

**THE CONCEPT 'FAIRNESS' IN THE REGULATION OF
CONTRACTS UNDER THE CONSUMER PROTECTION ACT 68
OF 2008**

by

PHILIP NICOLAAS STOOP

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SUPERVISOR: PROF CJ VISSER

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SUMMARY

The thesis analyses the concept 'fairness' in consumer contracts regulated by the Consumer Protection Act 68 of 2008, mainly from the perspective of a freedom and fairness orientation. It discusses the evolution of 'fairness' as background to a more detailed discussion of the classification of fairness into substantive and procedural fairness. The thesis examines dimensions of fairness, factors which play a role in the determination of fairness, and fairness-oriented approaches in an attempt to formulate a framework for fairness in consumer contracts. The main aspects that should be taken into account to justify a finding of fairness, or to determine whether a contract is fair, are identified. This analysis addresses, too, the extent to which the fairness provisions of the Consumer Protection Act are appropriate (with reference to the law of South Africa, Europe, and England).

KEY TERMS

Law of contract; consumer contracts; procedural fairness; substantial fairness; consumer protection law; contractual fairness; freedom of contract.

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1 Problem Statement

The concept 'fairness' has been implemented in full in consumer contracts by the Consumer Protection Act.¹ Although the concept 'fairness' is not foreign to South African law, the content of and test for fairness or unfairness in a consumer-protection context must be ascertained and developed. The law of contract forms the basis of most aspects of consumer-protection law. As consumer-protection law has developed rapidly during the past few years, it is necessary to understand how the concept 'fairness' operates, what its contents are, and how it will impact on consumer contracts regulated by the CPA. The aim of this thesis is to consider the law relating to fairness in consumer contracts regulated by the CPA. One of the main issues is that is not clear what we mean when we refer to 'fairness'; put differently, the concept 'fairness' is not defined in the CPA. A further source of uncertainty is how the concept 'fairness' influences freedom of contract. In this thesis, I shall discuss the existing legislation and the backdrop to this legislation (the common law and legislative developments). My aim is, accordingly, to develop a sound understanding of the concept 'fairness' in consumer contracts regulated by the CPA.

2 Chapter Overview

In chapter 2, I shall explain the philosophical context within which the regulation of fairness in the law of contract must be understood. In the discussion the issue of fairness in contract is described in terms of juxtapositions such as freedom orientations as against fairness orientations.

¹ 68 of 2008 ('CPA').

Chapter 3 contains an explanation of the dimensions of fairness, which are substantive, procedural, abstract, and contextual fairness. Traditionally, the law of contract merely provides a framework within which contracts are enforced without concern for their context. Legislation, such as the CPA, is then adopted to address this imbalance by, among others, regulating the fairness of contract terms. In this chapter, I shall give a brief overview of what must be considered when one introduces considerations of 'fairness' by means of consumer legislation. I shall identify dimensions of fairness, factors which play a role in the determination of fairness, and fairness-oriented approaches, in an attempt to formulate a framework for fairness. Such a framework will indicate the aspects that should be taken into account to justify a finding of fairness, or to determine whether a contract is fair.

In chapter 4, I shall give a brief overview of the background and main developments of the concept 'fairness' in the South African law of contract. In the course of this overview, I shall discuss the common law, the *exceptio doli generalis*, the South African Law Commission's Report on Fairness, the role of good faith and public policy, and the background to the CPA.

Chapter 5 forms the crux of this thesis. In this chapter I shall analyse the concept 'fairness' in consumer contracts regulated by the CPA. In this chapter, I shall critically analyse 'fairness' with reference to the framework set out in chapter 3, and, specifically with reference to substantive and procedural fairness. Substantive fairness is discussed under generalized and individual substantive fairness. In this chapter uncertainties are pointed out, the provisions of the CPA are criticized, and suggestions for reform are made.

Section 2(2) of the CPA provides that 'when interpreting or applying this Act, a person, court or Tribunal or the Commission may consider appropriate foreign and international law...'. In chapter 6, I shall discuss the two basic contractual fairness regimes of the United Kingdom, which are in many ways similar to the Consumer Protection Act. The first regime is contained in the Unfair Contract Terms Act 1977, and the second regime, which is based on the Unfair Contract

Terms Directive adopted by the Council of the European Communities,² is contained in the Unfair Terms in Consumer Contracts Regulations 1999.³ Article 10(1) of the Directive obliges member states to bring their laws, regulations, and administrative provisions into force to comply with the Directive, by not later than 31 December 1994. The provisions of the Directive can be divided in three sections: (a) an attempt to formulate a European concept 'unfairness'; (b) interpretation and plain language; and (c) the legal consequences of unfairness. The Directive provides a list of terms that can be considered as unfair (abusive). The Directive was, to a large extent, followed when the CPA was drafted. These instruments are accordingly used to interpret the concept 'fairness' in consumer contracts regulated by the CPA.

In chapter 7, I shall make recommendations in respect of the concept 'fairness' in consumer contracts regulated by the CPA. These recommendations will include amendments to the CPA and suggestions for judicial interpretation.

² EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC).

³ Statutory Instrument 1999 no 2083.

Chapter 2: The Philosophical Context of the Focus on Unfairness in Contracting Procedures, Unfair Terms, and Unfair Outcomes of Contracts

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1 Introduction

The issue of fairness in contracts is often described in terms of juxtapositions such as freedom of contract as against fairness, or individualism as against paternalism, collectivism, or welfarism.¹ So, to understand what the concept 'fairness' entails, one has to understand its philosophical context.

Traditionally, individualism underpinned the law of contract. Individualism assumes a world of traders who meet briefly on the market floor, where they engage in transactions. In a political form individualism advances a universe of agents with exclusive control over their private domain of autonomy in which the role of the state is limited and in which legal relationships are defined by free consent on the assumption that consent is a manifestation of individual autonomy. The dominant ideas linked to individualism are individual autonomy and self-reliance.² Individualism manifested in the South African law of contract, among others, through the rise of the doctrine of freedom of contract, which requires that the parties be left alone to choose what contract they want,

¹ AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 65-67; A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40 at 41-42; T Wilhelmsson & C Willet 'Unfair Terms and Standard Form Contracts' in G Howells, I Ramsay, T Wilhelmsson & D Kraft *Handbook of Research on International Consumer Law* (2010) 158; T Wilhelmsson 'Varieties of Welfarism in European Contract Law' (2004) 10 *European Law Journal* 712 at 712-713.

² P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 4-5; A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40 at 41-42; S Lukes *Individualism* (2006) 17-18.

with whom and on what terms, with very little scope for judicial interference.³ In *Wells v SA Alumenite Co*⁴ the then Appellate Division held that –

‘... if there is one thing which, more than other, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice.’⁵

So, provided that a person is not a minor or suffering from a mental illness, and his or her consent is not vitiated by fraud, mistake or duress, his or her contractual undertakings will always be enforced. The courts have always enforced contracts as expressed in the rule that agreements must be honoured (*pacta sunt servanda*), which is based on individualism, autonomy, personal liberty and freedom of contract.⁶ The common law, therefore, in general did not provide a remedy against the enforcement of an unfair contract or the enforcement of a contract in unfair circumstances, because intervention by the courts would have been a form of paternalism inconsistent with the parties’ freedom of contract. However, the common law has developed principles to curb unfairness in the making of a contract, for example, rules on quasi-mutual assent, misrepresentation, undue influence, mistake and illegality.⁷ In *Burger v Central South African Railways*⁸ the court set an absolute rule when it held that ‘our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely

³ See A Chrenkoff ‘Freedom of Contract: A New Look at the History and Future of the Idea’ (1996) 21 *Australian Journal of Legal Philosophy* 36 at 36-39 for a discussion on freedom of contract and liberalism.

⁴ 1927 AD 69. See also *Burger v Central South African Railways* 1903 TS 571 at 576 where the court held that ‘our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable’.

⁵ At 72. The court based its findings on the judgment in *Printing Registering Co v Sampson* LR 19 Eq 462 at 465.

⁶ See para 2.1 in ch 4. See also RH Christie & V McFarlane *The Law of Contract in South Africa* 5th ed (2005) 12; A Cockrell ‘Substance and Form in the South African Law of contract’ 61 (1992) *SALJ* 40 at 41 and 61.

⁷ RH Christie & V McFarlane *The Law of Contract in South Africa* 5th ed (2005) 13-14.

⁸ 1903 TS 571.

because that agreement appears to be unreasonable.⁹ This absolute rule was, however, over time whittled away by the courts which will not enforce an unreasonable restraint of trade¹⁰ and an unfair term in an unsigned contract (ticket contract)¹¹ or contract that has been signed without being read.¹²

Recently, however, in many jurisdictions, after the introduction of legislation that implements fairness, welfarism has increasingly impacted on the traditional basis of contract law. In this chapter I shall explain the philosophical context within which the regulation of fairness in the law of contract must be understood.

2 Unfair Contracts

Unfair contract terms are usually an issue with standard form contracts. The traditional emphasis of the law of contract is on party autonomy, and the will or consent of the parties, or their true consensus, as the factors that impart legitimacy to the binding force of contracts.¹³ In the process, it is accepted that a party, who might not even have read the terms or who knows nothing about their content, is bound by them.¹⁴ Sometimes, where standard-term contracts are used, there is a lack of transparency in the process leading to the contract, because of the lack of negotiations.¹⁵ A lack of transparency leads to situations where there is no informed consent or true consensus, where consumers are not aware of the existence of certain contractual terms or the risks to

⁹ At 576.

¹⁰ *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A).

¹¹ RH Christie & V McFarlane *The Law of Contract in South Africa* 5th ed (2005) 179-183.

¹² *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (AD); RH Christie & V McFarlane *The Law of Contract in South Africa* 5th ed (2005) 178-179.

¹³ A van Rensburg 'Die Grondslag van Kontraktuele Gebondenheid' (1986) 49 *THRHR* 448.

¹⁴ See, for example, *Cape Group Construction (Pty) Ltd v Government of the United Kingdom* 2003 (5) SA 180 (SCA); *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N); *Central SAR v McLaren* 1903 TS 727.

¹⁵ GTS Eiselen 'Die Standaardbedingprobleem: Ekonomiese Magsmisbruik, Verbruikersvraagstuk of Probleem in Eie Reg' (1988) 22 *De Jure* 251 at 254-256.

consumers posed by these contractual terms, where they cannot compare competing offers or terms, and where they cannot negotiate more favourable terms.¹⁶

A further problem is that standard-term contracts can lead to abuse: the party drafting a standard-term contract may insert clauses restricting the other party's rights without the latter realising it,¹⁷ as he or she may not have the time, or the skill, to understand the document.¹⁸ Another problem when standard-term contracts are used is that in many instances no negotiation may take place before the parties enter into a contract. A standard-term contract is then merely a contract between two parties where the terms are set by one of the parties and the other party is placed in a 'take it or leave it' position, with no ability to negotiate, commonly referred to as a contract of adhesion or *contrat d'adhésion*.¹⁹

However, it must be conceded that, from a supplier of goods or services' view, standard-term contracts have certain benefits. A supplier of goods or services on a large scale enters into thousands of contracts per year. It allows more consumers to obtain goods or services they might usually not be able to afford. Negotiation with every consumer is impracticable for such suppliers and standard-term contracts are therefore used.²⁰ It simplifies and shortens the bargaining

¹⁶ T Wilhelmsson & C Willet 'Unfair Terms and Standard Form Contracts' in G Howells, I Ramsay, T Wilhelmsson & D Kraft *Handbook of Research on International Consumer Law* (2010) 161-162.

¹⁷ Consumers often sign contracts without reading them because they assume that they do not contain unexpected terms or terms limiting their rights. See RH Christie & V McFarlane *The Law of Contract in South Africa* 5th ed (2005) 178-179.

¹⁸ H Beale 'Unfair Contract Terms Act 1977' (1978) 5 *British Journal of Law and Society* 114 at 115; R Bradgate 'Unreasonable Standard Terms' (1997) 60 *Modern Law Review* 582.

¹⁹ P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 16-17.

²⁰ H Beale 'Unfair Contracts in Britain and Europe' (1989) 42 *Current Legal Problems* 192; R Bradgate 'Unreasonable Standard Terms' (1997) 60 *Modern Law Review* 582.

process. It also simplifies the administration of a business, allows for planning, and reduces costs.²¹

In the next paragraphs, the philosophical context of the focus on unfairness in contracting procedures, unfair terms and unfair outcomes of contracts will be viewed by analysing the freedom and fairness orientations.

3 Freedom Orientation

3.1 Freedom of Contract

3.1.1 Background to Freedom of Contract

Although contracts have been part of human experience from time to immemorial contracts did not play a significant role in primitive societies.²² That is because in primitive societies based on kinship or family, liberal or capitalist impulses played an insignificant role since the individual was completely subsumed by the group and only seen in terms of his or her relationships with various other members of the same group. The capitalist impulses therefore never had a chance to emerge in these societies.²³ Freedom of contract did, however, made an appearance in ancient Rome. Roman citizens were deemed to be free and autonomous individuals. Freedom of contract, however, declined following the fall of the Western Roman empire.²⁴ Freedom of contract only

²¹ H Beale 'Unfair Contract Terms Act 1977' (1978) 5 *British Journal of Law and Society* 114 at 114-115; C Willet *Fairness in Consumer Contracts* (2007) 16.

²² A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 40.

²³ A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 40.

²⁴ RS Lopez *The Commercial Revolution in the Middle Ages, 950-1350* (1976) 48-49.

resurfaced in the Middle Ages in Western Europe, when trade revived on a large scale.²⁵

In England, the doctrine of freedom of contract was adopted by the eighteenth- and nineteenth-century promoters of the *laissez-faire* political economy.²⁶ Adam Smith was notable among them. Although he never used the term 'laissez-faire' he proposed the rule that legislation should not be used to interfere with freedom of contract. He was therefore opposed to legislation regulating employment contracts and he advocated the removal of all restraints of trade. Smith also believed that when an individual pursues his or her self-interest, he or she indirectly promotes the good of society and that self-interested competition in a free market would benefit the society by keeping prices low.²⁷ However, freedom of contract was often regarded as exploitative and is therefore sometimes linked to an era in which greedy factory owners and capitalists exploited the working class. These factory owners and capitalists pursued profit-making with no concern for public interests. The dogmas of *laissez-faire* were invoked to protect workers' freedom of contract while in reality the result was to give the factory owners complete freedom to exploit and ill-treat workers.²⁸ In this era, the working class had no real freedom. After the

²⁵ EH Mielants *The Origins of Capitalism and the 'Rise of the West'* (2007) 32-42.

²⁶ The French phrase *laissez-faire* literally means 'leave you'. It was used in England to broadly describe a policy of non-interference and freedom of trade which included freedom of contract. See P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 4-5; PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 299.

²⁷ The natural harmony between individual self-interest and the public interest was also described as 'the invisible hand'. See PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 294-310; P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 4-5 with reference to Smith's work, known as *The Wealth of Nations* (A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776)). See also A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 37-38; S Gordon 'The London Economist and the High Tide of Laissez Faire' (1955) 63 *Journal of Political Economy* 461-488.

²⁸ See PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 537-538. In general, see A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21

Industrial Revolution, a capitalist society emerged, which led to the growth of the free market and the rise of freedom of contract.²⁹ During this era fairness was excluded from contractual disputes due to the change in general beliefs about the determination of value. The value of contractual performance was believed to be only subjectively determinable and as a result the law of contract became an instrument to enforce contractual bargains without visiting its fairness. So the adjudication of contractual disputes became formalistic and positivistic, without any regard to general social context. It was also believed that it would be contrary to the market system and the need for commercial certainty to make contracts subject to equitable considerations.³⁰

3.1.2 The Meaning of Freedom of Contract

The cornerstones of the individualist philosophy are (a) freedom of contract, and (b) sanctity of contract.³¹ Freedom of contract entails that one is free to decide, without interference, whether or not to contract,³² with whom one wants to contract (party freedom), and on the terms of the contract (term freedom).³³ It is based on the notion that no-one can be forced to contract.³⁴

Australian Journal of Legal Philosophy 36 at 37-38; S Gordon 'The London Economist and the High Tide of Laissez Faire' (1955) 63 *Journal of Political Economy* 461-488.

²⁹ PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 230-237; A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 47.

³⁰ AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) at 27.

³¹ C-J Pretorius 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 *THRHR* 638 at 640.

³² The freedom not to contract is sometimes referred to as 'freedom from contract'. See C Willet *Fairness in Consumer Contracts* (2007) 18 and in general see T Rakoff 'Is "Freedom From Contract" Necessarily a Libertarian Freedom?' (2004) *Wisconsin Law Review* 477.

³³ See also AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 72-73; R Brownsword 'The Limits of Freedom of Contract and the Limits of Contract Theory' (1995) 22 *Journal of Law and Society* 259 at 262-263; L Hawthorne 'Closing the Open Norms in the Law of Contract'

A consequence of term freedom is that once the parties have concluded a contract, they must abide by it – sanctity of contract.³⁵ This cornerstone finds expression in the maxim *pacta sunt servanda* and is based on individualism, autonomy, personal liberty, and freedom of contract.³⁶

Sanctity of contract emphasises that parties must be held to their contracts and that the courts should not adjust the terms of their contracts on the basis of unfairness. Further, courts should not lightly relieve parties of their obligation to perform. The principle of sanctity of contract is therefore against the paternalistic intervention in contracts by the courts.³⁷

This individualist tradition proposes a world of autonomous, freedom-seeking beings, and a body of the law of contract that aids them in their search.³⁸ The essence of individualism can be described as:

‘... the making of a sharp distinction between one’s interests and those of others, combined with the belief that a preference in conduct for one’s own interests is legitimate.... The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without the help from others.... It means that they will neither share their gains nor one’s own

(2004) 67 *THRHR* 294 at 295; L Hawthorne ‘The Principle of Equality in the Law of Contract’ (1995) 58 *THRHR* 157 at 163; M Pettit Jr ‘Freedom, Freedom of Contract and the Rise and Fall’ (1999) 79 *Boston University Law Review* 263 at 282-287.

³⁴ L Hawthorne ‘Closing the Open Norms in the Law of Contract’ (2004) 67 *THRHR* 294 at 295 and A van Rensburg ‘Die Grondslag van Kontraktuele Gebondenheid’ (1986) 49 *THRHR* 448.

³⁵ C-J Pretorius ‘Individualism, Collectivism and the Limits of Good Faith’ (2003) 66 *THRHR* 638 at 640, C Willet *Fairness in Consumer Contracts* (2007) 19-20. In general see M Movsesian ‘Two Cheers for Freedom of Contract’ (2001-2002) 23 *Cardozo Law Review* 1529.

³⁶ RH Christie & V McFarlane *The Law of Contract in South Africa* 5th ed (2005) 12; A Cockrell ‘Substance and Form in the South African Law of contract’ (1992) 61 *SALJ* 40 at 41 and 61.

