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Franco Taisch

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Unconscionability in a Civil Law System: An Overview of Swiss Law

FRANCO TAISCH*

I. INTRODUCTION

Like most continental European countries, Switzerland is governed by a civil law system, under which the government attempts to express all laws in written language comprehensible to the average citizen.¹ Unconscionability is regulated by article 21 of the Swiss Code of Obligations,² which states:

In the case of an evident disproportion in the relative considerations passing between the contracting parties due to one party taking advantage of the distress, the inexperience or the improvidence of the other party, the prejudiced party may within one year rescind the contract and demand restitution of the consideration already given.

The period of one year commences with the entering into the contract.³

Article 21 applies to all contracts,⁴ so long as no special provision of another statute applies.

Several Swiss statutes contain special provisions dealing with the issue of unconscionability. These include the Federal Traffic Law;⁵ the Federal Liability Law Concerning Railroads, Steamship Lines, and Mail;⁶ and the Nuclear Energy Liability Law.⁷ Further, uncon-

* Foreign Associate with Chadbourne & Parke, New York; Associate with Walder Wyss & Partners, Zurich, Switzerland; Attorney at Law, admitted to all Swiss Bars. Lic. iur., University of Zurich Law School, 1985; Dr. iur., University of Zurich Law School, 1987. The manuscript of this Article has been closed as of August 15, 1991.

1. 3 THE NEW ENCYCLOPAEDIA BRITANNICA 338-39 (15th ed. 1988).

2. SCHWEIZERISCHES OBLIGATIONENRECHT [OR] art. 21 (Switz.). Article 21 went into effect in 1911, and has never been amended.

3. *Id.*

4. Although designed for bilateral obligations, such as purchase agreements, article 21 also applies to unilateral obligations, such as donations, partnership agreements, and other contracts. 1 PETER GAUCH & WALTER R. SCHLUEP, SCHWEIZERISCHES OBLIGATIONENRECHT ALLGEMEINER TEIL ¶ 559 (4th ed. 1987).

5. Bundesgesetz über den Strassenverkehr [Federal Traffic Law] art. 87(2), Systematische Sammlung des Bundesrechts [SR] 741.01 (Switz.).

6. Bundesgesetz betreffend Haftpflicht der Eisenbahn und Dampfschiffahrtsunternehmen und der Post [Federal Liability Law Concerning Railroads, Steamship Lines,

scionability that is so egregious as to be usury is governed by the Swiss Penal Code, which provides criminal sanctions for inducing unconscionable contracts.⁸

This Article provides an overview of unconscionability under Swiss law. First, it discusses the basic elements of unconscionability under Code of Obligations article 21. Next, it addresses the legal consequences of unconscionability, including unilaterally non-binding obligations; court reformation of unconscionable contracts; statute of limitation issues; nullity; and principles of loyalty, good faith, and prohibition against the misuse of a right. This Article then discusses unconscionable settlements. Finally, it analyzes the special statutes that regulate unconscionability, as well as the criminal liability consequences of unconscionability in Switzerland.

II. UNCONSCIONABILITY UNDER CODE OF OBLIGATIONS ARTICLE 21

Article 21 of the Swiss Code of Obligations addresses the issue of unconscionability. This article requires a plaintiff to establish three elements to trigger a remedy for unconscionability: (1) an obvious disparity in consideration; (2) weakness on the part of one contracting party; and (3) exploitation of that weakness by the other contracting party.⁹ The strength of one element does not compensate for the complete lack of another.¹⁰ However, where one element is doubtful but the other two are strong, a court may still declare the contract unconscionable.¹¹

A. *Evident Disparity in Consideration*

The first element of Code of Obligations article 21 is satisfied when, at the time of its formation,¹² a contract contains an obvious

and Mail] art. 17 [hereinafter Federal Railroad, Steamship, and Mail Law], SR 221.112.742 (Switz.).

