industry, but not for a person familiar with the industry(BGE 138 III 411, para. 3.1; BGE 119 II 443, para. 1a). However, knowledge of the industry or commercial experience does not necessarily rule out the unusual nature of the transaction. Even for a person familiar with the industry or with business experience, a clause in the general terms and conditions may be unusual in certain circumstances (BGE 148 III 57, 61 (judgment 4A_499/2018 of 10 December 2018, para. 3.3.3).

Objective test

2.1.3.3 In addition to the subjective unusual character, the clause in question must objectively have a content that is foreign to trade for the unusual character rule to apply. It must therefore be objectively unusual. This condition is met when it leads to a substantial change in the nature of the contract or when it goes far beyond the legal framework of the type of contract. The more a clause affects the legal position of the other party, the more unusual it may be(BGE 138 III 411, para. 3.1; BGE 135 III 1, para. 2.1; BGE 135 III 225, para. 1.3).

Specificity of Insurance contracts

In the case of insurance contracts, legitimate expectations regarding cover must also be taken into account(ATF 138 III 411, para. 3.1; judgments 4A_232/2019 of 18 November 2019, para. 2.2; 4A_48/2015 of 29 April 2015, para. 2.1). Similarly, a limitation of liability provided for in the general terms and conditions of insurance may be deemed unusual if the scope of the cover described in the designation and advertising is considerably reduced, so that precisely the most frequent risks are no longer covered(ATF 138 III 411, para. 3.1; judgments 4A_176/2018 of 6 August 2018, para. 4.2; 4A_152/2017 of 2 November 2017, para. 4.3; 4A_187/2007 of 9 May 2008, para. 5.4.2; 5C.134 /2004 of 1 October 2004 recital 4.2; 5C.53/2002 of 6 June 2002 recital 3.1).

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Interpretation of GTC

2.2 If the parties have incorporated the general terms and conditions into the contract, the second step is to determine their content by interpretation.

2.2.1 In principle, general terms and conditions must be interpreted in accordance with the same principles as other contractual provisions(BGE 142 III 671 rec. 3.3; BGE 135 III 1 rec. 2). What is decisive, therefore, is firstly the real and concordant will of the contracting parties and, secondly, if such a will cannot be established, the interpretation of the declarations of the parties on the basis of the principle of trust(BGE 142 III 671 rec. 3.3; BGE 140 III 391 rec. 2.3).

Wording

It is necessary to rely on the wording of the declarations, which must not, however, be assessed in isolation, but according to their concrete meaning (BGE 146 V 28 recital 3.2; BGE 142 III 671 recital 3.3; BGE 140 III 391 recital 2.3). Even if the text seems clear at first sight, one should not confine oneself to a purely literal l interpretation (BGE 131 III 606, para. 4.2; BGE 130 III 417, para. 3.2; BGE 129 III 702, para. 2.4.1; BGE 127 III 444, para. 1b). Rather, the parties' statements should be interpreted as they could and should be understood according to their text and context, and according to the circumstances as a whole (ATF 146 V 28, 3.2; ATF 145 III 365, 3.2.1; ATF 144 III 327, 5.2.2.1).

Purpose of contract

The court must also take into account the contractual purpose pursued by the parties as the addressee of the declaration could and should have understood it in good faith (BGE 146 V 28 rec. 3.2; BGE 142 III 671 rec. 3.3; BGE 140 III 391 rec. 2.3). For the interpretation of a contractual provision drafted by one of the parties, it is therefore decisive to know what contractual objective the other party could and should reasonably recognise in it as a bona fide commercial partner (judgments 4A_203/2019 of 11 May 2020 para. 3.3.2.2., not published in: ATF 146 III 254; 4A_652/2017 of 24 August 2018 para. 5.1.2; 4C.443/1996 of 26 March 1997 para. 2a). In this context, it must be considered, in general, that addressee of the statement could assume that the declarant was seeking a reasonable and appropriate solution (judgments 4A_652/2017 of 24 August 2018, para. 5.1.2; 4C.443/1996 of 26 March 1997, para. 2a).