³⁷ C-J Pretorius ‘Individualism, Collectivism and the Limits of Good Faith’ (2003) 66 *THRHR* 638 at 640.

³⁸ AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 70; C-J Pretorius ‘Individualism, Collectivism and the Limits of Good Faith’ (2003) 66 *THRHR* 638 at 639.

losses. And it means a firm conviction that I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others'.³⁹

Individualism further presupposes voluntary transactions, informed transactions, and consideration.⁴⁰ It might also be termed the liberal conception of law, which puts a premium on equality of opportunity rather than on equality of outcome. That is because liberalism deems the individual to be the best arbiter of his or her own interests, and respects the individual choice.⁴¹ Individualism comprises two aspects – market ideology, and individualistic ideology.⁴²

In terms of the market ideology, the function of the contract is to facilitate competitive exchange. It establishes the ground rules within which competitive commerce is conducted. Parties are allowed to contract with minimal intervention and regulation. The market promotes certain values – (a) the security of transactions must be protected, (b) the ground rules of contract must be clear to enable parties to plan their private transactions with the necessary circumspection, (c) the law should accommodate commercial practice, as the law of contract is concerned with the facilitation of market transactions, and (d) many of the rules relating to the formation of contracts are based on convenience.⁴³ For example, the cautious approach toward allowing a party to escape liability on the basis of subjective mistake reflect the concern for the

³⁹ D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 83 *Harvard Law Review* 1685 at 1713. See also NJ Grové 'Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet' (2003) 36 *De Jure* 134 at 135.

⁴⁰ R Brownsword 'The Limits of Freedom of Contract and the Limits of Contract Theory' (1995) 22 *Journal of Law and Society* 259 at 260-262.

⁴¹ A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 37.

⁴² AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 67; C-J Pretorius 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 *THRHR* 638 at 639; C Willet *Fairness in Consumer Contracts* (2007) 22.

⁴³ C-J Pretorius 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 *THRHR* 638 at 639-640.

security of transactions,⁴⁴ and the rules on contracts made by post reflect rules based on convenience and commercial practice.⁴⁵

The reasoning in the previous paragraph can be criticised for accepting that all legal problems can be solved by the manipulation of a few ground rules of the law of contract that are assumed to be beyond controversy.⁴⁶

Individualism focuses on aspects such as (a) the voluntary choice of individuals to enter markets, (b) the voluntary choice to choose the parties with whom the contract is concluded, and (c) the voluntary choice to conclude contracts on the parties' own terms and the choice to honour them. The individualist ideology prefers individual autonomy, self-reliance, free will, and subjective intention. Thus, judicial intervention is limited in order that parties have the utmost freedom to strike their bargain. The role of the law of contract is mainly to facilitate the voluntary choices of parties and to give effect to them.⁴⁷

3.1.3 Freedom of Contract in South Africa

From a South African perspective, freedom of contract, finding expression in the maxim *pacta sunt servanda*, can be traced back to Roman law.⁴⁸ The South

⁴⁴ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 470.

⁴⁵ *Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd; Cape Explosives Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244 at 265 and 276.

⁴⁶ A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 SALJ 40 at 40-41.

⁴⁷ A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 SALJ 40 at 41-42; C-J Pretorius 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 THRHR 638 at 640; T Rakoff 'Is "Freedom From Contract" Necessarily a Libertarian Freedom?' (2004) *Wisconsin Law Review* 477 at 480; CFC van der Walt 'Kontrakte en Beheer oor Kontrakvryheid in 'n nuwe Suid-Afrika' (1991) 54 THRHR 367 at 379; C Willet *Fairness in Consumer Contracts* (2007) 21-22.

⁴⁸ See AS Asser-Hartkamp *Mr C Asser's Handleiding to de Beoefening van het Nederlands Burgerlijk Recht Verbintenissenrecht, deel II, Algemene Leer der Overeenkomsten* 11th ed (2001) 36; L Hawthorne 'Closing the Open Norms in the Law of Contract' (2004) 67 THRHR 294 at 295. See also AJ Barnard *A Critical Legal Argument for Contractual Justice in the South*

African law of contract has, however, also been influenced by nineteenth-century English law and its will theory of contract.⁴⁹ Freedom of contract is also regarded as a constitutional value, and as one of the cornerstones of the South African law of contract.⁵⁰ The elevation of freedom of contract to a constitutional right is, however, incorrect, because a right to freedom of contract is nowhere to be found in the Constitution.⁵¹ Freedom of contract was omitted from the constitution. The underlying constitutional value of freedom does not equate with complete individual liberty and does not found an independent right to unlimited contractual liberty.⁵² Freedom of contract in this context is significantly restricted by its interaction with the constitutional values of equality and dignity.⁵³ Furthermore, a right to freedom of contract will be recognised only to the extent that such a right, and the conditions for and consequences of its exercise, are compatible with the Bill of Rights.⁵⁴ Although the values of equality, freedom, and dignity may require doctrinal rules that give effect to the

African Law of Contract (2005) (unpublished LLD thesis: University of Pretoria) 31-49; A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 41-43 for a discussion on the development of equity and freedom of contract in Roman law.

⁴⁹ AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 32.

⁵⁰ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 38; *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at 35; NJ Grové 'Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet' (2003) 36 *De Jure* 134 at 134-135; L Hawthorne 'Closing the Open Norms in the Law of Contract' (2004) 67 *THRHR* 294 at 295 and. See also para 2 in Ch 4 for a discussion on the development of the concept of fairness in the South African law in a pre-Consumer Protection Act era.

⁵¹ Constitution of the Republic of South Africa, 1996.

⁵² S 12. See also D Bhana & M Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 *SALJ* 865 at 877-879.

⁵³ G Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications for the Development of Contract Law' (2004) 121 *SALJ* 395 at 420-422.

⁵⁴ In *Ferreira v Levin NO; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para [184] the Constitutional Court held that the interests protected by the right to freedom of person would seldom extend beyond physical integrity. One can thus assume that freedom of contract has not explicitly been entrenched. See also the discussion on the meaning of the constitutional value of freedom in D Bhana & M Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 *SALJ* 865 at 878-883.

individual's voluntary decision to conclude a contract, it must be noted that such rules in themselves may infringe the right to dignity.⁵⁵ The position could be summarised as follows: freedom and autonomy are not guaranteed 'where one party effectively claims freedom of contract for it alone, whereas there is only freedom of contract for the other party in a very formalistic, hollow and practically meaningless sense'.⁵⁶

Freedom of contract is regarded as the basis of contractual obligations in the South African law of contract. In *Burger v Central South African Railways*,⁵⁷ the then Supreme Court found that the South African law of contract does not allow a court to release a party to a contract from his or her obligations on considerations of fairness.⁵⁸ This rule was, however, challenged in *Jajbhay v Cassim*,⁵⁹ where the Appeal Division found that public policy requires 'simple justice between man and man'. In *Bank of Lisbon and South Africa v De Ornelas and Others*,⁶⁰ the Appellate Division indicated its preference for individualism by doing away with the *exceptio doli generalis* in terms of which a contract could be declared unenforceable by a court on the basis of considerations of unfairness. In *Brisley v Drotzky*,⁶¹ the Supreme Court of Appeal criticised attempts to breathe new life into the *exceptio doli*. However, it was indicated in the minority judgment in *Brisley* that our law finds itself in a developmental phase where contractual justice is emerging increasingly as a juristic and moral norm.⁶² In *Afrox Healthcare v Strydom*,⁶³ the Supreme Court

⁵⁵ G Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications for the Development of Contract Law' (2004) 121 *SALJ* 395 at 421.

⁵⁶ T Naudé 'Unfair Contract Terms Legislation: The Implications of why we Need it for its Formulation and Application' 2006 *Stell LR* 361 at 366.

⁵⁷ 1903 TS 571 at 576.

⁵⁸ See also the discussion in J Lewis 'Fairness in South African Contract Law' (2003) 120 *SALJ* 330 at 332.

⁵⁹ 1939 AD 537.

⁶⁰ 1988 (3) SA 580 (A).

⁶¹ 2002 (4) SA 1 (SCA) at 14 and 29.

⁶² At 29. See also CFC van der Walt 'Beheer oor Kontraksbedinge – *quo vadis* vanaf 15 Mei 1999' 2000 *TSAR* 33 at 38.

⁶³ 2002 (6) SA 21 (SCA) at 40-41.

of Appeal held that good faith, reasonableness, and fairness are abstract considerations that are not free-floating bases for the non-enforcement of contracts: the court has no discretion to act on the basis of abstract ideas, but can act only on the basis of crystallised and established rules of law when it decides on the enforceability of a contractual term. Before the enactment of the Consumer Protection Act,⁶⁴ then, the courts followed an individualistic approach, as they did not find contracts to be unenforceable for unfairness, and they did not challenge freedom of contract on equitable grounds.⁶⁵ So the courts in these cases also assumed that any judicial supervision of contracts was contrary to the principle of freedom of contract.⁶⁶

Until recent times freedom of contract was so stringently enforced that consumers were left to take care of themselves. However, in modern times consumer protection increasingly appears as recognised legislative principle.⁶⁷ In short, the purpose of consumer protection and fairness regulation is to safeguard the actual consent of the consumer, in other words, to safeguard the substantive freedom of contract of the consumer. The rules which have this aim focus mainly on the procedure for concluding the contract and less on the content of the contract. So, these rules are based on procedural justices, in which negotiation and information are central.⁶⁸

⁶⁴ See para 3 in Ch 4 for a discussion on the background to the Consumer Protection Act.

⁶⁵ See D Bhana & M Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 *SALJ* 865 at 865-866 and 872-876 where it is indicated that the Supreme Court of Appeal closed off existing legal avenues through which the harshness of the unfettered operation of a classical liberal model of contract could have been ameliorated and CFC van der Walt 'Beheer oor Kontraksbedinge – quo vadis vanaf 15 Mei 1999' 2000 *TSAR* 33 at 35-36 where it is indicated that the courts with its positivist attitude towards lost track of reality.

⁶⁶ See also J Lewis 'Fairness in South African Contract Law' (2003) 120 *SALJ* 330 at 330-338.

⁶⁷ PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 544-545.

⁶⁸ T Wilhelmsson & C Willet 'Unfair Terms and Standard Form Contracts' in G Howells, I Ramsay, T Wilhelmsson & D Kraft *Handbook of Research on International Consumer Law* (2010) 159.

3.1.4 Freedom of Contract and the Process Leading to the Conclusion of a Contract

3.1.4.1 Procedural Factors Involved in the Process Leading to the Conclusion of a Contract

Although what happens in the course of the process leading to the contract is closely linked to the substantive contract itself, it is important to distinguish between the process or procedure leading to the making of a contract and the terms of a contract itself. That is because the process leading to the contract affects the expectations parties have about the substance of the contract and the extent to which the parties are able to protect their interests in relation to the substance of the agreement. It includes the way in which terms are presented or in other words, how 'transparent' the terms are. Another important aspect is the options available to the consumer, for example, was the consumer under pressure or influence which affected his or her ability to choose freely to contract or not to contract. If core terms, which include terms about the description, the price and delivery date, are not transparent, the consumer cannot compare the terms to those of competitors. Even if a consumer has a choice or different options, traders often refuse to bargain with the consumer over terms. If bargaining indeed takes place, the trader is usually in a strong enough bargaining position to enable him or her to avoid having to make significant changes to the terms.⁶⁹ So, consumers are faced with issues of a lack of transparency, a lack of alternatives or choice, and bargaining issues.

3.1.4.2 Freedom-oriented Approach and Procedural Factors

Freedom of contract is concerned with maximising self-reliant freedom to pursue self-interest in the making of contracts. So, at a procedural stage, it removes any constraints preventing the bringing about of a contract by maximising self-reliant freedom to enter into a binding agreement and

⁶⁹ C Willet *Fairness in Consumer Contracts* (2007) 22-25.

minimising attention paid to restrictions on consumer information and consumer options.⁷⁰

In terms of the freedom-oriented approach a consumer is free to decide what to do, therefore only minimal transparency is required. Minimal transparency entails that the consumer has only a basic awareness that terms exist. The consumer can then take the risk of entering into the contract even if he did not investigate the meaning and implication of terms. So, consumer freedom in general takes no cognisance of the contracting process, the relationship between the parties, or the weaknesses of the parties. Furthermore, in terms of the freedom-oriented approach the imposition of transparency requirements limits the freedom of a trader to pursue his or her self-interest.⁷¹

The only instances in which procedural factors are taken into account and intervention is allowed, are when the choice of a party has been restricted by duress or undue influence or in the case of illegality.⁷² So, in general, a freedom oriented-approach is uncomfortable with intervention and accepts only minimum procedural standards.

3.1.5 Freedom of Contract and the Substance of a Contract

Freedom of contract accepts only minimal procedural standards. The same applies to the substance of contract. Therefore, the resulting contract terms should be enforced, irrespective of their substantive features and the extent to

⁷⁰ C Willet *Fairness in Consumer Contracts* (2007) 25.

⁷¹ A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 37; C Willet *Fairness in Consumer Contracts* (2007) 26-27.

⁷² See eg in *Preller v Jordaan* 1956 (1) SA 483 (A); *Mauerberger v Mauerberger* 1948 (4) SA 902 (C); *Broodryk v Smuts* 1942 TPD 47. See also A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 37; RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2005) 301-311; T Rakoff 'Is "Freedom From Contract" Necessarily a Libertarian Freedom?' (2004) *Wisconsin Law Review* 477 at 478; C Willet *Fairness in Consumer Contracts* (2007) 27-29.

which they are fair. That is because the freedom of contract approach aims at maximising freedom to agree and then enforce what has been agreed to. This principle is expressed in the principle *pacta sunt servanda*, which requires contracts to be enforced. Whereas it is undesirable to impose too many constraints at a procedural stage, it is even more undesirable to set terms aside on substantive grounds.⁷³ That is because the parties in the process leading to the contract had the opportunity to exercise their freedom. Furthermore, the freedom of contract approach does not take the consequences of substantive terms or the ability of the parties to bear the consequences into account. So, the freedom of contract approach is in effect abstract, formalistic and non-contextual.⁷⁴

3.1.6 Shortcomings of Freedom of Contract and the Rationale for the Regulation of Fairness in Contracts

The main shortcoming of the freedom of contract approach or the classical contract law is that it is abstract, formalistic and non-contextual. Since it is a self-reliant, non-contextual approach it pays limited heed to contextual factors that might affect the consumer.⁷⁵ It attempts to create certainty, so parties are viewed as abstract persons, who are all equals to which rules should be applied. It is also unconcerned with a consumer's ability to protect him- or herself and his or her interests. That is because the traditional law of contract emphasises autonomy and the will or consent of the parties or true consensus as the legitimating factors behind the binding force of contracts.⁷⁶ In terms of traditional law of contract it is assumed, when parties enter into a contract, that they had real consensus and that they, as abstract consumers, are able and free to protect their own interests. It is also assumed that the abstract consumer has the required knowledge or necessary information to his or her

⁷³ See para 3.1.3.

⁷⁴ AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 75 and 77; C Willet *Fairness in Consumer Contracts* (2007) 31-32.

⁷⁵ C Willet *Fairness in Consumer Contracts* (2007) 32.

⁷⁶ A van Rensburg 'Die Grondslag van Kontraktuele Gebondenheid' (1986) 49 *THRHR* 448.

avail.⁷⁷ The issue with that is that it is difficult to view choice as autonomous or voluntary if one party is without basic knowledge or information, especially when standard-term contracts are used.⁷⁸ Furthermore, to hold parties bound to standard-term contracts which they have entered into but have not read or if they did, have not renegotiated the terms, does not rest comfortably within the basis of the freedom of contract approach which is based on individual autonomy and real consensus.⁷⁹ So, regulation is applied to curb these shortcomings of freedom of contract. This is done by limitations intended to protect one or more contract party and by limitations intended to protect third parties or general society.⁸⁰

It is believed in terms of the freedom of contract approach that it would be contrary to the market system and the need for commercial and contractual certainty to make contracts subject to equitable considerations.⁸¹ It is furthermore believed that to open contracts for challenge on the basis of

⁷⁷ PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 701-703.

⁷⁸ See also MJ Trebilcock *The Limits of Freedom of Contract* (1993) 103 and 119.

⁷⁹ MJ Trebilcock *The Limits of Freedom of Contract* (1993) 119-120

⁸⁰ M Pettit Jr 'Freedom, Freedom of Contract and the Rise and Fall' (1999) 79 *Boston University Law Review* 263 at 291.

⁸¹ FDJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *SALJ* 71 at 78. See also criticism in AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 27 and D Bhana & M Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 *SALJ* 865 at 873-874. In this regards see also the dissenting judgment of Jansen JA in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) at 613 where he indicated that '[i]t is said that the recognition of the *exceptio doli* ... would be an infraction of freedom of contract and the principle that *pacta servanda sunt* – that it would lead to legal uncertainty. Freedom of contract, the principles of *pacta servanda sunt* and certainty are however not absolute values. They did not prevent the modification in England of the common law by equity, which *inter alia* gives relief against 'unconscionable bargains'. Moreover, the twin concepts of freedom of contract and *pacta servanda sunt* have, during this century, increasingly come under assault as a result of *inter alia* rampant inflation, monopolistic practices giving rise to unequal bargaining power and the large-scale use of standard form contracts'.

fairness would be disastrous as it would lead to a flood of litigation. However, the point is that individuals should not be denied justice simply because it produces hassles or fears. Furthermore, the victims of contractual inequity usually can't afford litigation.⁸² It must also be noted that fairness-oriented legislation usually only applies to consumer contracts or contracts that have not been individually negotiated and not to commercial contracts, so fears of commercial uncertainty tend to be exaggerated.⁸³

Freedom of contract in the current social context is only a theoretical freedom.⁸⁴ Contract parties, with the increased use of standard-term contracts, no longer bargain, so there is in fact no or very little freedom to determine the contents of a contract or freedom to decide with whom to contract or not.⁸⁵ The classical law of contract, with its emphasis on freedom of contract, was traditionally designed for parties negotiating at arm's length and parties of equal standing reaching real or true consensus.⁸⁶ However, it does not take proper account of social reality and the issues related to it such as discrepancies in resources, knowledge, and wealth. Although it states that no one can be forced to contract, it ignores the fact that economic necessity provides compulsion to contract.⁸⁷ So, freedom of contract is applied outside of its theoretical context.⁸⁸

⁸² J Lewis 'Fairness in South African Contract Law' (2003) 120 *SALJ* 330 at 344-345.

⁸³ See the short discussion of field of application of the Consumer Protection Act 68 of 2008 ('CPA') and the exclusion of contract entered into between suppliers and certain juristic persons (commercial contracts exclusion) in para 1.2 Ch 5 .

⁸⁴ See also C van Loggerenberg 'Onbillike Uitsluitingsbedinge in Kontrakte: 'n Pleidooi vir Regshervorming' 1988 *TSAR* 407 at 413.

⁸⁵ J Lewis 'Fairness in South African Contract Law' (2003) 120 *SALJ* 330 at 331.