7. Kernenergiehaftpflichtgesetz [Nuclear Energy Liability Law] art. 8, SR 732.44 (Switz.).

8. SCHWEIZERISCHES STRAFGESETZBUCH [StGB] art. 157 (Switz.).

9. OR art. 21; see also 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 565a.

10. 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 565a. *Contra* Rolf Bender, *Probleme des Konsumentenkredits*, 21 NEUE JURISTISCHE WOCHENSCHRIFT 1133 (1980). For a discussion of the flexible thought system in Germany (*bewegliches Systemdenken*), see T. MAYER-MALY, FESTSCHRIFT FÜR KARL LARENZ 406 (1983).

11. 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 565a.

12. Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung [BGE] 109 II 348 (Switz.).

disparity between the respective considerations given by the parties.¹³ According to the Swiss Federal Court, an "obvious disparity" is an "imbalance that catches the eye."¹⁴ The determination of whether such an imbalance exists is within the discretion of the trial judge.¹⁵ However, the Swiss Civil Code requires that the judge's decision be guided by principles of justice and equity.¹⁶

In determining whether an imbalance exists in a particular case, the value of the consideration promised, rather than the consideration actually received, controls.¹⁷ This determination is based on an objective valuation.¹⁸ Therefore, the value of the performance to a particular contracting party and the subjective value a contracting party attributes to the performance are irrelevant.¹⁹ This does not mean, however, that the valuation may not take into account the circumstances surrounding a particular contract. For example, prices are relative and subject to changing market conditions. There is, therefore, no requirement that a particular price be paid.²⁰ Rather, the test for disparity depends on trade custom as to the allocation of risk of loss. It also depends on the individual contract as a whole, including all secondary obligations and clauses that establish liabilities or exemptions from liabilities.²¹ For example, the Swiss Federal Court, applying Code of Obligations article 21, held that a purchase price increasing the trade value of goods by sixty percent was obviously one-sided.²² On another occasion, the Swiss Federal Court held that a compensation of 100 Swiss Francs per hour in 1962 for work not requiring special skills or qualifications was clearly excessive.²³

Finally, article 21 does not apply to situations in which actual performance is not in compliance with the promised performance. This is simply a question of non-performance and outside the purview

13. OR art. 21.

14. BGE 53 II 488.

15. BGE 61 II 34.

16. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] art. 4 (Switz.).

17. 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 552.

18. BGE 92 II 170.

19. *See, e.g.*, BGE 92 II 170; BGE 84 II 111; BGE 61 II 34; BGE 44 II 186; 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 552.

20. BGE 109 II 125.

21. *See* Karl Oftinger, *Betrachtungen über die Laesio im schweizerischen Privatrecht*, in *FESTSCHRIFT ZEPAS* 548 (1973).

22. BGE 61 II 34.

23. BGE 92 II 171.

of article 21.²⁴

B. *Weakness of One Contracting Party*

To constitute unconscionability under Code of Obligations article 21, a disadvantaged party must have been motivated to enter into a contract by weakness²⁵ caused by distress, inexperience, or improvidence.²⁶ However, the disadvantaged party must at least have been competent. Otherwise, the party could not have legally entered into a contract at all.²⁷

According to the Swiss Federal Court, "distress" occurs when a contracting party is placed under duress.²⁸ Even legal entities, such as corporations, can be distressed.²⁹ Further, the nature of distress need not be financial; rather, it may be caused by pressing personal circumstances, such as health problems, or by political circumstances.³⁰

"Inexperience" is the lack of actual business experience by a disadvantaged party.³¹ General inexperience is not required.³² Instead, inexperience in assessing the particular transaction is sufficient.³³ Therefore, a person may qualify as experienced, even sophisticated, in many fields. With respect to a specific transaction, however, that person may be inexperienced, and article 21 would apply.³⁴ This reading of inexperience extends application of the unconscionability doctrine to general terms and conditions,³⁵ as well as to investor protection issues.³⁶

24. BGE 92 II 170. Non-performance is regulated by Code of Obligations article 97. See OR art. 97.

25. OR art. 21; see BGE 84 II 113; see also BRUNO VON BÜREN, SCHWEIZERISCHES OBLIGATIONENRECHT ALLGEMEINER TEIL 226-27 (1964).