The Federal Court examines this objective interpretation of the declarations of intent as a question of law, on the understanding that it is in principle bound by the findings of the cantonal court regarding the external circumstances and the knowledge and intent of the parties(art. 105 para. 1 FSCA; BGE 146 V 28 rec. 3.2; BGE 144 III 93 CONSID. 5.2.3; ATF 142 III 671 CONSID. 3.3).

Interpretation of unclear clauses

2.2.2 Unclear clauses in general terms and conditions must be interpreted in cases of doubt to the detriment of the party who drafted them (the unclear clauses rule). Unclear clauses in general terms and conditions of insurance must therefore be interpreted against the insurer who drafted them (ATF 146 III 339 consid. 5.2.3; ATF 133 III 61 consid. 2.2.2.3, ATF 133 III 607 CONSID. 2.2; ATF 124 III 155 CONSID. 1b). In the case of insurance contracts , art. 33 VVG confirms the unclear clause rule in that the insurer is liable for all events that bear the characteristics of the insured risk, unless the contract excludes certain events from the insurance "in a specific and unequivocal manner" (judgment 4A_92/2020 of 5 August 2020 E. 3.2.2). It is therefore up to the insurer to define precisely the scope of its commitment (BGE 135 III 410, para. 3.2; BGE 133 III 675, para. 3.3; on art. 33 VVG, see also judgment 4A_153/2015 of 25 June 2015, para. 4.1).

However, the unclear clauses rule applies only in the alternative, when all other means of interpretation have failed (BGE 133 III 61 rec. 2.2.2.3; BGE 122 III 118 rec. 2a and rec. 2d; judgments 4A_279/2020 of 23 February 2021 rec. 6.2; 4A_81/2020 of 2 April 2020 rec. 3.1). It is therefore not sufficient that parties dispute the meaning of a statement. The statement must be unclear in itself, i.e one may understand in different ways in

accordance with the rules of good faith (BGE 118 II 342, para. 1a) and it is not possible to remove the doubt by other means of interpretation (judgments 4A_92/2020 of 5 August 2020, para. 3.2.2; 4A_186/2018 of 4 July 2019, para. 4.1; 4A_152/2017 of 2 November 2017, para. 4.2).

(...)

TF 4A_54/2021, 28.10.2021 Abtract, original text French, summary of facts and title added.

In 2014, a client with some experience in the financial sector used the IT platform of a Vaud bank to speculate on fluctuations in the EUR/CHF exchange rate.

Article 4.13/iv of the e-forex *contract, which must be accepted in order to gain access to the platform, states the following:*

"You acknowledge and accept that in certain market conditions it will be difficult or impossible to execute orders at a specific price or to liquidate certain positions, to estimate a fair or acceptable price and to estimate risk exposure. This may occur, for example, when the market is illiquid or when there is a failure of an electronic or telecommunications system or in a case of force majeure. Placing a stop-loss order does not necessarily guarantee that the risk will be limited because, in certain market conditions, your order may not be executed".

On 8 January 2015, the client gave a stop-loss *order at 1.194 to secure his position, which consisted of buying 2,000,000 EUR/CHF at 1.204119.*

On 15 January at 10.30am, the SNB announced that it was abandoning the CHF/EUR floor rate. This caused a wave of panic and made the CHF/EUR market illiquid. The Vaud bank suspended trading for almost an hour. When trading resumed at 11.35am, the customer's position was automatically liquidated at a much lower rate (around 1.04) than the one at which it had been acquired (1.204119). This left the client with a negative balance of CHF 287,641.95.

Claim of client against Bank dismissed

Unfair competition law

6.4. The appellant then argues that Art. 4.13/iv. is invalid on the basis of Art. 8 of the Unair competition Act, which reads as follows:

"Art. 8 Use of unfair trading terms

A person acts unfairly who, in particular, uses general terms and conditions which, contrary to the rules of good faith, provide for a significant and unjustified disproportion between the rights and obligations arising from the contract to the detriment of the consumer".

(...)