⁸⁶ See D Bhana & M Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 *SALJ* 865 at 883 and 884-558 for a discussion on the courts' limiting interpretation of consensus.

⁸⁷ L Hawthorne 'The Principle of Equality in the Law of Contract' (1995) 58 *THRHR* 157 at 165-166. See also CFC van der Walt 'Aangepaste Voorstelle vir 'n Stelsel van Voorkomende Beheer oor Kontrakteervryheid in die Suid-Afrikaanse Reg' (1993) 56 *THRHR* 65 at 68-70 for a discussion on factors which necessitated the control of freedom of contract in South Africa.

⁸⁸ D Bhana & M Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 *SALJ* 865 at 883.

In contrast with a freedom-oriented approach, a fairness-oriented approach takes proper account of social reality and the issues related to it.

4 Fairness Orientation

4.1 Background to the Fairness Orientation

In the twentieth and twenty first century, in many jurisdictions, the tide started shifting against capitalism and classical liberalism and therefore against freedom of contract. So, instead of viewing society as composed of individuals, society was viewed as composing economic classes in which inequality of bargaining power became the main concern. The thrust of legal reform was, therefore, the redistribution of bargaining power between parties reflected in support for principles and development of rules on collective bargaining, unenforceable contract terms, protection of weaker parties, minimum wages, compulsory arbitration, collusion, franchising, mergers, price-fixing, and affirmative action.⁸⁹ The shifting tide also led to a paternalistic attitude towards the general society, which is based on the view that people do not possess sufficient information or the cognitive ability to determine what is truly in their interest.⁹⁰ This paternalistic outlook strikes at the rationale for the existence of the doctrine of freedom of contract, since it challenges the notion of the individual responsible for his or her own destiny.⁹¹

In the twentieth century unprecedented legislative and judicial regulation and control of contracts in many jurisdictions followed. The liberal and individualistic

⁸⁹ PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 506-568; A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 47-50; M Movsesian 'Two Cheers for Freedom of Contract' (2001-2002) 23 *Cardozo Law Review* 1529 at 1529-1530; M Pettit Jr 'Freedom, Freedom of Contract and the Rise and Fall' (1999) 79 *Boston University Law Review* 263 at 281.

⁹⁰ A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 51.

⁹¹ A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 51-54.

impulses were superseded by philosophies of collectivism and paternalism, and capitalism was more and more challenged by programs of egalitarianism, welfarism and planning. However, the failure of the greatest anti-individualist experiments of all, communism, bodes well for the future of freedom of contract.⁹² However, the current era is, again, not an era of absolute freedom of contract, but can be marked by a paternalistic attitude towards the weaker party to a contract in which public policy concerns can override freedom of contract in appropriate cases and by the increase in regulatory legislation.⁹³

4.2 General Fairness Concerns

A fairness-oriented approach is not concerned with freedom of contract, but with context and is therefore also described as a person-oriented approach to contracts.⁹⁴ This approach is therefore not abstract. In terms of this approach parties are viewed as consumers, who are the weaker party, and traders, focusing on their characteristics and the way in which the interests of parties are affected by substantive terms. This approach also focuses on factors that might affect the abilities of parties to protect their interests in the process leading to the contract.⁹⁵ The agenda is to fairly balance the interests of parties, by protecting the weaker party.⁹⁶ So, the fairness-oriented approach can be linked to social justice or welfarism (or collectivism), which can be observed in the development of rules protecting weaker parties like consumers in the contractual relationship. These rules are, for example, rules setting standards

⁹² A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 54-55 and M Movsesian 'Two Cheers for Freedom of Contract' (2001-2002) 23 *Cardozo Law Review* 1529 at 1530. See also CFC van der Walt 'Kontrakte en Beheer oor Kontraktvryheid in 'n nuwe Suid-Afrika' (1991) 54 *THRHR* 367 at 380-382 for a discussion of communism.

⁹³ See also PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 506-568 and M Pettit Jr 'Freedom, Freedom of Contract and the Rise and Fall' (1999) 79 *Boston University Law Review* 263 at 281.

⁹⁴ T Wilhelmsson *Social Contract Law and European Integration* (1995) 29-31.

⁹⁵ C Willet *Fairness in Consumer Contracts* (2007) 32-33.

⁹⁶ C Willet *Fairness in Consumer Contracts* (2007) 33.

for procedural fairness or rules that go beyond that by disallowing terms on substantive grounds. This approach can also be described as welfarism in contract law or the intrusion of the welfare state into the market-oriented structure of traditional contract law or as incorporating protective (welfarist) measures into the libertarian approach to contract, which is aimed at maximising wealth.⁹⁷

To summarise, the fairness-approach is contextual, person-oriented and less concerned with self-reliance. It does not restrict all types of freedom but addresses the idea that self-reliant, non-contextual freedom may not be effective or useful freedom in practice for consumers. So, the view is, for example, that there is only effective freedom for the consumer where terms are sufficiently transparent to enable the consumer to make an informed choice. It is therefore a version of freedom inspired by the sensitivity to context and concern with fairness.⁹⁸

4.2.1 *The Fairness-oriented Approach and Procedural Factors*

From a fairness-oriented approach, the contractual process and market conditions are viewed as making it difficult for consumers to protect their interests, based on problems of lack of transparency, choice and weak bargaining position.⁹⁹ The lack of transparency may also affect what the consumer expects to get from the contract and the ability of the consumer to

⁹⁷ C Willet *Fairness in Consumer Contracts* (2007) 33-34 and see also T Wilhelmsson 'Varieties of Welfarism in European Contract Law' (2004) 10 *European Law Journal* 712-733 for a discussion of different welfare directions that may affect contract law. In this discussion it is stressed at 715-723 that welfarism appears in different blends in different jurisdictions. These varieties of welfarism can be described with the help of dichotomies, which are (a) corrective justice / distributive justice, (b) market-rational regulation / market-rectifying regulations, (c) internal perspective / external perspective, (d) ability-orientation / need-orientation and (e) protection of parties / protections of values. The latter usually implies a move further away from traditional contract law towards more express welfarism.

⁹⁸ C Willet *Fairness in Consumer Contracts* (2007) 34.

⁹⁹ C Willet *Fairness in Consumer Contracts* (2007) 33.

protect his or her interests in relation to the substantive terms of the contract. So, if terms are not transparent,¹⁰⁰ a lack of informed consent exists, which is problematic, irrespective of the substantive features of the contract terms. A lack of transparency limits choice, awareness of terms or risks, it leads to a lack of informed consent, and prevents consumers from comparing terms or negotiating for improvements, which in effect undermines competition.¹⁰¹

A fairness-oriented approach recognises that it is unrealistic to expect consumers to overcome the problems of lack of transparency by self-reliant means because pre-existing procedural aspects or factors (procedural unfairness) are more powerful than substantive terms. That is because these pre-existing procedural aspects or factors may distract consumers from the substantive contractual terms, conditioning consumers to believe that the substantive terms are not important. Advertising, limited consumer experience, expertise or technical knowledge needed to understand terms and legal language can be regarded as pre-existing procedural aspects or factors turning a consumer's attention away from substantive terms.¹⁰²

Procedural fairness deals with preventative control of unfairness and not only with judicial control of fairness. That is because procedural fairness is not applied *ex post facto* but focuses on aspects such as transparency, before the conclusion of a contract. Usually, procedural fairness measures oblige suppliers to disclose specific information, to comply with language requirements and specific formats in contracts in order to address the lack of transparency in advance. So, procedural fairness has a proactive nature, because it applies to the procedure leading to the contract which includes aspects such as language, format, and the contract document itself.

¹⁰⁰ Examples of terms that are not transparent are terms in small print, unclear language or badly structured language.

¹⁰¹ C Willet *Fairness in Consumer Contracts* (2007) 39-40.

¹⁰² C Willet *Fairness in Consumer Contracts* (2007) 40-43.

4.2.2 The Fairness-oriented Approach and Substantive Factors

In contrast with the freedom-oriented approach, the fairness-oriented approach takes account of the way that terms affect the interests of parties. So, substantive terms are viewed as having the potential to be damaging to the interest of consumers.¹⁰³ This view is based on the idea that consumers enter into contracts to sustain and to enhance the private sphere of life, rather than to make profit.¹⁰⁴ The interests of consumers that may be affected by the substantive terms are physical safety, proprietary, economic and social interests, for example, allowing suppliers to evade responsibility or imposing undue burdens on consumers. While suppliers usually have the means to deal with losses or to distribute losses, consumers don't have.¹⁰⁵

Furthermore, the fairness-oriented approach does not only address transparency issues but also issues related to the lack of consumer choice and the weaker bargaining position of the consumer. Even if a consumer is aware of what a term provides and does not wish to agree to it, the supplier or other suppliers may not offer any alternatives, which makes it a contract of adhesion placing the consumer in a 'take it or leave it' position. In terms of the freedom-oriented approach, the consumer then has to refuse to enter into the contract or seek better terms. However, the fairness-oriented approach recognises that consumers can rarely realistically refuse to enter into a contract because the goods or services are needed. It also recognises that it is unrealistic to expect the consumer to bargain for better terms because the supplier will normally refuse to change standard terms since it is inefficient for him or her to engage in bargaining over standard terms. If the trader is prepared to bargain, the consumer is, however unlikely to be in a strong enough bargaining position to persuade the supplier to remove or amend a term.¹⁰⁶ Thus, a fairness-oriented

¹⁰³ C Willet *Fairness in Consumer Contracts* (2007) 33 and 37.

¹⁰⁴ C Willet *Fairness in Consumer Contracts* (2007) 37.

¹⁰⁵ C Willet *Fairness in Consumer Contracts* (2007) 37-38.

¹⁰⁶ Bargaining power refers to the lack of market power or the lack of bargaining sophistication relative to suppliers. See para 2.3.2 in Ch 6 for a discussion of the meaning of 'bargaining

approach attempts to balance the interests of the parties and to protect the interests of consumers by being cognisant of the ways in which terms may be damaging to a consumer's interests (and by addressing the problems of procedural fairness that may arise).¹⁰⁷

4.3 Collectivism

As indicated, the fairness-oriented approach can be linked to social justice, welfarism or collectivism or altruism, which can be observed in the development of rules protecting weaker parties like consumers in the contractual relationship.¹⁰⁸ Collectivism or altruism is the counter-ideology to individualism. Altruists believe that humans are social creatures with responsibilities and benefits which crystallise out of one's existence in a community. So, humans are not only concerned with the realisation of self-interest, but also with the interests of others and how their actions impact on the well-being of others.¹⁰⁹ Barnard is of the opinion that the good faith principle would have been able to form the theoretical basis for the judicial activism that is required to further the ideals of collectivism or altruism and to move away from an individualistic stance to one which takes account of the structural inequalities within society.¹¹⁰ The most important aspect of collectivism or altruism is that it acknowledges

position'. See also C Willet *Fairness in Consumer Contracts* (2007) 44. In general, see J Cartwright *Unequal Bargaining - A Study of Vitiating Factors in the Formation of Contracts* (1991).

¹⁰⁷ C Willet *Fairness in Consumer Contracts* (2007) at 39-46.

¹⁰⁸ See para 4.2. See also a discussion on legal paternalism in L Hawthorne 'The Principle of Equality in the Law of Contract' (1995) 58 *THRHR* 157 at 168-169 and T Wilhelmsson & C Willet 'Unfair Terms and Standard Form Contracts' in G Howells, I Ramsay, T Wilhelmsson & D Kraft *Handbook of Research on International Consumer Law* (2010) 158.

¹⁰⁹ AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 102-103; A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40 at 42; C-J Pretorius 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 *THRHR* 638 at 641.

¹¹⁰ AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 104 and GF Lubbe & CM Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* 3rd ed (1988) 469.

that blind enforcement of contracts is an ineffective method of achieving social ends and courts with an altruistic approach therefore consider procedures followed when the contract was concluded and the terms of a contract.¹¹¹ So, altruists see the gap between the ideal world and the real world of limitation and inequality unlike individualists who postulate an ideal world of freedom and equality.¹¹² Altruism or collectivism is associated with the rise of consumer protection.¹¹³ It therefore manifests in the law of contract in the form of rules or standards on unenforceability of contracts and on considerations of public interests, fairness or reasonableness.

5 Conclusion

Although the court, before the enactment of the Consumer Protection Act,¹¹⁴ had the opportunity to challenge issues related to freedom of contract on equitable grounds, the court did not. So, for many years, fairness-oriented approaches or collectivism were suppressed by the over-emphasis of traditional contract ideologies. In recent years, the freedom-oriented approach was, however, increasingly criticized as being abstract, formalistic and non-contextual. It was also realised that the classical law of contract with its freedom-oriented approach was designed for parties negotiating at arm's length. The need to implement a fairness-oriented approach for the types of contracts through the implementation of legislation was therefore recognised. A fairness-oriented approach takes proper account of social reality and the issues related to it and places obligations on parties not to exploit each other and in effect to contract in good faith. In South Africa, this led to the implementation of the CPA, that regulates fairness in consumer contracts.

¹¹¹ AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 105-106.

¹¹² AJ Barnard *A Critical Legal Argument For Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 106.

¹¹³ C-J Pretorius 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 *THRHR* 638 at 641.

¹¹⁴ 68 of 2008 ('CPA').

The CPA was enacted because the system of consumer laws in South Africa was outdated, fragmented and predicated on principles contrary to the democratic system. Before the enactment of the CPA, South Africa did not have a comprehensive consumer protection statute clearly spelling out the rights and obligations of all market participants. There was therefore a need for a comprehensive consumer policy to guide the welfare of South Africa's economic citizens. The CPA regulates consumer-supplier interaction with the aim of promoting a fair, efficient and transparent market place for consumers and businesses. For consumers to participate effectively in the market economy, they are afforded basic rights in a comprehensive consumer law that sets out guiding principles for market conduct. These guiding principles relate to trade, competition, balanced terms and a working market. The principles on balanced terms were incorporated into the CPA by inserting general provisions regarding unfair contracts. These fairness provisions, which are primarily built on English and European Council precedent, do not only deal with substantive terms, but also with procedural responsibilities of parties, such as the use and promotion of plain language in consumer contracts.¹¹⁵

The CPA uses various techniques to achieve fairness in contracts. In the preamble to the CPA it is stated that it is necessary to develop and employ innovative means to protect the interests of all consumers and to ensure redress for consumers who are subjected to abuse or exploitation in the marketplace. It is also stated that the CPA was enacted to promote and protect the economic interests of consumers and to improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual needs. The purpose of the CPA is, among others, to promote and advance the social and economic welfare of consumers in South Africa, by: (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;¹¹⁶ (b) promoting fair

¹¹⁵ See DTI *Draft Green Paper on the Consumer Policy Framework 09/04* at 6, 9-13 and 31 published in GN 1957 in GG 26774 of 9 Sept 2004.

¹¹⁶ Section 3(1)(a).

business practices;¹¹⁷ (c) protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices and deceptive, misleading, unfair or fraudulent conduct;¹¹⁸ and (d) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour.¹¹⁹

So the CPA applies a traditional contract law approach blended with welfarism which can be evidenced from its application of: (a) corrective justice (the CPA focuses on the need to correct situations that have emerged as a consequence of behaviour that is considered unacceptable); (b) a mixed system of market-rational and market rectifying regulation (the CPA mainly implements measures aimed at improving the function of the market mechanism but it also attempts to remedy the drawbacks of the market mechanism); (c) an internal perspective (the CPA regulates the individual legal relationship between the parties of a contract and it does not, in general, add an external perspective by looking beyond the individual relationship which is the case with collective contract law); (d) a need-orientation (the CPA focuses on the weaker party, not on a mere abstract person, and the need of the party as the ground for granting protection); and (e) protection of parties (the CPA focuses on the interest of the contracting parties and not on values not related to them).¹²⁰

In the Chapter 3, an overview will be given of what must be kept in mind when thinking of fairness. So, dimensions of fairness or factors playing a role in the question of fairness will be identified. In Chapter 5, specifics of fairness in terms of the CPA will be discussed against the backdrop of the factors identified in Chapter 3.

¹¹⁷ Section 3(1)(c).

¹¹⁸ Section 3(1)(d).

¹¹⁹ Section 3(1)(e). See also the discussion on the aims of the Act in para 1 in Ch 5.

¹²⁰ See also para 4.2.

Chapter 3 – Dimensions of Fairness

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‘If a contract is stigmatised as “unfair”, it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence.... It may also, in some contexts, be described ... as “unfair” by reason of the fact that the terms of the contract are more favourable to one party than to the other.’¹

1 Introduction

Traditionally, the law of contract merely provides a framework within which contracts are enforced,² without concern for their context.³ Legislation is then

¹ *Hart v O'Connor* [1985] AC 1017-1018 (per Lord Brightman).

² When it is alleged that a contract in restraint of trade is unreasonable, reasonableness (the context), is, however, assessed at the time of enforcement. See, for example, *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A); *National Chemsearch (SA) (Pty) Ltd v Borrowman and another* 1979 (3) SA 1092 (T) at 1107. Before the decision in *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A) it had also been accepted that the *exceptio doli generalis* provided a remedy against the enforcement of an unfair contract in unfair circumstances but the then Appellate Division reviewed the authorities on the *exceptio doli generalis* and concluded that it is not part of South African law (at 607B). The *exceptio doli*

adopted to address this imbalance by, among others, regulating the fairness of contract terms.⁴

The starting point for consumer protection is the imbalance, from a legal and an economic perspective, between suppliers and consumers in the making of a contract, in the contract terms and in the enforcement of a contract. This imbalance may arise, because the traditional (or classical) law of contract applies regardless of the identity of the parties, their relationship to one another, the subject matter of the contract, and the social context of the contract.

In this chapter, I shall give a brief overview of what must be considered when one introduces considerations of 'fairness' by means of consumer legislation. I shall do so without any reference to any specific jurisdiction,⁵ and irrespective of whether, and to what extent, fairness is supported by the current law of contract. I shall identify dimensions of fairness, factors which play a role in the determination of fairness, and fairness-oriented approaches, in an attempt to formulate a framework for fairness. Such a framework should indicate the aspects that should be taken into account in order to justify a finding of fairness, or to determine whether or not a contract is fair.

generalis could therefore no longer be used to give relief against the enforcement of an unfair contract. See para 2.2 in Ch 4.

³ The taking into consideration of context at the formation of a contract or pre-contractually, is therefore not foreign to the South African law of contract. See for example the rules on misrepresentation and fraud, duress, undue influence, mistake and illegality, which aim at curbing unfairness at the formation of a contract. In these instances context (at the formation of a contract) plays a role. The question is, however, whether the common-law rules and principles cover the ground sufficiently or whether there are gaps that need to be filled to curb unfairness. See para 2.1 in Ch 4. See also RH Christie & V McFarlane *The Law of Contract in South Africa* 5th ed (2005) 14.