26. See 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 560. One scholar argues that the weaknesses justifying a conclusion of unconscionability should not be limited by enumerating them. E. BUCHER, SCHWEIZERISCHES OBLIGATIONENRECHT ALLGEMEINER TEIL 204 (1979).

27. ZBG arts. 12, 13.

28. BGE 84 II 110.

29. *Id.*

30. BGE 61 II 35.

31. BGE 92 II 175.

32. At one time, general inexperience was required. See BGE 85 II 413; BGE 44 II 186; BGE 41 II 579. This interpretation of inexperience was overruled in BGE 92 II 175.

33. BGE 92 II 175.

34. Oftinger, *supra* note 21, at 544.

35. See 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 561; see also P. MERZ, FESTGABE SCHOENENBERGER 156 (1968); Oftinger, *supra* note 21, at 547. This is particularly true when an unconscionable clause is printed in very small typeface.

36. Cf. K.J. Hopt, *Schweizerisches Kapitalmarktrecht, Begriffe, Aufgaben und aktuelle*

"Improvvidence" is another ground for invoking Code of Obligations article 21.³⁷ Like inexperience, improvidence does not require any general predisposition of an injured contracting party. Rather, it is sufficient that the party closed the specific contract carelessly and rashly, without adequately taking into consideration its significance and consequences.³⁸

C. *Exploitation by the Other Contracting Party*

The third crucial element to a claim of unconscionability under Code of Obligations article 21 is the exploitation of one party's weakness by the other contracting party.³⁹ Exploitation consists of two factors. First, the exploiting party must be aware of the other party's weakness, as well as the obvious disparity of the contract.⁴⁰ Second, the party must deliberately use this weakness in order to finalize the contract.⁴¹ However, "using" the weakness does not require that the exploiting party take the first step or even act affirmatively.⁴² Instead, it is sufficient if the exploiting party merely takes advantage of an opportunity presented to him or her.⁴³

III. LEGAL CONSEQUENCES OF UNCONSCIONABILITY

A. *Unilateral Right of Rescission*

Once a disadvantaged party becomes aware of the unconscionability of a contract, the party can rescind it and demand restitution of the consideration paid.⁴⁴

Several leading scholars argue that an unconscionable contract is initially valid.⁴⁵ Under this theory, a disadvantaged party has a uni-

Probleme, 38 WuR 101 (1986); FRANCO TAISCH, *PRIVATPLACIERUNGEN, INSBESONDERE IM HINBLICK AUF NOTES 72-75, 88-94* (1987); ANDREAS ROHR, *GRUNDZÜGE DES EMISSIONSRECHTS* (1990).

37. See 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 560.

38. BGE 61 II 35.

39. OR art. 21.

40. 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 564; see BGE 95 II 112.

41. BGE 92 II 177.

42. See 1 ANDREAS VON TUHR & HANS PETER, *ALLGEMEINER TEIL DES SCHWEIZERISCHEN OBLIGATIONENRECHTS* 345 (3d ed. 1979).

43. 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 565.

44. OR art. 21.

45. See, e.g., BUCHER, *supra* note 26, at 184-88; VON BÜREN, *supra* note 25, at 244; P. PIOTET, *LA FORMATION DU CONTRAT EN DOCTRINE GENERALE ET EN DROIT PRIVÉ SUISSE* 131 (1956); T. GUHL ET AL., *DAS SCHWEIZERISCHE OBLIGATIONENRECHT* 123 (7th ed. 1980); ERNST A. KRAMER, *GRUNDFRAGEN DER VERTRAGLICHEN EINIGUNG* ¶¶ 133-34 (1972); 1 M. KELLER & CH. SCHOEBI, *DAS SCHWEIZERISCHE SCHULDRECHT* 125 (1982);

lateral right to rescind.⁴⁶ Thus, an unconscionable contract is voidable. If a disadvantaged party exercises this right of rescission, the contract is repealed *ex tunc*,⁴⁷ and both contracting parties may demand restitution of the consideration already given.⁴⁸