Definition of consumer

6.4.2. This court did not have the opportunity to rule on the concept of "consumer" used in art. 8 UWG (judgment 4A_275/2019 of 29 August 2019, para. 1.4), and more specifically to decide whether protection is limited to everyday consumer services. At most, it excluded from the circle of consumers a limited company dedicated to supervising construction work, having taken out professional liability insurance with a company (judgment 4A_152/2017 of 2 November 2017 recital 5.3). There is little dispute in the legal literature that a legal person with a commercial purpose does not constitute a consumer within the meaning of art. 8 UWG (cf. e.g. HELMUT HEISS, in UWG Kommentar, [Heizmann/Loacker ed.] 2018, no. 119 ad art. 8 LCD; PASCAL PICHONNAZ, in Commentaire romand, Loi contre la concurrence déloyale, 2017, nos 128-130 ad art. 8 LCD; ESTHER WIDMER, Missbräuchliche Geschäftsbedingungen nach Art. 8 UWG [...], 2015, n. 312; THOMAS KOLLER, Art. 8 UWG: Eine Auslegeordnung [...], in PJA 2014 p. 25 i.f. et seq.; FLORENT THOUVENIN, in Basler Kommentar, Bundesgesetz gegen den unlauteren Wettbewerb [UWG], 2013, n° 82 ad art. 8 LCD).

Everyday consumer services (?)

On the other hand, authors are divided as to whether the protection afforded by art. 8 UWG should be restricted to everyday consumer goods - not without deploring in passing the imprecision of the legislator. Some answer this question in the affirmative on the basis of the definitions given in art. 32 para. 2 CPC and art. 120 para. 1 LDIP, advocating in particular harmonisation with procedural law (cf. inter alia HESS/RUCKSTUHL, AGB-Kontrolle nach dem neuen Art. 8 UWG [...], in PJA 2012 pp. 1194-1196; SYLVAIN MARCHAND, Art. 8 LCD: Un léger mieux sur le front des intempéries, in REAS 2011 p. 330; ANDREAS FURRER, Eine AGB-Inhaltskontrolle in der Schweiz? [...], in REAS 2011 p. 326 let. b, followed by KUT/STAUBER, Die UWG-Revision vom 17. Juni 2011 im Überblick, in Jusletter of 20 February 2012, n. 115, who consider this solution to be defensible ["vertretbar"]). Others, on the other hand, advocate a broader interpretation that is not confined to everyday consumer services (see in particular WIDMER, op. cit. nos. 305-321 and the authors cited in footnote 668; HEISS, op. cit. nos. 141-144 ad art. 8 LCD and the authors cited in footnote 432; PICHONNAZ, op. cit, n° 131 ad art. 8 LCD; THOMAS PROBST, in Schweizerisches Recht der Allgemeinen Geschäftsbedingungen, 2016, nn. 501 f.; KOLLER, op. cit. p. 26 f.; THOUVENIN, op. cit. n° 83 ad art. 8 LCD). This line of thought argues in particular that if a restrictive notion of the consumer is defended, as in art. 32 para. 2 CPC, art. 8 UWG could well remain a dead letter: everyday consumption concerns acts of daily life which are rarely governed (with a few exceptions) by general terms and conditions.Art. 210 para. 4 let. b CO, adopted nine months later, is based on a broad conception of the consumer contract (KOLLER, ibidem).

Nor does the European Union's topical directive contain a limitation to ordinary consumption. The purpose of the regulation would also preclude a too restrictive interpretation - as would the system of the law: other provisions of the UWG (art. 3 para. 1 let. n, arts. 16, 19 and 24) use the concept of consumer, particularly in connection with the obligation to indicate prices to consumers (art. 24 UWG). However, art. 2 para. 2 of

the relevant ordinance (OIP; RS 942.211) contains a definition of consumer that does not include the restrictive criterion of current consumption (E. WIDMER, op. cit., n. 308). Nor does art. 3 of the Federal Law on Consumer Credit (LCC; RS 221.214.1), which can be linked to art. 3 para. 1 let. n UWG (THOUVENIN, op. cit., no. 83 ad art. 8 UWG).