⁴ For a discussion of the goal of consumer protection, see JGJ Rinkes 'European Consumer Law: Making Sense' in C Twigg-Flesner, D Parry, G Howells & A Nordhausen (eds) *The Yearbook of Consumer Law 2008* (2008) 3 at 15.

⁵ Although the discussion will not be linked to any specific jurisdiction, I shall in the footnotes refer to relevant South African jurisprudence and literature.

Willet, a well-known author on the British law of contract, has identified the dimensions of fairness, or fairness-oriented approaches. I shall base much of this discussion on his research. He distinguishes between a fairness approach aimed at substantive fairness, on the one hand, and a fairness approach aimed at procedural fairness, on the other. As the aim of these two approaches, and the moment at which fairness is relevant, differ, it makes sense to distinguish between them, even though they are interdependent.

In this chapter, I shall extend the discussion on the fairness-oriented approach.⁶ As I have shown in Chapter 2, the focus of the fairness-oriented approach is on balancing the interests of the parties, and, especially, to protect the interests of consumers.⁷ So, the fairness-oriented approach considers the way in which terms affect the interests of the contracting parties, and problems relating to procedural fairness that may arise.⁸ However, properly to understand the concept 'fairness' and its regulation, one needs to concretise the concept— a lack of certainty is often raised as a concern in relation to the assessment of fairness.⁹ The lack of precedent to guide the development of the concept

⁶See Ch 2.

⁷ See para 4.2.2 in Ch 2.

⁸ See paras 4.2.1 and 4.2.2 in Ch 2.

⁹ FDJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *SALJ* 71 at 78. See also the criticism in AJ Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (2005) (unpublished LLD thesis: University of Pretoria) 27; D Bhana & M Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' 122 (2005) *SALJ* 865 at 873-874. See also the dissenting judgment of Jansen JA in *Bank of Lisbon and South Africa Ltd v De Ormelas* (1988 (3) SA 580 (A) at 613) where he stated:

'It is said that the recognition of the *exceptio doli*... would be an infraction of freedom of contract and the principle that *pacta servanda sunt* – that it would lead to legal uncertainty. Freedom of contract, the principles of *pacta servanda sunt* and certainty are however not absolute values. They did not prevent the modification in England of the common law by equity, which *inter alia* gives relief against 'unconscionable bargains'. Moreover, the twin concepts of freedom of contract and *pacta servanda sunt* have, during this century, increasingly come under assault as a result of *inter alia*

contributes to uncertainty. In the final analysis, the concept 'fairness' is of little value if its content cannot be determined because of overgeneralisation or vagueness.

2 Substantive Fairness

Substantive fairness concerns the outcome of the contracting process, whereas procedural fairness concerns the contracting process. If a contract is substantively unfair, then there is at least something objectionable about its terms taken by themselves, or its terms are unfair as between the contracting parties.¹⁰

Conceptions of substantive fairness may be either generalised or individualised. Where fairness is determined with reference to factors external to the contracting parties, such as the market price of goods or services or the availability of alternatives from competitors the conception is generalised. But where fairness is determined with reference to factors related to consumer welfare, such as the effect of contract terms on the consumer, the conception is generalised. It is very difficult to work with an individualised conception in practice, as the required information about a consumer's state of mind, and the effect of a contract term on a consumer, cannot always be determined reliably and may differ from time to time.¹¹

There are, furthermore, different measures that can be applied to determine whether contract terms are substantively fair. Terms may come under

rampant inflation, monopolistic practices giving rise to unequal bargaining power and the large-scale use of standard form contracts.'

¹⁰ See also SA Smith 'In Defence of Substantive Fairness' (1996) 112 *Law Quarterly Review* 138 at 140-144 (an introduction to the meaning of substantive fairness, and a discussion of the distinction between substantive and procedural fairness) and at 144-155 (a discussion of the relevance of price to a decision as to whether a contract is unfair).

¹¹ See SA Smith 'In Defence of Substantive Fairness' (1996) 112 *Law Quarterly Review* 138 at 141, where the different conceptions of substantive fairness are analysed.

suspicion when they deviate from default rules, or from a consumer's reasonable expectations.¹² A further approach considers the type of consumer interests involved, and whether a contract term affects the consumer interests. A fairness assessment must, for example, take into account whether a term has the effect of denying liability for injury or death (physical integrity),¹³ damage to property (property interests), or economic loss (economic interests), or whether it excludes legal remedies or access to justice,¹⁴ or allows a party to a contract to vary or terminate a contract at will.¹⁵

So the focus of a fairness assessment is on the effect of a contractual term on the interests of a consumer. A term may, for example, be regarded as unfair on the basis that it unduly impacts on the interest of the consumer while it is not necessary to protect the supplier's interests.¹⁶ Since the supplier's interest is also taken into account, this approach requires a comprehensive analysis of the interests of the consumer and the supplier.¹⁷

Furthermore, overall substantive fairness must be considered. This means that the contract terms are scrutinised in the context of other terms of the contract and of related contracts. For example, one term may be to a consumer's detriment, while another term may favour him. Put differently, a consumer may pay a 'price' for a term that is favourable to him. The key question, therefore, is

¹² See para 2.2.

¹³ See, for example, *Johannesburg Country Club v Stott and another* 2004 (5) SA 511 (SCA) where the court had to decide whether the effective exclusion of liability for damages for negligently causing the death of another is contrary to high value accorded at common law and in the Constitution of the Republic of South Africa Act, 1996, to sanctity of life.

¹⁴ See, for example, *Barkhuizen v Napier* 2007 (5) SA 323 (CC) in which the right of access to courts was considered when the court had to decide whether a term was contrary to public policy and therefore unenforceable.

¹⁵ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 49-50.

¹⁶ See, for example, *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). The court (at 9) found that although public policy favours utmost freedom of contract, 'simple justice between man and man' should be done. The court further indicated that a contract maybe declared contrary to public policy if it is plainly improper and unconscionable, or unduly harsh or oppressive.

¹⁷ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 50.

whether the detrimental term represents a 'fair price', or whether an imbalanced (or detrimental) term is reasonably necessary to protect the legitimate interest of the party who would be advantaged by the term.¹⁸ To answer this question, the risks that the supplier is seeking to protect himself against by using the term, and the degree of detriment or risk caused to the consumer by the term, should be considered. A good rule of thumb is that if there is a term detrimental to the consumer, there should be another term that protects the consumer or allows the consumer to protect himself against the term under consideration. If, for example, the term allows the supplier to increase the contract price in his or her discretion, there should be a term allowing a consumer to cancel in the event of a price increase.¹⁹

One way to measure this is by asking whether, without the term under consideration, the price should have been higher to cover the supplier's risks and make it economically viable for him to contract. If so, the price charged can be viewed as representing a 'fair price' for the term, and there can be said to be overall substantive fairness. A different way of measuring is by asking whether the price and the overall balance of rights and obligations are fair by typical market price in contracts where such terms are used. The problem is, however, that market price is not necessarily the best price from the consumer's perspective. From a supplier's perspective, it can be asked whether it is economically efficient to provide the goods or service without the specific term. If it is not, it may be argued that the price is fair.²⁰

¹⁸ For a discussion on whether a term is reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, see J Paterson 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2003) 33 *Melbourne University Law Review* 934 at 944-945.

¹⁹ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 51-52.

²⁰ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 52-55. In para 2.2.1.3 in Ch 5, considering the price of goods or services as part of a fairness assessment is criticised.

To conclude, in terms of this approach, which focuses on substantive issues, it is assessed whether there is a fair balance between rights and obligations. But this approach is usually not conclusive. Usually a review of procedural fairness should also be undertaken. The reason is that despite the existence of a fair balance of substantive rights and obligations, a consumer has a legitimate interest in being able to make his or her own assessment, which means that transparency is required.²¹

2.1. Disallowing Terms with Certain Substantive Features

Disallowing terms with certain substantive features is the most radical form of fairness and the least acceptable from a freedom orientation. The reason is that terms are disallowed irrespective of overall substantive or procedural fairness.²² This approach implies the pre-emptive control of fairness, as certain terms are rendered ineffective, irrespective of how and when they are used. In some jurisdictions, a regulatory body controls the use of terms with certain substantive features.²³

There are several lines of thought underpinning this approach.²⁴

In the first instance, consumers should be given absolute protection where certain so-called irreducible rights (substantive interests) are involved.²⁵ These

²¹ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 55. See also T Naudé 'Unfair Contract Terms Legislation: The Implications of Why we Need it for its Formulation and Application' 2006 *Stell LR* 361 at 371-377, where the possibility of control on the basis of only substantive fairness is considered.

²² See also para 2.3 in Ch 6.

²³ See para 3.3.1 in Ch 6 in respect of some of the functions of the English Office of Fair Trading performed in the prevention of unfairness in contracts.

²⁴ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 65-66.

²⁵ For example, a term purporting to exclude liability for causing death probably would be void for being contrary to public policy. See *Johannesburg Country Club v Stott and another* 2004 (5) SA 511 (SCA).

irreducible rights are treated as legally guaranteed and cannot be traded for more beneficial terms, as they are rights that should be protected irrespective of procedural fairness or overall substantive fairness.²⁶ Another line of thought is that the nature of the unfairness in substance is so serious that we cannot risk that procedural fairness did not, or could not, work in practice because the consumer was not in a position to take advantage of procedural fairness to protect his or her interest against terms compromising his or her substantive interests. So the degree to which a term compromises a consumer's substantive interests is such that it is presumed that consumers may not take the opportunities that may have been available to them to protect their interests pre-contractually. These opportunities refer to whether the terms are transparent, whether choices are available to the consumer, and whether the consumer is in a strong bargaining position. This approach accordingly implies that there are doubts as to how effective procedural fairness on its own can be to help consumers to protect their interests during the contractual bargaining stage. However, the main reason for disallowing terms is that they are substantively detrimental. This means that the focus is on the substantive features of the terms.²⁷

Secondly, non-negotiated (standard) terms cannot be regarded as the proper expression of the self-determination of both parties, with the result that intervention is justified. Although this line of thought may be speculative, the removal of unfair terms may increase consumer confidence and trust, and so increase economic activity.²⁸

²⁵ For example, a term purporting to exclude liability for causing death probably would be void for being contrary to public policy. See *Johannesburg Country Club v Stott and another* 2004 (5) SA 511 (SCA).

²⁶ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 66-67. See also T Naudé 'Unfair Contract Terms Legislation: the Implications of why we Need it for its Formulation and Application' 2006 *Stell LR* 361 at 372.

²⁷ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 67-70.

²⁸ T Naudé 'Unfair Contract Terms Legislation: The Implications of why we Need it for its Formulation and Application' 2006 *Stell LR* 361 at 365 and 370-371.

Thirdly, setting substantive standards that apply irrespective of procedural fairness helps to extract more benefit from procedural fairness – the substantive features of contracts are standardised in the process and, as a result of the focus on their substantive features. This promotes transparency in that it helps consumers to know to what they are agreeing.²⁹

Fourthly, there is a need to promote clear and effective consumer protection. Certain terms compromise the interests of consumers to such an extent that they may be banned outright. So this orientation also aims at the practical and effective protection of the majority of consumers, who would not usually want to agree to the specific term.³⁰

2.2 Default Rules and Reasonable Expectations

As fairness legislation is usually aimed at specific types of terms that have been used to consumers' detriment, or that may lead to exploitation, it is important to have a concrete idea as to the types of substantive terms that are targeted. This issue can be approached by using default rules, implied terms,³¹ and legal remedies as benchmarks of fairness, and by comparing express terms that are detrimental to consumers to default rules or legal remedies.³²

Default rules, implied terms, and legal remedies often aim at balancing the interests of the parties. Implied terms are, for example, sometimes based on what a reasonable person would regard as satisfactory, reasonable, or equitable – they contain an element of justice that strives to level the playing field between parties that do not have equal bargaining power. Implied terms

²⁹ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 70.

³⁰ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 70-71.

³¹ A contract of lease that falls within the ambits of the Rental Housing Act 50 of 1999 is, for example, in terms of s 5, deemed to include certain terms. These terms are implied to balance the rights and duties of tenants and landlords.

³² C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 47.

are also referred to as *naturalia*, legal incidents, or residual provisions that derive from common law, precedent, custom, or legislation.³³

When there are no default rules, implied terms, or legal remedies dealing with a particular situation, an alternative fairness benchmark is the consumer's reasonable expectations. For example, where a term requires a consumer to perform in a way different from what he reasonably expected, the term may be regarded as unfair.³⁴ The reasonable expectation of an ordinary consumer can be described as the 'objectively justified belief in the likelihood in some future event or entitlement'.³⁵ However, the interests of the parties still should be balanced, and the expectations of the consumer should objectively be reasonable.³⁶

To conclude: substantive fairness relates to the fairness of terms, the fairness of the outcome, and fairness as between the parties.³⁷ A term will become subject to scrutiny where it creates an imbalance between parties, or it deviates from a default rule, runs contrary to an implied term, denies a legal remedy, or deviates from a consumer's reasonable expectations.

³³ SJ Cornelius *Principles of the Interpretation of Contracts* 2 ed (2007) 162-163; JP Vorster 'The Bases for the Implication of Contractual Terms' 1988 *TSAR* 161 at 166-167.

³⁴ See T Naudé & G Lubbe 'Exemption Clauses – a Rethink Occasioned by Afrox Healthcare v Strydom' (2005) 122 *SALJ* 441 at 454: the authors submit that a party may reasonably expect the terms of a written document to be consistent with the aim of the envisaged contract. They found that a clause which purports to vary the consequences of the contract in a manner contrary to the essence of the contract by undermining the reciprocity between the essential obligations envisaged by the parties was 'surprising'. In *Mercurius Motors v Lopez* (2008) (3) SA 572 (SCA) para [33]), the Supreme Court of Appeal found that if a term undermines the very essence of a contract, it should clearly and pertinently be brought to the attention of a consumer who signs a standard form. For a discussion of reasonable expectations regarding quality, see also C Willet 'Fairness in Sale of Goods Act Quality Obligations and Remedies', in C Willet *Aspects of Fairness in Contract* (1996) 123 at 125-130.

³⁵ See also P Nebbia *Unfair Contract Terms in European Law* (2007) 158.

³⁶ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 48-49.

³⁷ For an introduction to the meaning of substantive fairness, see also SA Smith "In Defence of Substantive Fairness" (1996) 112 *Law Quarterly Review* 138 at 140.

3 Procedural Fairness

Measures aimed at procedural fairness address conduct during the bargaining process, and generally aim at ensuring transparency.³⁸ Transparency has two elements: (a) transparency in relation to the terms of a contract, and (b) transparency in the sense of not being positively misled, pre-contractually or during the performance of a contract, as to aspects of the goods, service, price, and terms. Transparency in relation to the terms of a contract relates to whether the contract terms are accessible, in clear language, well-structured, and cross-referenced, with prominence being given to terms that are detrimental to the consumer or because they grant important rights.³⁹ In a nutshell, one could say that a contract is procedurally fair, where it has been concluded voluntarily, or put differently, without being misled as to aspects of the goods, service, price and terms.

Substantive fairness relates to procedural fairness through the requirement of transparency. A good level of transparency has to do with, among others, aspects such as information disclosure, awareness of terms, size of print, clarity of language, and interpretation and format, as these procedural factors relate to circumstances surrounding the manner in which agreement is reached.⁴⁰ Transparency can be a negative control which allows at most the elimination of unclear and incomprehensible contract terms, or it may provide for positive

³⁸ See, generally, R Lawson *Exclusion Clauses and Unfair Contract Terms* 8 ed (2005) 219; T Naudé "Unfair Contract Terms Legislation: the Implications of why we Need it for its Formulation and Application" 2006 *Stell LR* 361 at 377.

³⁹ C Willet 'General Clauses on Fairness and the Promotion of Values Important in Services of General Interest', in C Twigg-Flesner, D Parry, G Howells & A Nordhausen (eds) *The Yearbook of Consumer Law 2008* (2008) 67 at 75. See also J Paterson 'The Australian Unfair Contract Terms Law: the Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2003) 33 *Melbourne University Law Review* 934 at 949, where the author analyses elements of transparency: a term is in transparent where it is (a) expressed in reasonably plain language, (b) legible, (c) presented clearly, and (d) readily available to any party affected by the term.

⁴⁰ See also P Nebbia *Unfair Contract Terms in European Law* (2007) 135-136.

duties, such as to explain and summarise the implication of certain substantive contractual terms.⁴¹ While a fairness orientation requires a high level of transparency, a freedom orientation would require a mere awareness of the contractual terms. A high level of transparency means that the consumer is placed in a position at least to have a chance of being able to exercise a reasonable degree of informed consent. Transparency also enhances choice and fairness substantively.⁴²

From a substantive fairness perspective, procedural fairness requires that terms that are damaging to consumers' substantive interests should be transparent. Accordingly, the greater the substantive unfairness, the higher are the demands of transparency. However, where a term is in some way substantively detrimental but it is balanced by another favourable term, both the detrimental and favourable terms should be transparent, so that controlling bodies, such as the Office of Fair Trading or an ombudsman can apply preventative control. These bodies should be allowed to assert that terms that are not transparent are unfair, and a court would, *ex post facto*, be allowed to consider the lack of transparency.⁴³

Consumers should be aware not only of terms that are to their detriment but also of terms that are to their advantage. This is clearly in the consumers' interests. From this follows that these terms should also be transparent, so that consumers avail themselves of the advantages that these terms offer. It is argued that in order to pro-actively or pre-contractually achieve transparency, it should be compulsory to include certain terms that reflect certain rights of consumers, or that provide mechanisms that will help consumers to protect themselves post-contractually. Transparency in this regard means that a consumer should be aware of a term, and should understand it. Awareness

⁴¹ See also P Nebbia *Unfair Contract Terms in European Law* (2007) 137.

⁴² C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 55-56.

⁴³ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 56-57.

increases, of course, situations in which consumers challenge terms, or exercise their rights under a term.⁴⁴

As we have seen, the major problem with standard-terms contracts is usually the lack of transparency.⁴⁵ This problem can be addressed by focusing on procedural fairness preventatively, by setting transparency requirements. However, there are limits to the efficacy of procedural measures and transparency. Several factors would likely limit consumers' ability to overcome a lack of transparency, irrespective of a supplier's compliance with transparency requirements. These factors include: (a) consumers' disinclination to read detailed contractual terms; (b) consumers' pre-existing expectations suggesting a successful contractual relationship, which would obviate certain contractual terms coming into play; (c) consumers not reading contractual terms properly, as they have other complex decisions to make (such as whether to contract in the first place); (d) consumers not understanding the formal terms, irrespective of them being transparent; (e) consumers' idea that they do not need to understand the contractual terms, as suppliers are unlikely to change them; (f) consumers not understanding how a term will affect them in practice; and (g) competitors expressing equivalent terms differently, which makes it difficult for consumers to compare.⁴⁶

⁴⁴ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 58-59.

⁴⁵ See para 3.3.1 in Ch 6. See also E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 229-230.