The prevailing case law tends to support this theory of initial validity.⁴⁹ However, case law has always been divided, and recently the Swiss Federal Court again changed its opinion.⁵⁰ Accepting the arguments of many legal scholars,⁵¹ it rejected the theory of initial validity and adopted the theory of initial invalidity.⁵² This occurred in a case in which one contracting party's error affected the necessary basis of the contract.⁵³

B. Reduction in Substance

If a contract is held unconscionable, a question arises as to whether it should bind the parties on reformed, fair substantive terms. Swiss courts are very cautious in this respect, but have not yet ruled

KARL OFTINGER, BUNDESGERICHTSPRAXIS ZUM ALLGEMEINEN TEIL DES SCHWEIZERISCHEN OBLIGATIONENRECHTS 87 (2d ed. 1973).

46. This theory of rescission is criticized by several scholars who argue that it is inconsistent with the legislative history of Code of Obligations article 21.

Some scholars argue that an unconscionable contract is initially invalid. See 1 GAUCH & SCHLUEP, *supra* note 4, ¶¶ 674-82. Under this analysis, an unconscionable contract is never binding, since it is null and void at its inception. However, only the disadvantaged party may plead invalidity and refuse performance. See *id.*

Other scholars argue that an unconscionable contract is partially invalid. See VON TUHR & PETER, *supra* note 42, at 480, 493, 338. Under this theory, an unconscionable contract does not bind the disadvantaged party, but does bind the exploiting party. However, when the disadvantaged party exercises this right of rescission, the obligations of the exploiting party are simultaneously dissolved. See *id.*

47. "*Ex tunc*" means that the contract is rescinded as of the time of formation. Therefore, following rescission, the contracting parties are placed in the position in which they would have been had they never entered into a contract. See Gerhard Bebr, *Direct and Indirect Judicial Control of Community Acts in Practice: The Relation Between Articles 173 and 177 of the EEC Treaty*, 82 MICH. L. REV. 1229, 1242 (1984).

48. For example, contracting parties may demand restitution by claiming ownership, as provided in Swiss Civil Code article 641(2); under a theory of unjust enrichment, as provided in Code of Obligations articles 62 through 67; or through a correction of the Land Register, as provided in Swiss Civil Code article 975. See OR arts. 62-67, ZGB arts. 641(2), 975; BGE 98 II 22; BGE 97 II 48; BGE 87 II 139. If a claim of ownership is an appropriate method of restitution in a particular case, however, Swiss law will not permit a claim under unjust enrichment. BGE 110 II 234.

49. See BGE 109 II 327.

50. BGE 114 II 142.

51. See, e.g., 1 GAUCH & SCHLUEP, *supra* note 4, ¶¶ 674-82; see also *supra* note 46.

52. BGE 114 II 142.

53. See *id.*

on the issue. However, the Swiss Federal Court has held that a disadvantaged party cannot be forced to accept a reformed contract after the initial contract is found unconscionable within the meaning of Code of Obligations article 21.⁵⁴

Legal scholars generally justify reduction in substance by analogy to the concept of nullity.⁵⁵ Under Code of Obligations article 20, if a defect affects only particular parts of a contract, only those parts are null and void, unless it is shown that, but for the defective parts, the contract would not have been signed.⁵⁶ The nullity concept in article 20 may prohibit a court from reducing the content of an unconscionable clause because that clause is null and void.⁵⁷ However, a "reduction" in the sense of "replacing" an unconscionable clause with a corresponding fair clause is a possible legal construction, if it can be shown that reasonable and fair contracting parties would have entered into the contract as reformed.⁵⁸ Further, as with the unilateral right to rescind, only the disadvantaged party can invoke a reduced obligation.⁵⁹

C. Statute of Limitations

In order to invoke Code of Obligations article 21, a disadvantaged party must rescind the contract within one year from the effective date of the contract.⁶⁰ The lapsing of this one-year period results in the forfeiture of the right to rescind and, therefore, in the curing of any defect in the contract, including unconscionability.⁶¹ To be effective, the disadvantaged party's declaration of rescission must be unconditional⁶² and irrevocable.⁶³

Article 21's statute of limitations differs in one important respect from the statute of limitations applicable to cases of unjust enrichment under article 67. Where article 21 only applies to the right of

54. BGE 84 II 112; *see also* BGE 92 II 179.

55. *See* VON BÜREN, *supra* note 25, at 228-29; GUHL ET AL., *supra* note 45, at 44; Oftringer, *supra* note 21, at 553-54; VON TUHR & PETER, *supra* note 42, at 346; E. Stark, *Die Übervorteilung (Art. 21 OR) im Lichte der bundesgerichtlichen Rechtsprechung*, in FESTGABE ZUR HUNDERTJAHRFEIER DES BUNDESGERICHTS 393 (1975).