Historical analysis

Legislative work is of little help (PROBST, op. cit., n. 464). Initially, the Federal Council had refused to restrict the application of art. 8 of the Unfair Competition Act to contractual relations with consumers, thereby rejecting a suggestion made during the consultation process, inspired by a European directive on unfair terms (Message of 2 September 2009 concerning the amendment of the Federal Act against Unfair Competition, FF 2009 5568 § 1 and art. 8 of the Draft in FF 2009 5579 f.; E. WIDMER, op. cit., n. 197). The National Council considered that the proposed rule restricted contractual freedom too much. A political compromise was reached at the last minute by inserting the phrase "to the detriment of the consumer", although no precise details are available on this point (see the background paper by E. WIDMER, op. cit. nn. 185 ff, in particular 197, 205 and 207 ff). At most, there has been a refusal to apply the article to relationships between legal entities acting on a commercial or professional basis (E. WIDMER, op. cit., no. 315 and the reference cited), or to small and medium-sized enterprises (SMEs; THOUVENIN, op. cit., no. 79 ad art. 8 UCA).

The arguments put forward by those in favor of a broad interpretation of the concept of consumer are detailed and must be given some weight. However, this court does not need to rule on this delicate issue, as there are already other clear grounds for opposing the application of art. 8 UWG.

No significant and unjustified imbalance

6.4.3. The Cantonal court explained that art. 4.13/iv. of the e-forex contract did not give a blank cheque to the respondent bank, which had acted in one of the exceptional situations set out in that clause. The e-forex contract was not unfair and did not create a significant and unjustified imbalance. Moreover, the bank had not taken advantage of the client's lack of experience or knowledge, as the client had some experience in the financial field.

6.4.3. Whatever the appellant may say, the fact that the risk of market 'illiquidity' should be borne by the client rather than by a financial institution that is 'regulated, capitalised and organised in such a way as to be able to withstand liquidity problems' is not sufficient to alter the cantonal court's analysis. It insinuates that the risk should be assumed by the partner with the higher capital base. This is not the meaning of art. 8 UWG. A client who can obtain dizzying profits from currency transactions must also assume the proportional risks inherent in this form of poker; the previous authority pointed out that the foreign exchange market is extremely volatile and can result in disproportionate, if not unlimited, gains and losses. The e-forex contract, which has only been partially reproduced above, contains sufficient warnings about the risks involved, pointing to the possibility of theoretically unlimited losses, by means of bold underlined characters. The absence of a significant and unjustified disproportion between rights and obligations is sufficient to

defeat the application of this provision - irrespective of the fact that the disputed clause has "not been highlighted in any way".

TF 4A_372/2022, 11 juillet 2023 Abtract, original text in French, summary of facts and title added.

In 2016, a company active in the supply of computer software entered into three contracts with another company: a licence contract for the use of the software, an IT services contract for the development of specific software tailored to the customer's needs, and a maintenance contract. Each contract was accompanied by specific general terms and conditions.

Article 6 of the general terms and conditions supplementing the services contract provides for (i) a maximum period of 30 days for the customer to object to the services invoiced by registered letter, and (ii) a lump-sum payment of CHF 107,289 in the event of termination of the contract by the customer through no fault of the company.

In 2019, the customer terminated the contracts with immediate effect due to a significant budget overrun and IT security breaches.

The software company applied to the Fribourg Cantonal Court for payment of CHF 199,771.10 (CHF 92,482.10 for unpaid invoices and CHF 107,289.00 as lump-sum compensation for termination) and for a ban on the customer's use of the software.

Definition of standard clauses

3.3. Standardised clauses, pre-formulated by one party, intended to govern a large number of contractual relationships, have no normative value as such: the contractual partners must incorporate them into their agreement (" keine Geltung ohne Übernahme "), expressly or tacitly agreeing that they will form an integral part of it and complete it (judgment 4C.282 /2003 of 15 December 2003, para. 3.1; ATF 118 II 295, para. 2a concerning SIA standards; ARIANE MORIN, in Commentaire romand, Code des obligations I, 3rd ed. 2021, nos. 165 and 169 ad art. 1 CO; GAUCH AND ALII, Schweizerisches Obligationenrecht, Allgemeiner Teil [OR AT], vol. 1, 11th ed. 2020, n. 1124 and 1128-1128a). The signed contract often refers to the general terms and conditions (GAUCH AND ALII, op. cit., n. 1128b). Sometimes, the partners append their signatures to the text of the conditions themselves(ATF 119 II 443, para. 1a).