⁴⁶ For reasons why consumers accept standard terms without reading them, and related issues, see also T Naudé 'Unfair Contract Terms Legislation: The Implications of why we Need it for its Formulation and Application' 2006 *Stell LR* 361 at 366-369. See also M Donnelly & F White 'The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market', in C Twigg-Flesner, D Parry, G Howells & A Nordhausen (eds) *The Yearbook of Consumer Law 2008* (2008) 271 at 283-284 (the limits of transparency, and an essential presumption underlying fairness in the form of disclosure – consumers will act rationally on the basis of information received). See further J Paterson 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2003) 33 *Melbourne University Law Review* 934 at 951-956.

However, although transparency may often not be sufficient to ensure fairness, it at least provides some basis for consumers to give informed consent. Transparency also enables consumers to ascertain their rights and duties in the event of a dispute. It may also affect the affordability of goods and services: if consumers have a clear idea of the price and quality, they may be able to assess an offer and to compare it with offers of competitors. This may also lead to wider consumer choice and increased competition.⁴⁷

To overcome the problems related to procedural measures and transparency, a strong emphasis should be placed on standardisation of the way in which terms are presented. However, this will still not address all these issues; for example, it may not make it more likely that a consumer will actually read the terms. Standardisation in presentation, however, makes it slightly easier for a consumer to understand the contractual terms proffered, as information is presented in a standard way. It may also help a consumer to compare the terms offered by competitors.

Further, as we have seen, although transparency may be a basic right, it is uncertain whether a consumer will actually exercise this right pre-contractually. This problem can be addressed by disclosure rules and mandatory terms, which require the disclosure of certain information or rights.⁴⁸ From a supplier's perspective, the compulsory disclosure of information involves relatively minimal

⁴⁷ C Willet 'General Clauses on Fairness and the Promotion of Values Important in Services of General Interest', in C Twigg-Flesner, D Parry, G Howells & A Nordhausen (eds) *The Yearbook of Consumer Law 2008* (2008) 67 at 75-76.

⁴⁸ It may happen that a mandatory term is unfair substantively. To address this, mandatory terms, provided for in legislation other than fairness legislation, should be excluded from fairness legislation if they are fair. A regulatory body or the court should therefore be empowered to analyse the fairness of such provisions. See also C Willet 'General Clauses on Fairness and the Promotion of Values Important in Services of General Interest', in C Twigg-Flesner, D Parry, G Howells & A Nordhausen (eds) *The Yearbook of Consumer Law 2008* (2008) 67 at 72-73.

interference with party autonomy – all that is required is that information be disclosed. The transaction may then proceed.⁴⁹

Another possible solution aimed at addressing the issues related to transparency is the standardisation of the substantive features of terms, or independent content control. If terms are standardised substantively, transparency may lead to better levels of informed consent, which is supported by the classical contract theory.⁵⁰

In terms of a procedural approach to fairness, the poor bargaining position of a consumer and the lack of choice militate against a finding of fairness. The reason is that even if the term is transparent (for example, where the consumer is aware of the risks), the lack of choice and/or the weak bargaining position of the consumer may mean that he or she cannot do anything to protect his or her interests. However, in consumer contracts there will usually be an inequality of bargaining power, as an individual consumer will usually not be important enough to the supplier to give him any leverage. From this perspective, then, it is unrealistic to use a lack of choice and inequality of bargaining power as sole measures of fairness. These two aspects should be considered only where substantive terms are significantly detrimental. Substantive terms are significantly detrimental if they prevent consumers from protecting their interests against terms that are detrimental. If it is established that a term is significantly detrimental, it must be enquired whether the supplier or a competitor offers a choice in the form of alternatives. If there then is a choice between alternatives, this would argue in favour of a finding of fairness. If a consumer should have been in a bargaining position in which he or her could have protected his or her

⁴⁹ For a discussion on the information provision model and its critics, see also M Donnelly & F White "The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market" in C Twigg-Flesner, D Parry, G Howells & A Nordhausen (eds) *The Yearbook of Consumer Law 2008* (2008) 271 at 282-283.

⁵⁰ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 59-62. For a further discussion of the role of measures aimed at procedural fairness, see also T Naudé 'Unfair Contract Terms Legislation: The Implications of why we Need it for its Formulation and Application' 2006 *Stell LR* 361 at 377-378.

interests against a detrimental substantive term, it may also argue in favour of a finding of fairness.⁵¹

It is clear from the above that there is a link between procedural and substantive fairness. That is so because the approach to issues of choice and bargaining power are dictated by the degree of substantive unfairness. If, for example, the question is whether the consumer had an opportunity at the procedural stage to protect his or her substantive interests, it is relevant to consider the extent to which these interests are affected.⁵²

To conclude: transparency is fundamental to fairness. However, transparency (limited to an understanding of the risks and informed consent) is not necessarily enough. Consumer choice and the parties relative bargaining positions are not fundamental to procedural fairness but may also be relevant. In practice, it is difficult to address consumer choice and bargaining power, as suppliers will have to determine which terms are significantly detrimental to consumers' interests, and whether competitors offer consumers alternatives. It would place an intolerable burden on suppliers if choice was a prerequisite of fairness, and especially for a fairness as a prerequisite of enforceability. Terms are standardised for the reasons that it is usually not efficient for traders to bargain over all contractual terms.⁵³

4 Abstract and Contextual Fairness (Generalised and Individualised Fairness)

The main shortcoming of the freedom orientation is that it is abstract, formalistic, and non-contextual, whereas the fairness orientation focuses on

⁵¹ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 62-63.

⁵² C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 63-64.

⁵³ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 64-65.

context and the person of the parties.⁵⁴ However, within the fairness orientation, some approaches are contextual and others are abstract.

In terms of an abstract approach ('pure fairness'), the same standards apply to consumers and suppliers irrespective of their particular characteristics, strengths, or weaknesses, and irrespective of the circumstances of a case. The advantage of an abstract approach to fairness is that it retains greater certainty and predictability in assessing fairness, and is accordingly generally applied in the form of preventative control mechanisms.⁵⁵ The scope of protection of an abstract approach is usually very high, as there is no scope for reducing the levels of protection. Usually, in terms of an abstract approach, the focus is on the extent to which a term deviates from the default position, the way in which a term would affect the interests of an average consumer, whether there is another term that is beneficial to consumers generally, and whether a term is sufficiently transparent to be understood by the typical consumer.⁵⁶

The same factors are considered in terms of a contextual approach, but the particular weaknesses, strengths, and general circumstances that might arise after the contract has been drafted, are also considered. So this approach involves less predictability and a lower level of protection. However, although pure contextual fairness is rarely applied, it amounts to a purer form of individual justice, as it allows, for example, a more protective approach to vulnerable consumers.⁵⁷ A risk inherent in the contextual approach is that it easily leads to shifting the focus of the fairness test from the time of the conclusion of the contract to the time when enforcement of the contract is sought.⁵⁸ In practice, the abstract and contextual approaches to fairness are

⁵⁴ See para 3.1.6 in Ch 2.

⁵⁵ See also P Nebbia *Unfair Contract Terms in European Law* (2007) 159.

⁵⁶ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 71-72.

⁵⁷ See also P Nebbia *Unfair Contract Terms in European Law* (2007) 158.

⁵⁸ See also P Nebbia *Unfair Contract Terms in European Law* (2007) 158.

usually mixed, as the rules are expressed broadly enough to take account of contextual factors.⁵⁹

5 Conclusion

In practice, consumers often, for various reasons, do not read the terms of a contract. For consumers to be aware of their rights, it should, therefore, be compulsory to include certain terms to reflect certain consumer rights, or to provide mechanisms that will help consumers to protect themselves post-contractually. However, the inability of consumers to benefit from extra information, or even from transparency, render procedural measures insufficient. Procedural fairness on its own, then, is not sufficient to ensure that contractual terms are fair. To ensure fairness, control of the contents of a contract is needed, and some detrimental terms should be disallowed from the outset. It is accordingly clear that there is a link and interdependency between procedural and substantive fairness, and that both are needed to ensure fairness of contractual terms.

The two main elements or dimensions of fairness are substantive and procedural fairness. To achieve substantive and procedural fairness, certain specific factors need to be considered and certain measures need to be applied. These factors are set out in the figure below (figure 1).

To achieve substantive fairness, an outright prohibition and a list indicating terms, or types of term, which may be regarded as unfair, should be set out in legislation. Furthermore, the impact of contract terms on the consumer's interests should be considered, as well as default rules or the consumer's reasonable expectations. Substantive fairness can be measured against the 'price' of a contract, by a balancing of interests, default rules, and reasonable expectations, or pro-actively by disallowing terms with certain substantive features.

⁵⁹ C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 72-73.

To achieve procedural fairness, transparency should be required. To increase transparency, disclosure rules should be enacted, or mandatory terms should be imposed by legislation. Legislation may also require standardisation to increase consumer awareness and, by the same token, transparency. To evaluate procedural fairness, the bargaining position of the parties, and the choices or alternatives available to the consumer, should be considered.

So fairness entails substantive and procedural fairness.

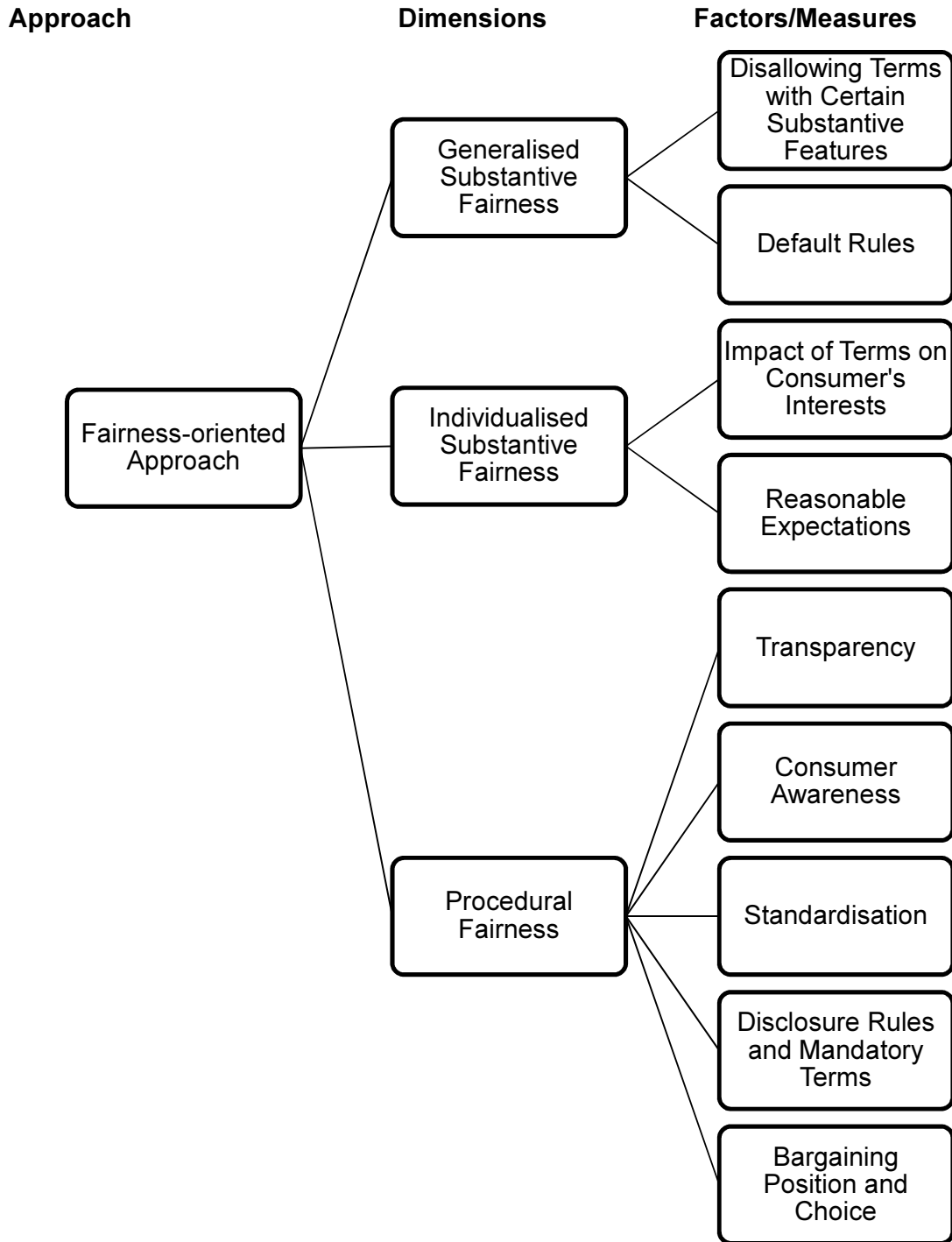


Figure 1: Measures to achieve fairness or to determine fairness

Chapter 4 – History of Fairness in the South African Law of Contract

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1 Introduction

In South Africa, until recently, there was no comprehensive legislation dealing with consumer protection, generally, and fairness in contracts, specifically. However, governments around the world, in particular in developing countries, have been encouraged by the United Nations (UN) to adopt general consumer protection laws, since the adoption of the Resolution on Guidelines for Consumer Protection¹ in 1985.²

¹ Resolution 39/248 of 16 April 1985, available at

<http://www.un.org/documents/ga/res/39/a39r248.htm> (accessed on 1 Dec 2011).

² Department of Trade and Industry *Consumer Law Benchmark Study* (2004) 10, available at

<http://www.thedti.gov.za/ccrdlawreview/dtiConsumerLawReviewBenchmarkingStudy.pdf>

(accessed on 1 Dec 2011).

Some of the main questions which had to be answered before new legislation to this effect could be adopted in South Africa, were: (a) whether there was a need for new legislation with provisions that will apply to specific contracts; (b) whether legislation should deal with standard-term contracts and abusive practices; (c) whether there should be a uniform test of 'fairness', and, if so, whether the test should be objective or subjective; and (d) whether exemptions should be allowed.³

There was a general belief that the judicial supervision of contracts by the courts was contrary to the fundamental principles of freedom of contract. In contrast, those who were willing to accept that society has an interest in the contractual relations between parties, had less problems with accepting the need for legislation giving courts the mandate to, in appropriate circumstances, scrutinise the fairness of contracts.⁴ The Department of Trade and Industry, in its benchmark study, recommended that abusive contract terms should be prohibited, regardless of whether or not they were stated in standard-term contracts, and that the test for unfairness should be objective.⁵ Although most jurisdictions provide a comprehensive list of conduct that can be considered *prima facie* unfair, the Department of Trade and Industry was of the opinion that such a list should merely be a guideline that is provided in addition to the general objective test.⁶

In this chapter, I shall give a very brief overview of the background and main developments of the concept 'fairness' in the South African law of contract.

³ Department of Trade and Industry *Consumer Law Benchmark Study* (2004) 28 and 36.

⁴ See, generally, CFC van der Walt 'Kontrakte en Beheer oor Kontrakvryheid in 'n Nuwe Suid-Afrika' (1991) '54 *THRHR* 367; CFC van der Walt 'Aangepaste Voorstelle vir 'n Stelsel van Voorkomende Beheer oor Kontrakteervryheid in die Suid-Afrikaanse Reg' (1993) 56 *THRHR* 65.

⁵ Department of Trade and Industry *Consumer Law Benchmark Study* (2004) 35.

⁶ Department of Trade and Industry *Consumer Law Benchmark Study* (2004) 36.

2 History and Development of Law Regarding Fairness in Contracts

2.1. The Common Law

At common law, sanctity of contract takes pride of place in our predominantly capitalist society: parties enter into a contract in the hope that it is enforceable, and that the government and the courts will not interfere, regardless of the hardships that the contract may cause.⁷

In *Wells v South African Alumenite Company*,⁸ Innes CJ stated:

'No doubt the condition is hard and onerous. But if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands. "If there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice".⁹

So, in principle, the courts enforce contracts, as expressed in the rule that agreements must be honoured (*pacta sunt servanda*), which is based on individualism, autonomy, personal liberty, and freedom of contract.¹⁰ By contrast, paternalism (or welfarism) is the principle or system of controlling contracts, and the parties to a contract, in a parental way; this runs counter to the principle of freedom of contract.¹¹ Put differently, intervention by the courts where an agreement appears to be unreasonable would be a form of paternalism inconsistent with the parties' freedom of contract.¹² However, for

⁷ Department of Trade and Industry *Consumer Law Benchmark Study* (2004) 28.

⁸ 1927 AD 69 at 72.

⁹ Quoting Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

¹⁰ See the discussion on the philosophical context of the focus on unfairness in contracting procedures, unfair terms and unfair outcomes of contracts in Ch 2. See also RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2005) 12; A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 61 SALJ 40 at 41 and 61.

¹¹ See Ch 2.

¹² RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2005) 14.

quite a while, courts have whittled away the common law at this general principle by developing specific (paternalistic) rules for, among others, restraints of trade,¹³ terms that had been signed without reading,¹⁴ ticket contracts,¹⁵ and consensus improperly obtained (such as misrepresentation,¹⁶ duress,¹⁷ and undue influence¹⁸).¹⁹

One can trace the progression of the development and acceptance of the concept 'fairness' in the law of contract from Roman law to the present. During

¹³ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at par [10]; *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A) at 891-893; *National Chemsearch (SA) (Pty) Ltd v Borrowman and another* 1979 (3) SA 1092 (T) at 1107. See also AJ Kerr 'Restraint of trade after Magna Alloys' in CJ Visser (ed) *Essays in Honour of Ellison Kahn* (1989) 186; JM Otto 'Inkorting van "Restraint of Trade" – bedinge in Kontrakte: Magna Alloys se Nageslag' (1997) 60 *THRHR* 282; C-J Pretorius 'Covenants in Restraint of Trade: an Evaluation of the Positive Law' (1997) 60 *THRHR* 6; CJ Visser 'The Principle pacta servanda sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade' (1984) 101 *SALJ* 641.

¹⁴ *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v The Government of the United Kingdom* 2003 (5) SA 180 (SCA); *Home Fires Transvaal CC v Van Wyk* 2002 (2) SA 375.

¹⁵ *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v The Government of the United Kingdom* 2003 (5) SA 180 (SCA); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A); *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N); *Central South African Railways v McLaren* 1903 TS 727. See further AJ Kerr *The Principles of the Law of Contract* 5 ed (1998) 321-324.

¹⁶ *Bayer South Africa Ltd v Frost* 1991 (4) SA 559 (A); *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A); *Ranger v Wykerd and another* 1977 (2) SA 976 (A); *Phame (Pty) Ltd v Paizes* 1973 (3) SA 1019 (A); *De Jager v Grunder* 1964 (1) SA 446 (A); *Trotman and another v Edwick* 1951 (1) SA 443 (A); *Wells v South African Alumenite Company* 1927 AD 69.

¹⁷ *Broodryk v Smuts* 1942 TPD 47. See further G Glover 'The Test for Duress in the South African Law of Contract' (2006) 123 *SALJ* 98.