56. OR art. 20, para. 2.

57. 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 570.

58. *Id.*

59. *Id.*; *see also* ROLAND HÜRLIMANN, TEILNICHTIGKEIT VON SCHULDVERTRÄGEN NACH ART. 20 ABS. 2 OR at 101 (1984).

60. OR art. 21.

61. 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 567.

62. BGE 108 II 104; BGE 98 II 22; BGE 79 II 145.

63. BGE 109 II 326; BGE 98 II 98; BGE 98 II 22.

rescission, article 67 also applies to the resulting claim for recovery.⁶⁴ Under article 67, a claim is barred one year after the injured party learns of his or her claim, or ten years after the claim arose.⁶⁵ Thus, if a disadvantaged party has reason to know of the unconscionability, the party must rescind the contract within one year and, at the same time, demand restitution of the consideration already given.⁶⁶

D. Nullity Under Code of Obligations Article 20

Under Code of Obligations article 20, a contract "containing provisions which are impossible, illegal or *contra bonas mores* is invalid."⁶⁷ Therefore, if a disadvantaged party cannot provide sufficient evidence to establish the required elements for invoking unconscionability,⁶⁸ or if the statute of limitations lapses,⁶⁹ the party may still plead nullity of contract under article 20. However, article 20 can be invoked only if the contract is deemed illegal or amoral because of a specific defect *in addition to* the obvious disparity required by article 21.⁷⁰

E. *The Principles of Loyalty and Good Faith, and the Prohibition Against the Misuse of a Right Under Swiss Civil Code Article 2*

Principles of loyalty and good faith, as well as the prohibition against the misuse of a right, are fundamental to Swiss law.⁷¹ However, these principles are not designed to guarantee fair contracts, and they do not limit the freedom of contract.⁷² To the contrary, the principles of loyalty and good faith are consistent with the concepts of

64. See OR arts. 21, 67; see also 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 692.

65. OR art. 67, para. 1.

66. BGE 82 II 428.

67. OR art. 20.

68. For a discussion of the elements of unconscionability under Swiss law, see *supra* notes 9-43 and accompanying text. See also BGE 51 II 169.

69. For a discussion of the statute of limitations for unconscionability under Swiss law, see *supra* notes 60-66 and accompanying text.

70. See BGE 80 II 327; BGE 56 II 193; BGE 51 II 169; BGE 43 II 806. *But cf.* BGE 95 II 112 (declining to resolve the question of whether article 20 applies as an exception where the disadvantaged party was unable to demand rescission timely).

For example, a contract may be deemed null and void if the unconscionability is considered usurious exploitation under article 157 of the Swiss Penal Code. See BGE 93 II 191 (with respect to a 26% interest clause); see also 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 507.

71. See ZGB art. 2.

72. Die Praxis des Bundesgerichts [Pra.] 79 (1990) no. 13; see also ERNST ZELLER, TREU UND GLAUBEN UND RECHTSMISSBRAUCHSVERBOT 256 (1980).

nullity and unilateral rescission of contracts in only three situations: (1) situations in which the content of a contract is completely beyond the limits of the law;⁷³ (2) situations in which the conclusion of a contract is defective;⁷⁴ and (3) situations in which the requirements to deem a contract unconscionable are met.⁷⁵ Further, due to the concept of freedom of contract, parties can agree to any disparity whatsoever, so long as it does not infringe on the prohibition against the misuse of a right.⁷⁶ Therefore, the above principles rarely, if ever, replace specific provisions addressing unconscionable or defective contracts.