Unusual clauses rule

According to the rule of the unusual clauses (" Ungewöhnlichkeitsregel"), the supposed global acceptance of general terms and conditions does not cover unusual clauses to the existence of which the attention of the weaker or less experienced party has not been specifically drawn. The author of general terms and conditions must expect, in accordance with the principle of trust, that his inexperienced contractual partner will not adhere to such clauses, which are unexpected or atypical. A clause that is customary in a particular sector of the economy may be unusual for someone who does not operate in

that sector. In addition, the clause must objectively appear to be foreign to the case, in the sense that it modifies its nature in an essential way or goes significantly beyond the legal framework of a type of contract. The more a clause affects the legal position of the other party, the greater the risk that it will be considered unusual(ATF 138 III 411 rec. 3.1; 135 III 1 rec. 2.1; 119 II 443 rec. 1a p. 446; MORIN, op. cit. n. 176 f. ad art. 1 CO; GAUCH AND ALII, op. cit. n. 1136-1138). In principle, attention is sufficiently drawn if the clause has been drafted clearly, unequivocally and highlighted using technical printing techniques such as bold type (MORIN, op. cit., no. 177 ad art. 1 CO).

(...)

deadline for objecting to an invoice

3.6. The standard clause giving the customer a maximum of thirty days to object to the invoices, by means of a registered letter with acknowledgement of receipt, is unusual. It seriously affects the customer's legal position: if he fails to react within the prescribed period, he will be obliged to pay the invoices deemed to have been accepted (on expiry clauses and their validity, see BAPTISTE ALLIMANN, La péremption - Etude en droit privé suisse, 2011, n. 608 ff, spe. n. 625 and n. 634-638; cf. also the brief mention of KARL SPIRO, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen, vol. II, 1975, § 391 p. 1006 and footnote 6). This regulation differs significantly from the legal system, which at most prohibits the manifest abuse of a right (art. 2 para. 2 CC; cf. PIERRE ENGEL, Traité des obligations en droit suisse, 2nd ed. 1997, p. 205, criticism of theATF 112 II 500 dealing with the contestation of an invoice); in any case, it does not introduce a relatively short time limit for lodging an objection on pain of forfeiture, nor does it require such a form.

Equality of parties

The cantonal court ruled, with regard to art. 11.2 inserted in the service contract, that the two contractual partners were "economically equal" and "both experienced in business". It is true that both were commercial companies. In this configuration, it is difficult to speak of a "strong party" and a "weak party", as is the case with an employment contract or a residential lease. However, the theory of the unusual is not restricted to these cases. As is clear from the case law cited above, a clause may well be unusual for someone who does not operate in the commercial segment in question. In this case, one of the parties (referred to here as "the company") specialized in IT and was therefore familiar with the particularities of IT contracts, unlike A._____ SA (the "client"), which simply needed software to run its businesses.

The IT company is clearly the author of the general terms and conditions and the drafter of the contracts. In this context, it cannot be assumed that the parties were on an equal footing in terms of legal expertise - all the more so as it is not known under what circumstances these technical contracts were negotiated and then signed and which persons (with or without specific legal knowledge) acted on behalf of the client. There is no indication that the client's attention was in any way drawn to this unusual clause, and nothing of the sort can be found in the parties' cantonal pleadings, particularly in the

plaintiff’s statements. For all these reasons, the clause cannot be set up against the client.

Penalty

3.7. The same objection, based on the same grounds, may be raised with regard to the lump-sum compensation of 107,289 fr. provided for in the event of termination without fault on the part of the company (supra letter A.a i.f.). Although its purpose is easy to guess (to spare the company the task of proving the damage and to allow the customer to gauge the "cost" of such a decision), this standardized clause also seriously affects the customer's legal position and deviates significantly from the legal regime. For the reasons set out above, it is not enforceable against the customer.

3.8. The situation should therefore be judged based on the legal regime.

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