¹⁸ *Preller v Jordaan* 1956 (1) SA 483 (A); *Patel v Grobbelaar* 1974 (1) SA 532 (A); *Hofer v Kevitt* 1998 (1) SA 382 (SCA). See further J Barnard & C Nagel 'Jordan v Farber (1352/09) [2009] ZANHC 81 (15/12/2009)' (2010) 13 *PELJ* 449 at 461-462.

¹⁹ RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2005) 14, 178-179, 183 and 361; A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 61 *SALJ* 40 at 61; L Hawthorne 'The Principle of Equality in the Law of Contract' (1995) 58 *THRHR* 151 at 168-169.

the Middle Ages, the Roman law changed from a system of a limited number of formal contracts, to a system where *consensus* formed the basis of all contracts.

In pre-classical and classical Roman law all obligations were individualised mainly by those *actiones* which were available for their enforcement. The recognised *actiones* which were included with their pattern *formulae* in the edicts of praetors and aedilis, was limited to a number of types of obligations: parties could not create obligations other than those for which an *actio* has been provided. Gaius distinguished between two sources of obligations: (a) contract, and (b) delict.²⁰ Later, Justinianus further divided obligations into (a) contract, (b) quasi-contract, (c) delict, and (d) quasi-delict.²¹ Gaius divided contractual obligations again in those created (a) *re*, (b) *verbis*, (c) *litteris*, and (d) *consensu*.²²

Mainly loans were regarded as contractual obligations created *re* (real contracts).²³ These obligations were loan for consumption (*mutuum*),²⁴ loan for use (*commodatum*),²⁵ deposit (*depositum*),²⁶ and pledge (*pignus*).²⁷ Apart from contractual consent, the handing over of a thing which the recipient was obliged to restore was required for the creation of a contractual obligation.²⁸

With literal contracts, the writing down of words was the only source of the obligation. The formal entry into the account book which was a fictitious payment of money lent, was, for example, regarded as the source of an

²⁰ Gaius *Institutiones* 3.88

²¹ Justinianus *Institutiones* 3.13.2.

²² Gaius *Institutiones* 3.89.

²³ Gaius *Institutiones* 3.90 *et seq.*

²⁴ Gaius *Institutiones* 3.90. Paulus *Digesta* 12.1.2pr.

²⁵ Ulpianus *Digesta* 13.6.1pr./1.

²⁶ Gaius *Institutiones* 4.47.

²⁷ Ulpianus *Digesta* 13.7.13.1.

²⁸ Gaius *Digesta* 44.7.1.2-6

obligation created *litteris*.²⁹ A literal contract was therefore created with the debit entry which a creditor made in his or her account book as if he or she paid over the booked sum of money as a loan to the debtor.

With a contractual obligation created *verbis* or a verbal contract especially *stipulatio*, the only source of the obligation was the ritual form or formal word spoken, which was binding, even if no obligation was intended.³⁰ The *stipulatio* was a unilaterally binding contract. If the *stipulatio* did not disclose the legal foundation (*causa*) for the object it was concluded, the obligation was created even if the *causa* was absent. To meet the action on the *stipulatio* the debtor could plead the absence of the *causa* by means of the *exceptio doli*.³¹

Although *consensus* underlined contracts, it was in itself not sufficient to make contracts enforceable. Something more was required, namely an underlying *causa* (*causa contractus*).

Only in consensual contracts the informally declared *consensus*, in itself, without the giving of a thing or a formal act, created the obligation. The consensual contracts rendered actionable initially were (a) contracts of sale (*emptio venditio*), (b) hire (*locatio conductio*), (c) partnership (*societas*), and (d) mandate (*mandatum*).³² Contracts which were not actionable were called *pacta*.³³ Some of them were, however, made actionable by the praetor and others only by post-classical imperial legislation. Initially *pacta* gave rise to a praetorian defence to any action. Later they were admitted to vary obligations

²⁹ Gaius *Institutiones* 3.128 *et seq.*

³⁰ Gaius *Institutiones* 3.92-96.

³¹ Gaius *Institutiones* 4.116 and 119.

³² Gaius *Institutiones* 3.135 *et seq.*

³³ Ulpianus *Digesta* 2.14.1.2.

by means of ancillary contracts. These contracts were systematised later by East Roman academia as unnamed or innominate contracts.³⁴

The formal approach was therefore no longer followed when *consensus* became the basis of contractual liability in Roman law. The Roman-Dutch writer, De Groot is regarded as the father of the modern law of contract. He contended that in terms of natural law all *pacta* were binding.³⁵ He based his contention on texts to the effect that *fides* formed the basis of justice.³⁶ He attached great importance to the principle that promises should be kept, which he declared to be one of the basic principles of natural law.³⁷ In his *Inleidinge* he stressed the fact that men are free to bind themselves by means of their *toezegging* or by promising something to someone,³⁸ which is interpreted as his acceptance of the principle *pacta servanda sunt* as the basic tenet of the Roman-Dutch law of contract law.³⁹ This freedom was, however, limited if a contract's contents were, for example, illegal or immoral.⁴⁰ In an exception to the rule that promises should be kept, he stated that parties should not be bound to an agreement where holding them so bound would work intolerable hardship on one of them.⁴¹ Put differently, he argued that leeway should be left to deal with circumstances which would have left the parties to provide for an exception which could be made to their obligations under the agreement.⁴² Although he only used three examples to illustrate the above, he did open the door for a party to escape liability by providing that the covenant would work

³⁴ Generally, see R Dannenberg *Roman Private Law* 2 ed (1968) (a translation of M Kaser *Römisches Privatrecht* (1960)) 194-208.

³⁵ H de Groot *De Jure Belli ac Pacis Libre Tres* (1625) 2.11.1.1 and 3.

³⁶ Cicero *De Officiis* 1.7.2.3.

³⁷ H de Groot *De Jure Belli ac Pacis Libre Tres* (1625) prolegomena 15.

³⁸ H de Groot *Inleidinge tot de Hollandsche Rechtgeleerdheid* (1631) 3.1.10.

³⁹ See also E Kahn (ed), C Lewis & CJ Visser *Contract & Mercantile Law* 2ed vol 1 (1988) 11-15; C-J Pretorius 'The Basis of Contractual Liability in South African Law (1)' (2004) 67 *THRHR* 179 at 182.

⁴⁰ H de Groot *Inleidinge tot de Hollandsche Rechtgeleerdheid* (1631) 4.1.42 and 43.

⁴¹ H de Groot *De Jure Belli ac Pacis Libre Tres* (1625) 2.16.27.1.

⁴² H de Groot *De Jure Belli ac Pacis Libre Tres* (1625) 2.16.26.1.

intolerable hardship on him if enforced.⁴³ So generally fairness did not play a major role, since contracts had to be honoured in all circumstances.

When Jan van Riebeeck, who was commissioned by the Vereenigde Oost-Indische Compagnie to establish a refreshment station at the Cape, landed at the Cape in 1652, Roman-Dutch law became the law of the land.⁴⁴ The Cape was regarded as a *res nullius*. It therefore became Dutch territory through *occupatio*. In terms of the Roman-Dutch law, mere *consensus* gave rise to contractual liability (will theory).⁴⁵ The principles of freedom of contract and *pacta sunt servanda* therefore became the cornerstones of the South African law of contract.⁴⁶ In 1795 and 1806 Britain conquered the Cape and ended the reign of the Vereenigde Oost-Indische Compagnie. The law in force under the Dutch was however still enforced. In 1827 and 1832 Britain published the first and second Charters of Justice. In terms of these charters courts in the Colony of Good Hope had to exercise their jurisdiction according to the laws which have been in force at that time, and according to the laws which were to be made after that time. After 1828 Dutch judges and magistrates were replaced by jurists trained in England and the English procedural law was applied in courts. After that, the South African law was further influenced by English mercantile law. The independent Republics of Natalia, Oranje-Vrijstaat, and the Zuid-Afrikaanse Republic were established between 1838 and 1856. These republics and the Kaffaria- and Griekwaland areas were at different times annexed by England. They were also managed in terms of the laws in force

⁴³ Generally, see R Feenstra & M Ahsmann *Contract: Aspecten van de Begrippen Contract en Contractsvrijheid in Historisch Perspectief* (1980) 17-25; CJ Visser 'The Principle *pacta servanda sunt* in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade' (1984) 101 *South African Law Journal* 641 at 649-654.

⁴⁴ The charter that has been awarded by the State-General to the Vereenigde Oost-Indische Compagnie has given the 17 directors the power to dispose over matters which normally fall within the sphere of the State.

⁴⁵ C-J Pretorius 'The Basis of Contractual Liability in South African Law (1)' (2004) 67 *THRHR* 179 at 185.

⁴⁶ C-J Pretorius 'The Basis of Contractual Liability in South African Law (1)' (2004) 67 *THRHR* 179 at 185.

within the Colony of the Cape of Good Hope.⁴⁷ Under the influence of English law, the objective approach to consent was accepted.⁴⁸ In terms of this approach, if there is no actual agreement or *consensus* between parties no contract exists.⁴⁹ In 1979, in *Saambou-Nasionale Bouvereniging v Friedman*,⁵⁰ the court considered, *obiter*,⁵¹ the basis of contractual liability. It concluded that *consensus* between the parties is the basis of contractual liability and the enforcement of contracts.⁵²

2.2 *The exceptio doli*

The *exceptio doli generalis* was a Roman law remedy developed during the heyday of the formulary procedure of classical Roman law.⁵³ It was aimed at addressing a situation in which a contract was concluded in a wholly proper manner but turned out to have an unfair result at a later stage. This remedy made it possible for a defendant brought before a court in terms of a contract to acknowledge the contract, but to raise circumstances which would render the enforcement of the contract by the plaintiff tantamount to fraud.⁵⁴

⁴⁷ Generally, see HR Hahlo & E Kahn *The South African Legal System and its Background* (1960) 575ff.

⁴⁸ *Smith v Hughes* (1871) LR 6 QB 597; *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 955; see also C-J Pretorius 'The Basis of Contractual Liability in South African Law (1)' (2004) 67 *THRHR* 179 at 188.

⁴⁹ S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (2007) 21-22; also see C-J Pretorius 'The Basis of Contractual Liability in South African Law (1)' (2004) 67 *THRHR* 179 at 188.

⁵⁰ 1979 (3) SA 978 (A).

⁵¹ The discussion was *obiter* in view of the eventual finding of the court that the appellant had contracted with the person pretending to be the respondent and that the respondent himself had not been involved in any contractual negotiations with the appellant. For a discussion on the force of *obiter dicta* see AJ Kerr 'The Persuasive Force of Obiter Dicta' (1975) 92 *SALJ* 136.

⁵² At 933F.

⁵³ *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) at 605.

⁵⁴ In *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) it was accepted that the *exceptio doli generalis* formed part of the South African law.

In *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*,⁵⁵ the court considered the *exceptio doli generalis*⁵⁶ as a remedy against the enforcement of a contract in unfair circumstances. The majority held, after examining old authorities,⁵⁷ that the *exceptio doli generalis* was not part of South African law.⁵⁸ The court did not indicate any other remedy in our law that could achieve the same result as the *exceptio doli generalis*. Actually, the court held that the South African courts did not have equitable jurisdiction,⁵⁹ and that there was no support in the Roman-Dutch law for an equitable defence to an action for the enforcement of a contract. The court was of the opinion, however, that Roman-Dutch law was itself inherently equitable.⁶⁰

This decision was criticised, among others, for its absence of a discussion of general policy considerations, of the responsibility of a court to ensure justice between parties, and for its positivist historical and formalistic approach.⁶¹ This

⁵⁵ 1988 (3) SA 580 (A).

⁵⁶ The *exceptio doli* had a dual function: (a) Where the debtor alleged that the plaintiff was guilty of fraud before he or she instituted a claim the *exceptio doli specialis* was raised; (b) where the debtor alleged that the plaintiff claimed something that he or she was legally entitled to, but that he or she was in terms of reasonableness and good faith not entitled to, the *exceptio doli generalis* was raised. See DJ Joubert *General Principles of the Law of Contract* (1987) 279.

⁵⁷ The court, at 605, considered old sources and came to the conclusion that the *exceptio doli* never formed part of the Roman-Dutch law. The court, however, held that Roman-Dutch law is itself inherently an equitable system. See Voet *Commentarius ad Pandectas* (1829) 1.1.6; Huber *Hedendaegse Rechtsgeleerthheit* (1686) 1.1.17, 18, and 21; Van der Keessel *Thesis Selectae* (1800) 24; De Groot *Inleidinge tot de Hollandsche Rechtgeleerdheid* (1631) 1.2.22.

⁵⁸ At 607B. Cf *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A). See also SWJ van der Merwe, GF Lubbe & LF van Huyssteen 'The *exceptio doli generalis*: requiescat in pace – vivat aequitas' (1989) 106 *SALJ* 235 at 236.

⁵⁹ Unlike their United Kingdom counterparts, for example, under s 49 of the Supreme Court Act 1981.

⁶⁰ At 605-606.

⁶¹ See RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2005) 12; C Lewis 'The Demise of the *exceptio doli*: Is There Another Route to Contractual Equity?' (1991) 107 *SALJ* 26 at 29-30; J Lewis 'Fairness in South African Contract Law' (2003) 104 *SALJ* 330 at

decision left the South African law of contract, generally, without any means to serve the demands of justice, fairness, and reasonableness.⁶² However, at that time, *bona fides* or good faith had been recognised as a relevant factor in the context of contract as far as equity was concerned.⁶³

2.3 The South African Law Commission's Report on Fairness

The South African Law Commission set up a project to investigate the question of fairness in contracts. In its report,⁶⁴ the Law Commission proposed comprehensive legislation⁶⁵ to deal with unfair contracts and unfair contractual terms, the unfair enforcement and execution of contracts, and the unfair formation of contracts.⁶⁶ The aim of the Bill was to provide courts with the power to determine whether contractual terms are unreasonable, unconscionable, or oppressive, and, if so, to make the appropriate orders. The Bill supplied the court with 25 guidelines that could be taken into account to determine unreasonableness, unconscionableness, or oppressiveness in contracts or contractual terms. The last guideline was 'any other factor which in the opinion of the court should be taken into account'.⁶⁷ These guidelines were criticised for

332-333; SWJ van der Merwe, GF Lubbe & LF van Huyssteen 'The exceptio doli generalis: requiescat in pace – vivat aequitas' (1989) 106 SALJ 235 at 238-240.

⁶² See, however, L Veldsman & B Kuschke 'The exceptio doli generalis – back again' (2012) 12.4 *Without Prejudice* 28.

⁶³ See SWJ van der Merwe, GF Lubbe & LF van Huyssteen 'The exceptio doli generalis: requiescat in pace – vivat aequitas' (1989) 106 SALJ 235 at 241-242 with reference to *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) and *Meskin NO v Anglo-American Corporation of SA Ltd and another* 1968 (4) SA 793 (W). See also para 2.4.

⁶⁴ South African Law Commission *Unreasonable Stipulations in Contracts and the Rectification of Contracts* Report, Project 47, April 1998.

⁶⁵ Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Bill.

⁶⁶ See also JJF Hefer 'Billikheid in die Kontrakereg Volgens die Suid-Afrikaanse Regskommissie' 2000 TSAR 142; J Jamneck 'Die Konsepwetsontwerp op die Beheer van Kontraksbedinge, 1994' 1997 TSAR 637; CFC van der Walt "Beheer oor Onbillike Kontraksbedinge – quo vadis Vanaf 15 Mei 1999" 2000 TSAR 33 at 50-51..

⁶⁷ Clause 2(z).

opening almost every contract to attack, for their potential to upset the balance which the courts were in the process of achieving by employing the concept 'public policy', and for creating legal uncertainty.⁶⁸ Some authors were of the opinion that the acceptance of the proposed legislation would have meant the complete adoption of a paternalistic approach, whereas the common law provided the courts with all the principles that they needed.⁶⁹ The proposed legislation was never promulgated.

2.4 Good Faith

After *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*,⁷⁰ academics and the courts analysed *bona fides* as a means to serve the demands of justice, fairness, and reasonableness.⁷¹ In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*,⁷² the minority judge came to the same conclusion as the majority judges, by applying the concept 'good faith' (or the *bona fide* principle)⁷³ as an independent basis for setting aside a contract.⁷⁴

⁶⁸ RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2005) 13; GB Glover 'Good Faith and Procedural Unfairness in Contract – Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman 1997 4 SA 302 (A)' (1998) 61 *THRHR* 328 at 334; NJ Grové 'Kontraktuele Gebondenheid, die Vereistes van Goeie Trou, Redelikheid en Billikheid – Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman 1997 4 SA 302 (A)' (1998) 61 *THRHR* 687 at 697; JJF Hefer 'Billikheid in die Kontraktereg Volgens die Suid-Afrikaanse Regskommissie' 2000 *TSAR* 142 at 149.

⁶⁹ RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2005) 14-15.

⁷⁰ 1988 (3) SA 580 (A).

⁷¹ SWJ van der Merwe, GF Lubbe & LF van Huyssteen 'The exceptio doli generalis: requiescat in pace – vivat aequitas' (1989) *SALJ* 235 at 242.

⁷² 1997 (4) SA 302 (A) at 318-322.

⁷³ See *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (A) at 304 where Olivier AJ equated the *bona fide* principle and good faith. See also *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) at 612.

⁷⁴ The minority view *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) was also referred to in *NBS Boland Bank v One Berg River Drive* 1999 (4) SA 928 (SCA) and *Mort v Henry Shields Chiat* 2001 (1) SA 464 (C), and followed in *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C). See also GB Glover 'Good Faith and Procedural Unfairness in Contract – Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman 1997 4 SA

However, in *Brisley v Drotsky*,⁷⁵ the majority held that good faith could not be accepted as an independent basis for not enforcing or setting aside a contract, or as an instrument to counter unfairness in contracts.⁷⁶ The court did draw attention, though, to public policy as a recognised basis for not enforcing a contract.⁷⁷ It further held that public policy was rooted in the Constitution of the Republic of South Africa, 1996, and the values that it enshrines.⁷⁸ In *Afrox Healthcare Bpk v Strydom*,⁷⁹ the court held that although abstract ideas or considerations such as good faith, fairness and reasonableness were the basis and reason for the existence of legal rules, and also led to the creation and amendment of those rules, they were not in themselves legal rules.⁸⁰ Also, when it comes to the enforcement of contractual terms, the court has no discretion and does not operate on the basis of abstract ideas but rather on the basis of established legal rules.⁸¹ However, the courts in these cases, actually

302 (A)' (1998) 61 *THRHR* 328; NJ Grové 'Kontraktuele Gebondenheid, die Vereistes van Goeie Trou, Redelikheid en Billikheid – Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman 1997 4 SA 302 (A)' (1998) 61 *THRHR* 687; CFC van der Walt 'Beheer oor Onbillike Kontraksbedinge – quo vadis Vanaf 15 Mei 1999' 2000 *TSAR* 33 at 39-40.

⁷⁵ 2002 (4) SA 1 (SCA) para [22].