IV. UNCONSCIONABLE SETTLEMENTS

Code of Obligations article 21 applies to both private and court settlements.⁷⁷ Settlements resolve uncertain legal positions by mutual concessions of the contracting parties, thereby establishing an indisputable legal state.⁷⁸ They are not based on reciprocal performances, so one performance cannot be in disparity with another. Nonetheless, settlements may be unconscionable. However, in contrast to the contract situation, what is relevant in assessing settlement disparity is not the obligation of each party pursuant to the settlement, but the degree of each party's concession.⁷⁹

V. REGULATION OF UNCONSCIONABILITY UNDER SPECIAL STATUTES

In addition to Code of Obligations article 21, several statutes provide special provisions addressing the issue of unconscionability, primarily in areas of high risk, such as traffic and atomic energy. Such statutes generally contain specific regulations that favor disadvantaged parties.

A. *Federal Traffic Law*

The Swiss Federal Traffic Law regulates traffic on public roads, as well as liability and insurance issues regarding damages caused by

73. OR art. 19.

74. *Id.* art. 23.

75. Pra. 79 (1990) no. 13. For a discussion of the elements of unconscionability under Swiss law, see *supra* notes 9-43 and accompanying text.

76. Pra. 79 (1990) no. 13.

77. *See id.*; BGE 114 Ib 78; *see also* 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 568a.

78. BGE 111 II 350; BGE 105 II 277.

79. 1 GAUCH & SCHLUEP, *supra* note 4, ¶ 568a.

motor vehicles and bicycles.⁸⁰ Contracts and settlements dealing with liability claims based on such damages are subject to rescission if the contracting parties agree to obviously inadequate compensation.⁸¹ Determination of the adequacy of compensation is based on the circumstances at the time the contract or settlement is made.⁸²

In contrast to Code of Obligations article 21, unconscionability under the Federal Traffic Law does not require the existence of subjective elements, such as the weakness of one contracting party and the exploitation of that weakness by the other.⁸³ Rather, inadequacy of consideration alone is sufficient to deem a contract or settlement unconscionable.⁸⁴ However, like Code of Obligations article 21, a one-year statute of limitations applies to the Federal Traffic Law.⁸⁵

B. Federal Liability Law Concerning Railroads, Steamship Lines, and Mail

The Swiss Federal Liability Law Concerning Railroads, Steamship Lines, and Mail regulates liability with respect to death or physical injury caused by the construction or operation of railroads, steamship lines, and the mail.⁸⁶ Contracts and settlements dealing with such liability are subject to rescission for unconscionability if the contracting parties agree to obviously inadequate consideration.⁸⁷ Similar to the Federal Traffic Law, the existence of subjective elements is not required.⁸⁸ Further, this law contains no statute of limitations for rescission.⁸⁹

C. Nuclear Energy Liability Law

The Nuclear Energy Liability Law governs liability for damages caused by nuclear power plants and the transportation of nuclear ma-

80. Federal Traffic Law art. 1(1), SR 741.01.

81. *Id.* art. 87(2).

82. BGE 109 II 347.

83. BGE 99 II 371. For a discussion of the subjective elements required to establish unconscionability under Code of Obligations article 21, see *supra* notes 9-43 and accompanying text.

84. Federal Traffic Law art. 87(2), SR 741.01.

85. *Id.*

86. Federal Railroad, Steamship, and Mail Law arts. 1(1), 24, SR 221.112.742.

87. *Id.* art. 17.

88. *See id.* For a discussion of the Federal Traffic Law, see *supra* notes 80-85 and accompanying text.