⁷⁶ See also *South African Forestry Co Ltd v York Timbers* 2005 (3) SA 323 (SCA). Further on the role of *bona fides*, see D Bhana & M Pieterse 'Towards a Reconciliation of the Contract Law and Constitutional Values: Brisley and Aprox Revisited' (2005) 122 *SALJ* 865 at 889-893; FDJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *SALJ* 71 at 73-74; L Hawthorne 'The Principle of Equality in the Law of Contract' (1995) 58 *THRHR* 157 at 171-172; L Hawthorne 'Closing the Open Norms in the Law of Contract' (2004) 67 *THRHR* 294 at 296-297 and 300-301; GF Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications For the Development of Contract Law' (2004) 121 *SALJ* 395 at 396-398; C-J Pretorius 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 *THRHR* 638 at 643-645.

⁷⁷ Paragraph [31].

⁷⁸ Paragraph [91]. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.

⁷⁹ 2002 (6) SA 21 (SCA).

⁸⁰ Paragraphs [32].

⁸¹ Paragraph [32]. Compare GF Lubbe 'Bona fides, Billikheid en die Openbare Belang in die Suid Afrikaanse Reg' 1990 *Stell LR* 7 at 20. Lubbe defines *bona fides* and concludes:

also uncritically based their findings on incomplete or open-ended concepts such as 'freedom of contract', '*pacta sunt servanda*', and 'freedom of trade'.⁸²

2.5 Public Policy

In *Wells v South African Alumenite Company*,⁸³ Innes CJ held that public policy requires that parties to a contract must be held to it in the absence of fraud. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁸⁴ the appeal court held that agreements should be enforced unless they are unreasonable and thus contrary to public policy.⁸⁵

'Die presiese strekking van die agsaamheidsaspek van die bona fides hang af van die relatiewe gewig wat aan outonomie teenoor altruïsme toegeken word, en mag van stelsel tot stelsel, en van tyd tot tyd en van kontrakstipe tot kontrakstipe varieer. Die implikasie is egter dat die onredelike bevordering van eie belang ten koste van die ander party tot die kontraktuele verhouding strydig mag wees met die bona fides. Vanweë die noodsaaklikheid om botsende individuele belange te versoen, kan nie betwyfel word dat die handhawing van hierdie norm in openbare belang is nie". He also indicated that *bona fides* plays a role in the conclusion of contract and the result of a contract between parties or in procedural and substantive fairness' (at 23).

See also GB Glover 'Good Faith and Procedural Unfairness in Contract – Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman 1997 4 SA 302 (A)'; (1998) 61 *THRHR* 328 at 334, who mentions that it is difficult to attach a precise meaning to amorphous concepts such as *bona fides*.

⁸² See also GF Lubbe 'Bona fides, Billikheid en die Openbare Belang in die Suid Afrikaanse Reg' 1990 *Stell LR* 7 at 15.

⁸³ 1927 AD 69 at 72.

⁸⁴ 1984 (4) SA 874 (A) at 892-894.

⁸⁵ The case dealt with contracts in restraint of trade. See also *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at paras [10] and [15]; *CTP Ltd and others v Argus Holdings Ltd and another* 1995 (4) SA 774 (A) at 784; *J Louw and Co (Pty) Ltd v Richter and others* 1987 (2) SA 237 (N) at 243; *National Chemsearch (SA) (Pty) Ltd v Borrowman and another* 1979 (3) SA 1092 (T) at 1107. See further a historical survey in CJ Visser 'The Principle *pacta servanda sunt* in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade' (1984) 101 *South African Law Journal* 641.

In *Sasfin (Pty) Ltd v Beukes*,⁸⁶ in a case where the contract subjected one party almost entirely to the economic power of the other, the court held that no court should shrink from the duty of declaring a contract contrary to public policy when the circumstances so demand, but that this power should be applied sparingly and only in the clearest cases – a judge’s individual sense of propriety and fairness should not influence the judge’s power to declare a contract to be contrary to public policy.⁸⁷ Although public policy favours unbridled freedom of contract, ‘simple justice between man and man’⁸⁸ should also be effected.⁸⁹

In the constitutional era, the Constitutional Court, in *Barkhuizen v Napier*,⁹⁰ held that public policy should be determined with reference to the Constitution, and that a contractual term that violated the Constitution was by definition contrary to public policy and thus unenforceable.⁹¹ This case illustrates how the court in the constitutional era applies fairness in terms of the common law.⁹² The court held that where a court has to decide whether the terms of a contract are contrary to public policy, ‘reasonableness’ and ‘fairness’ must be considered.⁹³ The court held that there are two questions to ask when it has to determine fairness:

⁸⁶ 1989 (1) SA 1 (A).

⁸⁷ At 9. For a discussion of the role of public policy, see also FDJ Brand ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ (2009) 126 *SALJ* 71 at 74-83; L Hawthorne ‘The Principle of Equality in the Law of Contract’ (1995) 58 *THRHR* 157 at 173-174; L Hawthorne ‘Closing the Open Norms in the Law of Contract’ (2004) 67 *THRHR* 294 at 296-297; J Lewis ‘Fairness in South African Contract Law’ (2003) 104 *SALJ* 330 at 333-338.

⁸⁸ *Jajbhay v Cassim* 1939 AD 537 at 544.

⁸⁹ At 9.

⁹⁰ 2007 (5) SA 323 (CC).

⁹¹ Paragraph [29].

⁹² See also, generally, FDJ Brand ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ (2009) 126 *SALJ* 71 at 84-90; DW Jordaan ‘The Constitution’s Impact on the Law of Contract in Perspective’ (2004) 37 *De Jure* 58; G Lubbe ‘Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications For the Development of Contract Law’ (2004) 121 *SALJ* 395.

⁹³ Paragraph [36].

'The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the ... clause.'⁹⁴

The court further held that the question of 'reasonableness' involves the weighing up of two considerations:

'On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.'

The other consideration is the specific fundamental right involved in a case. So, reasonableness and fairness were considerations that the court considered in order to determine whether time-limitation clauses were contrary to public policy.⁹⁵ The court also held that although it is necessary to recognise the doctrine of *pacta sunt servanda*, courts could still decline to enforce clauses if implementation would result in unfairness or would be unreasonable for being contrary to public policy.⁹⁶

In *Breedenkamp and Others v Standard Bank of South Africa Ltd and Another*,⁹⁷ the court held that *Barkhuizen v Napier* was authority for the proposition that a party could not impose a term on another party, where the term would, if applied, operate unfairly, and that a term could not be enforced in a manner that was unfair.⁹⁸

⁹⁴ Paragraph [56].

⁹⁵ Paragraph [48].

⁹⁶ Paragraph [70]. See also M Kruger 'The Role of Public Policy in the Law of Contract, Revisited' (2011) 128 SALJ 712.

⁹⁷ 2009 (5) SA 304 (GSJ).

⁹⁸ Paragraph [48].

From the above one can conclude that although freedom of contract is favoured by public policy, public policy at the same time sets the limits to freedom of contract. However, the courts have declared only a few contracts to be contrary to public policy after *Sasfin v Beukes*.⁹⁹

3 Background to the Consumer Protection Act

The Department of Trade and Industry, in its *Draft Green Paper on the Consumer Policy Framework*,¹⁰⁰ referred to the South African Law Commission's report on unfair contracts, and likewise recognised the need to legislate against contractual unfairness.¹⁰¹ Although the Law Commission recommended that unfair contracts legislation be adopted, the Department of Trade and Industry proposed that rather than enacting special legislation, general provisions regarding unfair contracts should be inserted in a more general consumer protection law.¹⁰² The aim of the Department was to enact law to provide not only for the rights and responsibilities of the parties, but also to promote the use of plain language in consumer contracts, and to give

⁹⁹ For example, *Jordan and another v Farber* (1352/09) [2009] ZANCHC 81 (15 Dec 2009) (unreported case) (immense bargaining position of a client and breach of the standards of professional ethics); *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) (clause insulated the appellant from the effects of an administration order); *Standard Bank of South Africa Ltd v Essop* 1997 (4) SA 569 (D) (clause deprived respondent of his status as a solvent person, and inevitably subjected him to all the onerous obligations and extensive restrictions which bind an insolvent).

¹⁰⁰ DTI *Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence* (2005), available at <http://www.thedti.gov.za/ccrdlawreview/consldraftgreenpaper/1tablesandcontent.pdf> (accessed on 1 Dec 2011).

¹⁰¹ DTI *Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence* (2005) 30.

¹⁰² DTI *Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence* (2005) 31. See also T Woker 'Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons behind the Promulgation of the National Credit Act and the Consumer Protection Act' (2010) 31 *Obiter* 217.

examples of unfair contractual terms through guidelines that built on international precedent. A further aim was to create an overarching consumer law to regulate the interaction of consumers and businesses in the market place, with regard to issues such as marketing and selling practices, contracts, product safety, and product labelling.¹⁰³

In developing an overarching consumer protection law, the imbalances between consumers and businesses as a result of consumers' poor or low literacy levels, limited skills, and residency in rural areas were taken into account, as was consumers' exposure to unfair advertising, predatory selling mechanisms, lack of access to information, and unfair deals and contractual terms.¹⁰⁴ The lack of proper information disclosure was also raised as a concern, as such disclosure (a) allows consumers to make informed choices and so achieves consumer driven outcomes; (b) enhances consumer protection, as it enables basic information to be presented in a uniform format, which prevents consumers from being misled; and (c) makes markets more efficient, as it can drive down prices by allowing consumers to shop around for the lowest price.¹⁰⁵

The inequality of bargaining power between consumers and businesses was also directly addressed in the Green Paper. Many consumers, who generally have limited resources, enter into contracts without reading them. Although consumers are bound to contracts which they have signed even if they did not familiarise themselves with the provisions,¹⁰⁶ the compilers of the Green Paper noted that consumers' actions can be attributed to the fact that contracts are

¹⁰³ DTI Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence (2005) 9-10.

¹⁰⁴ ¹⁰⁴ DTI Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence (2005) 27-30.

¹⁰⁵ DTI Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence (2005) 27-28.

¹⁰⁶ In *Burger v Central SAR* 1903 TS 571 at 578 the court held that a person who signs a contractual document signifies his or her assent to the contents of the document (also known as the *caveat subscriptor* rule).

often written in language that is difficult to comprehend, and that consumers have little resources and few options to negotiate the terms.¹⁰⁷

In 1998, the Law Commission¹⁰⁸ had already recognised the need to legislate against contractual unfairness in all contractual phases. It concluded that unless measures against unfair contract terms were introduced, South Africa would become the exception to the rule, and its law of contract would be deficient by comparison with countries that recognise and require compliance with the principle of good faith in contract.¹⁰⁹

However, the Department of Trade and Industry, in its Green Paper, proposed that rather than enacting separate legislation, a general provision regarding unfair contracts should be inserted in consumer protection law. It said that the legislation should provide not only for the rights and responsibilities of parties, but promote the use of plain language in consumer contracts, specifically in view of South Africa's low levels of literacy. It also stated that through guidelines, built on international precedent, the legislation could provide examples of unfair contractual terms.¹¹⁰

The Consumer Protection Act was signed into law on 29 April 2009.¹¹¹ The Act and its measures that deal with fairness entered into force on 31 March 2011.¹¹² In Part G of Chapter 2, the Act now contains measures dealing with unfair, unreasonable, or unjust contractual terms. One of the aims of the Act is to

¹⁰⁷ DTI *Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence* (2005) 30.

¹⁰⁸ See para 2.3.

¹⁰⁹ DTI *Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence* (2005) 31; South African Law Commission "Unreasonable Stipulations in Contracts and the Rectification of Contracts" Report, Project 47, April 1998, xiii.

¹¹⁰ DTI *Draft Green Paper on the Consumer Policy Framework 09/04 – Driving Competitiveness, Consumer Confidence and Business Excellence* (2005) 31.

¹¹¹ GG 32186 of 29 April 2009.

¹¹² The general effective date was published in Gen N 917 GG 33581 of 23 September 2010.

protect consumers against unconscionable, unfair, unreasonable, unjust, or improper practices.¹¹³ The regulations under the Act contain a list of terms that are presumed to be unfair; the regulations likewise entered into force on 1 April 2011.¹¹⁴

5 Conclusion

Although the courts have had several opportunities to create or enforce fairness mechanisms or requirements in the law of contract, they never did, despite the fact that the need for the regulation of unfair contractual terms was noted several times. The concept 'good faith' was never sufficiently developed to serve as an independent fairness mechanism, and the courts were never willing to develop it to this end, despite a considerable body of academic opinion suggesting this.¹¹⁵ It became quite clear, therefore, that South African consumer law and the law of contract were in dire need of fairness legislation.

¹¹³ It is uncertain why the legislature used all these concepts to describe and regulate fairness in contracts. The concepts "fairness" would have served this purpose equally well.

¹¹⁴ GN R293 in GG 34180 of 1 April 2011.

¹¹⁵ Lubbe is the only academic who properly defined the concept 'good faith': see GF Lubbe 'Bona fides, Billikheid en die Openbare Belang in die Suid Afrikaanse Reg' 1990 *Stell LR* 7 at 20. See further GTS Eiselen 'Die Standaardbedingprobleem: Ekonomiese Magsmisbruik, Verbruikersvraagstuk of Probleem in Eie Reg' (1988) 22 *De Jure* 251; GB Glover 'Good Faith and Procedural Unfairness in Contract – Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman 1997 4 SA 302 (A)' (1998) 61 *THRHR* 328; NJ Grové 'Kontraktuele Gebondenheid, die Vereistes van Goeie Trou, Redelikheid en Billikheid – Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman 1997 4 SA 302 (A)' (1998) 61 *THRHR* 687; C Lewis 'The Demise of the *exceptio doli*: Is There another Route to Contractual Equity' (1991) 107 *SALJ* 26; SWJ van der Merwe, GF Lubbe & LF van Huyssteen 'The *exceptio doli generalis: requiescat in pace – vivat aequitas*' (1989) 106 *SALJ* 235; CFC van der Walt 'Aangepaste Voorstelle vir 'n Stelsel van Voorkomende Beheer oor Kontrakteervryheid in die Suid-Afrikaanse Reg' (1993) 56 *THRHR* 65; CFC van der Walt 'Kontrakte en Beheer oor Kontrakvryheid in 'n Nuwe Suid-Afrika' (1991) 54 *THRHR* 367; C van Loggerenberg 'Onbillike Uitsluitingsbedinge in Kontrakte: 'n Pleidooi vir Regshervorming' 1988 *TSAR* 407;

As I have indicated, the courts paid little or no attention to the significance of fairness in the process of negotiating and concluding contracts. At common law, the courts have formally recognised only three instances in which contracts may be rescinded for procedural unfairness - misrepresentation, duress, and undue influence.¹¹⁶ I have also shown that freedom of contract, with its emphasis on negotiation and real party autonomy, is actually only a theoretical freedom, as a result of the increased use of standard-term contracts, and the concomitant lack of negotiation.¹¹⁷ It has accordingly emerged that the common law does not offer a sufficient mechanism for the judicial control of fairness in contract. As I have shown, the courts are not willing to read the common law extensively so as to give them the power to control fairness in contract and to strike down unfair contractual terms. Legislative control in the form of fairness legislation was accordingly the only option.¹¹⁸ In Chapter 5, I shall analyse 'fairness' as used in the Consumer Protection Act, with reference to the types of fairness (substantial and procedural).

¹¹⁶ On the lack of a remedy aimed at addressing the lack of procedural fairness and the suitability of *bona fides* in this regard, see also GB Glover 'Good Faith and Procedural Unfairness in Contract – Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman 1997 4 SA 302 (A)' (1998) 61 *THRHR* 328 at 333-334.

¹¹⁷ See para 3.1.6 in Ch 2. See also T Naudé 'Unfair Contract Terms Legislation: The Implications of why we Need it for its Formulation and Application' 2006 *Stell LR* 361 at 366: she states that freedom or autonomy is not guaranteed where one party effectively claims freedom of contract only for itself, whereas there is freedom of contract for the other party only in a very formalistic, hollow, and practically meaningless sense.

¹¹⁸ For a discussion of the reasons for legislative control, see also GTS Eiselen *Die Beheer oor Standaardbedinge: 'n Regsvergelykende Ondersoek* (1988) (unpublished LLD thesis: Potchefstroomse Universiteit vir Christelike Hoër Onderwys) 203-204, 467-476; T Naudé 'Unfair Contract Terms Legislation: The Implications of why we Need it for its Formulation and Application' 2006 *Stell LR* 361 at 365-378.

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1. Introduction to the Consumer Protection Act

1.1 Fundamental Consumer Rights

Before the concept 'fairness' under the CPA¹ is analysed, it is important to give a brief overview of the rights introduced by the Act. The CPA applies to every transaction occurring within South Africa for the supply of goods or services, unless the transaction is exempt from the application of the Act.² The CPA introduced eight consumer rights: (a) equality in the consumer market;³ (b) the right to privacy;⁴ (c) the right to choose;⁵ (d) the right to disclosure and

¹ Act 68 of 2008 ('CPA').

² Section 5.

³ Section 8-10.

⁴ Section 11-12.

⁵ Section 13-21.

information;⁶ (e) the right to fair and responsible marketing;⁷ (f) the right to fair and honest dealing;⁸ (g) the right to fair, just, and reasonable terms and conditions;⁹ (h) and the right to fair value, good quality, and safety.¹⁰

Chapter 2 Part G of the CPA contains measures dealing with unfair, unjust, and unreasonable contract terms. The right to fair, just, and reasonable terms and conditions is the first general fairness measure introduced in South African contract law by means of which one party can rely on protection if a bargain is unreasonable, unfair, or onerous to him or her.

A fundamental error is to assume that the meaning of the concept 'fairness' can be determined, or may be restricted, by reference to only the right to fair, just, and reasonable terms and conditions. Rather, fairness extends much further. Although most of the fairness mechanisms of the CPA are contained under the umbrella of the right to fair, just, and reasonable terms and conditions, the CPA contains several other provisions dealing with and related to fairness. These provisions make it difficult for suppliers to understand the concept 'fairness' in such a way that they are able to know whether a contract will be fair, or whether they have complied proactively with fairness requirements.

1.2 Field of Application

Before I discuss the concept 'fairness' in consumer contracts regulated in terms of the CPA, it is necessary first to consider the Act's field of application.¹¹

⁶ Section 22-28.

⁷ Section 29-39.

⁸ Section 40-47.

⁹ Section 48-52.

¹⁰ Section 53-61.