89. *See* Federal Railroad, Steamship, and Mail Law art. 17, SR 221.112.742.

terial.⁹⁰ Contracts and settlements of claims based on such damages are subject to rescission for unconscionability if the contracting parties agree to obviously inadequate compensation.⁹¹ The subjective elements required for unconscionability under the Code of Obligations need not be proven.⁹² Further, the statute of limitations in the Nuclear Energy Liability Law distinguishes it from the other regulations dealing with unconscionability, as it provides a three-year statute of limitations for demanding rescission.⁹³

VI. CRIMINALIZATION OF UNCONSCIONABILITY

The Swiss Penal Code prohibits gross unconscionability, deeming it usury.⁹⁴ One who commits an act of usury, as defined in the Swiss Penal Code, can be fined and imprisoned for up to five years.⁹⁵ Further, if the perpetrator engages in commercial usury, or intentionally effects the financial decay of another, he or she is subject to a prison sentence of up to ten years, as well as a fine.⁹⁶

Similar to Code of Obligations article 21, under Penal Code article 157, the criminal prosecution authorities must establish the exploitation of one party's weakness by another to enter into a contract with obvious disparity.⁹⁷ However, the Penal Code's definition of weakness is different in some respects from that of the Code of Obligations. Weakness, pursuant to Penal Code article 157, may be caused by distress, mental deficiency, inexperience, dependency, weakness of character, or imprudence.⁹⁸

"Distress" is a situation in which a disadvantaged party is under duress, and in which his or her will is undermined to enter into a contract.⁹⁹ "Mental deficiency" may be found, for example, in the case of a mentally disabled person, a person easily influenced, or a

90. Nuclear Energy Liability Law art. 1, SR 732.44.

91. *Id.* art. 7(2), SR 732.44.

92. *Id.* For a discussion of these elements, see *supra* notes 9-43 and accompanying text.

93. Nuclear Energy Liability Law art. 7(2), SR 732.44.

94. See STGB art. 157(1); see also STEFAN TRECHSEL, KOMMENTAR ZUM SCHWEIZERISCHEN STRAFGESETZBUCH art. 157(1) (1989).

95. StGB art. 157(1).

96. *Id.* art. 157(2).

97. *Id.* art. 157(1). For a discussion of this requirement under the Code of Obligations, see *supra* notes 39-43 and accompanying text.

98. STGB art. 157(1).

99. See, e.g., BGE 87 IV 150; BGE 70 IV 204; see also BGE 93 IV 90; BGE 92 IV 137; BGE 80 IV 18; 43 Blätter für Zürcher Rechtsprechung [ZR] 1 (1944).

person suffering defects of consciousness.¹⁰⁰ "Inexperience" is a lack of actual and business experience by a disadvantaged party. However, unlike inexperience in the context of Code of Obligations article 21,¹⁰¹ Penal Code article 157 requires general inexperience in the relevant business field.¹⁰² Inexperience in assessing an individual deal is insufficient to invoke article 157.¹⁰³ Further, "dependence," "weakness of character," and "improvidence" must be interpreted narrowly.¹⁰⁴

Finally, it should be emphasized that, unlike Code of Obligations article 21, Penal Code article 157 does not apply to unilateral obligations.¹⁰⁵

VII. CONCLUSION

Swiss regulation of unconscionability is based on the traditional civil law system. Under Code of Obligations article 21, a contract is deemed unconscionable if three requirements are met: (1) an obvious disparity exists between the consideration given by the contracting parties; (2) one contracting party suffers from a weakness; and (3) the other contracting party exploited this weakness. As a legal consequence of unconscionability, the affected party may, within one year of the closing of the contract, rescind the contract and demand restitution of the consideration already given. This regulation applies to all contracts, including private and court settlements, so long as no special provision of another statute applies.

Unlike Code of Obligations article 21, the Federal Traffic Law, the Federal Liability Law Concerning Railroads, Steamship Lines, and Mail, and the Nuclear Energy Liability Law do not require subjective elements in order to declare a contract unconscionable. Furthermore, these laws provide different statutes of limitations with respect to rescission.

Perhaps the most notable feature of Swiss law is that the Swiss Penal Code prohibits gross unconscionability as usury, and provides criminal sanctions for inducing grossly unconscionable contracts.

100. BGE 111 IV 140.

101. See *supra* notes 31-36 and accompanying text.

102. StGB art. 157.

103. 48 ZR 92 (1949); see also TRECHSEL, *supra* note 94, art. 157(5).

104. See TRECHSEL, *supra* note 94, art. 157(5).

105. See BGE 111 IV 142; 55 ZR 37 (1956) (discussing donation).