¹¹ For a detailed critical discussion on the CPA's field of application, see W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 309-316; RD Sharrock 'Judicial Control

As I have indicated,¹² the CPA applies to every transaction occurring within South Africa for the supply of goods or services, or the promotion of goods and services, and the goods or services themselves, unless the transaction is exempt from the application of the Act.¹³ Although the CPA has a wide field of application, it may not be interpreted so as to preclude a consumer from exercising any rights afforded by the common law.¹⁴

1.2.1 Regulated Transactions

The CPA applies to certain 'transactions'. A 'transaction' is defined as an agreement between two or more persons, in the ordinary course of business, for the supply of goods and services for consideration.¹⁵ Once-off transactions (transactions not concluded in the ordinary course of business) and other non-business transactions are therefore not transactions that will be regulated by the Act. Although 'consideration' is mentioned in the definition of 'transaction', certain arrangements must be regarded as transactions irrespective of whether a charge or economic contribution is required.¹⁶ Those arrangements that must be regarded as transactions include the supply of goods or services in the ordinary course of business to members of a club, trade union association, society or an incorporated or corporate voluntary association of people for a common purpose. A solicitation of offers to enter into a franchise agreement also constitutes a transaction. An offer by a potential franchisor to enter into a franchise agreement with a potential franchisee, a franchise agreement or an agreement supplementary to it, and the supply of goods and services to a franchisee in terms of the franchise agreement, are also regarded as

of Unfair Contract Terms: The Implications of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 295 at 299-304. See also R Sharrock 'Judicial control of unfair contract terms: The implications of the Consumer Protection Act' in M Kidd and S Hoctor *Stella Juris – Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 115–148

¹² Para 1.1.

¹³ Section 5(1).

¹⁴ Section 2(10).

¹⁵ Section 1 sv 'transaction'.

¹⁶ Section 5(6).

transactions between a supplier and consumer in terms of the CPA. The CPA applies to these potential franchises or franchise agreements, irrespective of the exclusionary provision that states that the Act does not apply to transactions where the consumer is a juristic person¹⁷ whose asset value or annual income is more than R2 million.¹⁸ Furthermore, the Act applies to transactions, irrespective of whether the supplier resides outside or has its principal place of business outside South Africa, or irrespective of the supplier's nature or irrespective of the fact that a license is required to supply the products or services or part of the products or services to the public.¹⁹ The effect is therefore that the Act also applies to foreign suppliers of goods and services in terms of every transaction occurring within South Africa, even if the supplier has no principal office or residence within South Africa.

1.2.2 Goods, Services, Supply and Promotion

'Goods' is defined in section 1 of the Act. 'Goods' include, but are not limited to, anything marketed for human consumption, any tangible object, literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written on any medium, licences to use such intangible objects, legal interest in land or other immovable property, gas, water and electricity.

'Service' is defined in section 1 of the Act. 'Service' includes, but is not limited to, work performed by a person for the direct or indirect benefit of another, the provision of education, information, advice or consultation, banking or similar financial services, transportation of goods or individuals, provision of accommodation, entertainment or access to entertainment, access to electronic communication infrastructure, access or a right of access to an event, premises, activity or facility or access to or use of property in terms of a rental. Services also include the right of occupancy of, or power or privilege over, land or

¹⁷ Section 1 sv 'juristic person'.

¹⁸ Section 5(7).

¹⁹ Section 5(8). The R2 million threshold was published in GN 294 in GG 34181 of 1 April 2011.

immovable property, and the rights of a franchisee in terms of a franchise agreement to the extent provided for in the Act.

'Supply' is defined in section 1 of the Act. In relation to goods it includes selling, renting, exchanging and hiring in the ordinary course of business for consideration. In relation to services, it means to sell services, to perform or to cause services to be performed or provided, and to grant access to premises, events, activities or facilities in the ordinary course of business for consideration.

In many provisions, the Act refers to a supplier. A 'supplier' is any person, including a juristic person, who markets goods or services. 'Market' means to supply or to promote.

'Promote', as defined in section 1 of the Act, means to advertise, display or offer to supply services or goods in the ordinary course of business for consideration. It also means to make any representation in the ordinary course of business that could be inferred as expressing willingness to supply services or goods for consideration, or engagement in any other conduct in the ordinary course of business that could reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

A 'consumer' is any person, including a juristic person, to whom goods or services are marketed or supplied in the ordinary course of a supplier's business, unless the transaction is exempted from the application of the Act. However, transactions in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, is more than or equals the threshold value determined by the Minister of Trade and Industry, are excluded from the application of the Act.²⁰

²⁰ See para 1.2.3.

1.2.3 Excluded Transactions

As was indicated,²¹ the Act applies to every transaction occurring within South Africa for the supply of goods or services or the promotion of goods and services and the goods or services themselves, unless the transaction is exempted from the application of the Act. The following are exempted from the application of the Act:²²

- (a) transactions for the supply or promotion of goods or services to the State;²³
- (b) transactions in terms of which, at the time of the transaction, the consumer is a juristic person²⁴ whose asset value or annual turnover is more than or equals the threshold value of R2 million determined by the Minister of Trade and Industry;²⁵
- (c) transactions exempted by the Minister of Trade and Industry after a regulatory authority has applied for an industry-wide exemption;²⁶
- (d)

²¹ Paragraph 1.1.

²² Section 5(2).

²³ The Act does not contain a definition of 'State'. It is not clear whether companies and other entities, of which the State is a shareholder or member, are included in the definition of 'State'. However, an 'organ of state' is defined in s 1 of the Consumer Protection Act as an organ of state, as defined in s 239 of the Constitution.

²⁴ See the definition of 'juristic person' in s 1 of the Act. See also see W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 309.

²⁵ GN 294 in GG 34181 of 1 Apr 2011.

²⁶ In terms of section 5(3), only a regulatory authority may apply to the Minister of Trade and Industry for an industry-wide exemption from one or more provisions of the Act on the basis that the provisions overlap or duplicate a regulatory scheme regulated by any authority under national legislation, treaty, international law, convention or protocol. Therefore, an individual supplier or a representative body may not apply for an exemption from the Act. However, in terms of section 5(4), the Minister of Trade and Industry may, by notice in the *Government Gazette*, grant an exemption to an industry, after receiving advice from the Consumer Commission. Such an exemption may only be granted to the extent that the regulatory scheme ensures the achievement of the purposes of the Act and its provisions. The exemption may be subjected to limits or conditions that are necessary to ensure the achievement of the purposes of the Act. See also W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 310.

transactions constituting credit agreements under the National Credit Act (but the goods and services subject to such agreement are not excluded for the application of the CPA);²⁷ (e) transactions pertaining to services to be supplied under an employment contract; (f) transactions giving effect to a collective bargaining agreement in terms of the Labour Relations Act²⁸ or section 23 of the Constitution of the Republic of South Africa, 1996; and (g) advice or intermediary services, banking services, related financial services or undertaking, underwriting or assumption of risks to the extent that the service is regulated by the Financial Advisory and Intermediary Services Act²⁹ and the Long-term Insurance Act³⁰ and the Short-term Insurance Act³¹.³²

²⁷ Although this exemption seems to be clear, it is not. The National Credit Act makes provision for so-called 'incidental credit agreements'. Incidental credit agreements are credit agreements in terms of s 1, 5(2) and 8(4)(b) of the National Credit Act. However, an incidental credit agreement is regarded as a credit agreement only twenty 'business days' (see s 2(5) of the National Credit Act) after the supplier of goods or services had first charged interest or fees for late payment of an account. Therefore, during the above-mentioned first twenty business days, an incidental credit agreement does not constitute a credit agreement in terms of the National Credit Act. The question is then whether the Consumer Protection Act can apply to an 'incidental credit agreement' that is not yet a credit agreement in terms of the National Credit Act. Furthermore, the Consumer Protection Act only excludes credit agreements in terms of the National Credit Act from its ambit. Marketing of credit products in terms of the National Credit Act is not expressly excluded from the application of the Consumer Protection Act. Therefore, the National Credit Act and the Consumer Protection Act should apply to credit advertisements and marketing of credit. This leads to a duplication of regulations. The National Credit Regulator could, on behalf of the credit industry, apply for an exemption from the marketing provisions of the Consumer Protection Act in terms of section 5(3). However, should there be any inconsistency between any provisions of the Consumer Protection Act and other legislation, the provisions of both Acts apply concurrently to the extent that it is possible. Should it not be possible to apply the provisions of the Acts concurrently, the provisions that extend the greater protection to consumers must prevail (s 2(9) of the Consumer Protection Act). See also W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 310.

²⁸ 66 of 1955.

²⁹ 37 of 2002.

³⁰ 52 of 1998.

³¹ 53 of 1998.

³² See this exemption in the definition of 'service' in s 1.

1.2.4 Purposes of the Act

The purposes of the CPA are to promote and advance the social and economic welfare of consumers through various means, and to ensure the realisation of the purposes of the Act and the enjoyment of consumer rights conferred by the Act.³³ The Consumer Commission is responsible for the realisation of the purposes of the Act and the enjoyment of consumer rights conferred by the Act.³⁴

These purposes of the Act are achieved by, among others: (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers;³⁵ (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods and services by low-income consumers or communities, minors, seniors and other similarly vulnerable consumers, and most important, of consumers whose ability to read and comprehend advertisements, contracts, marks, notices, warnings, labels or instructions is limited by reason of low literacy, visual impairment or limited fluency in the language of the representation;³⁶ (c) promoting fair business practices;³⁷ (d) protecting consumers from unconscionable, unfair, unreasonable, unjust or improper trade practices and deceptive, misleading, unfair or fraudulent

³³ Section 3(1) and (2). The National Consumer Commission was established in terms of s 85 of the Consumer Protection Act. It is an organ of state, which has jurisdiction throughout the Republic. The Commission has several enforcement functions and is responsible for promoting dispute resolution between consumers and suppliers and receiving complaints concerning prohibited conduct or offences. It is also responsible for, amongst other things, monitoring the consumer market, investigation, issuing and enforcing compliance notices (see ss 99-106). The Commission has powers in support of investigation such as the power to issue summons and to enter and search premises under warrant. The Commission must also conduct research, liaise with other regulatory authorities, promote consumer protection and make recommendations to the Minister of Trade and Industry (see ss 92-98).

³⁴ Section 3(2).

³⁵ Section 3(1)(a).

³⁶ Section 3(1)(b).

³⁷ Section 3(1)(c).

conduct;³⁸ (e) and improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour.³⁹

The Act further provides an extensive framework for consumer protection and aims to develop, enhance and protect the rights of consumers and to eliminate unethical suppliers and improper business practices.⁴⁰

In the current era, unprecedented legislative and judicial regulation and control of contracts in many jurisdictions have been introduced.⁴¹ Liberal and individualistic impulses were therefore superseded by philosophies of collectivism and paternalism, and capitalism is more and more challenged by programmes of egalitarianism, welfarism and planning. The purposes of the Act can also clearly be recognised by a paternalistic attitude towards the weaker party to a contract and is in line with international developments in terms of which public policy concerns can override freedom of contract in appropriated cases and by the increase in regulatory legislation.⁴²

1.2.5 Interpretation of the Act

When one has to interpret the CPA, the traditional approaches cannot be followed. In section 2(1), the Act expressly provides that it (the Act) must be interpreted in a manner that gives effect to the purposes of the Act as set out in section 3.⁴³ This method of interpretation may lead to a result different to that expected when the traditional rules of interpretation are applied to ascertain the intention of the legislature, which is the main aim of interpretation. Usually, legislation is interpreted according to the ordinary grammatical meaning of words, but contextual interpretation, namely to interpret the meaning that the

³⁸ Section 3(1)(d).

³⁹ Section 3(1)(e).

⁴⁰ See the Preamble to the Consumer Protection Act.

⁴¹ See, for example, the discussion of developments in the European and English law in Ch 6.

⁴² See also para 4.1 and in Ch 2.

⁴³ See para 1.2.4 on the purposes of the Act.

words have ascertained in their broader legal context in the rest of the world, is not unknown to our law.⁴⁴

Furthermore, when interpreting the Act, applicable foreign law, international law, conventions, declarations or protocols may be considered.⁴⁵

The Act further provides that any decision of a consumer court, ombud, or arbitrator in terms of this Act that has not been set aside by a higher court may also be considered when interpreting the Act.⁴⁶ Precedents may thus be created and followed if a consumer court, ombud, or arbitrator interprets the Act.

Sections 2(8) and 2(9) prescribe rules in cases of conflict between the Act and other legislation. Should there be an inconsistency between any provisions of Chapter 5 of this Act⁴⁷ and the Public Finance Management Act⁴⁸ or the Public Service Act,⁴⁹ the latter Acts will apply. In other instances in which there is an inconsistency between any provisions of other legislation and the Act, the provisions of both pieces of legislation will apply concurrently to the extent that it is possible. If it is not possible to apply the provisions of both the pieces of the

⁴⁴ In terms of the literal interpretation principle, which is firmly entrenched in our law, legislation is interpreted according to the ordinary grammatical meaning of words. See CJ Botha *Wetsuitleg: 'n Inleiding vir Studente* (1991) at 14-15 and JR De Ville *Constitutional and Statutory Interpretation* (2000) at 94 *et seq* on literal interpretation, and CJ Botha *Wetsuitleg: 'n Inleiding vir Studente* (1991) at 11-15 and JR De Ville *Constitutional and Statutory Interpretation* (2000) at 238-241 on contextual interpretation. See also W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 305.

⁴⁵ Section 2(2)(a)-(b). See also Ch 6 for a discussion on the current two fairness-oriented regimes in the United Kingdom, under the Unfair Contract Terms Act (which requires good faith) and the Unfair Terms in Consumer Contract Regulations 1999 (which requires reasonableness).

⁴⁶ Section 2(2)(c).

⁴⁷ Chapter 5 of the Act deals with national consumer protection institutions.

⁴⁸ 1 of 1999.

⁴⁹ 103 of 1994.

legislation concurrently, the provision that extends the greater protection to consumers must prevail.

As I shall show below, the basic problem with the concept 'fairness', as used in the CPA, is that there is no specific definition of the term 'fairness' in the Act. So it is difficult to predict with any certainty whether a court will consider a contract to be fair, and provide relief in any particular case. Suppliers⁵⁰ therefore also struggle to determine in a pro-active manner whether their contracts are fair. Concrete guidance on the content of the concept 'fairness' is accordingly needed. For example, one factor that may yield greater predictability is proactive or preventative fairness requirements, which can be applied to attain fairness in contract. Lists of prohibited conduct and unfair contract terms may also help. To increase the effectiveness of the CPA, the concept 'fairness' must be defined properly and contextualized, so as to allow suppliers to predict in advance whether their contracts are fair.

What exactly is the content of the concept 'fairness', has never been easy to determine.⁵¹ In lay terms, 'fairness' is often considered to be acting in a fair or reasonable manner. But what is the legal content of the concept 'fairness'? 'Reasonableness' and 'fairness' are in legal terms often regarded as synonyms.

In this chapter, the concept 'fairness' will be narrowed down, described and analysed with reference to the two types of fairness – substantive and procedural fairness. Substantive fairness will be divided into generalised and individual substantive fairness, of which the former is easier to predict and to measure than the latter. After the analyses, standards in terms of which substantive fairness and procedural fairness may be measured will be deduced. Uncertainties will also be pointed out and current fairness provisions of the CPA will be analysed and criticised.

⁵⁰ A supplier is a person who markets any goods or services. Section 1 sv 'supplier'.

⁵¹ See, for example, J Jamneck 'Die Konsepwetsontwerp op die Beheer van Kontraksbedinge, 1994' 1997 *TSAR* 637 at 637-638, who asked what exactly is meant by 'fairness'.

This chapter therefore looks at the problem of fairness in contracts, whether such contracts are substantively or procedurally unfair, and furthermore considers both generalised and individual substantive fairness in terms of the CPA.

A good definition or description of 'fairness' will provide suppliers with the opportunity of attaining fairness through self-imposed control, which may also eliminate the need to wait for the courts to take action reactively.⁵²

2 Fairness in Terms of the Act

2.1 General

The meaning of the concept 'fairness' cannot be determined or restricted with reference only to the right to fair, just and reasonable terms and conditions. The Act also contains several other provisions related to fairness. In this Chapter, the concept 'fairness' will be analysed critically with reference to the framework set out in Chapter 4.

All the fairness measures contained in the Act resort under either substantive or procedural fairness, and they will therefore be analysed accordingly. At the end,⁵³ the different unfairness standards for each type of fairness will be highlighted and uncertainties will be pointed out. The aim of this paragraph is, among others, to analyse the concept 'fairness' and to put it into a framework, so as to allow suppliers to predict whether their contracts are fair or not and to encourage pro-active action amongst suppliers against unfairness in contracts.

Chapter 2 Part G of the Act contains a right to fair, just and reasonable terms and conditions. The concepts 'fair', 'just' and 'reasonable' are however not defined. Since these terms seem to overlap significantly, it is not sure why the legislature used all these concepts to describe and regulate fairness in

⁵² See also Ch 3.

⁵³ See paras 2.2.1.4, 2.2.2.6 and 2.3.4.

contracts. It has been submitted that the concepts 'unfairness' and 'fairness' would have served this purpose equally well.⁵⁴ Therefore, the concept 'fairness' will be used instead of 'fair, just and reasonable' or 'unfair, unjust or unreasonable'. Under the right to fair terms and conditions, it describes when terms and conditions will be unfair,⁵⁵ when a notice is required for certain terms and conditions,⁵⁶ and when consumer contracts must be in writing.⁵⁷ It also sets out which transactions, agreements, terms or conditions are prohibited,⁵⁸ and what the powers of court are to ensure fair conduct, terms and conditions.⁵⁹

Over and above the fairness provisions contained under the right to fair contracts, the Act also contains other provisions related to fairness. To ensure sufficient disclosure of information, the Act requires that certain minimum information must be disclosed to consumers. This ensures transparency and puts consumers in a better position to protect their own interests. Under the right to disclosure and information,⁶⁰ the Act deals with the right to information in plain and understandable language,⁶¹ disclosure of the price of goods or services,⁶² product labelling and trade descriptions,⁶³ disclosure of reconditioned or grey market goods,⁶⁴ sales records,⁶⁵ disclosure by intermediaries⁶⁶ and identification of deliverers and installers.⁶⁷ Furthermore,

⁵⁴ RD Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 295 at 307.

⁵⁵ Section 48.

⁵⁶ Section 49.

⁵⁷ Section 50.

⁵⁸ Section 51. See also para 2.2.1.1.1 for a discussion on this 'black list'.

⁵⁹ Section 52.

⁶⁰ Chapter 2, Part D of the Act.

⁶¹ Section 22.

⁶² Section 23.

⁶³ Section 24.

⁶⁴ Section 25.

⁶⁵ Section 26.

⁶⁶ Section 27.

⁶⁷ Section 28.

the Act provides consumers with the right to fair and responsible marketing,⁶⁸ under which a general standard is set for marketing⁶⁹ and certain types of marketing are regulated,⁷⁰ and the right fair and honest dealing,⁷¹ under which unconscionable conduct⁷² and false, misleading or deceptive representations are regulated.⁷³ Under the right to fair value, good quality and safety,⁷⁴ consumers should receive warnings concerning the fact and nature of certain risks.⁷⁵ 'Fairness' can therefore not be determined or restricted with reference only to the right to fair, just and reasonable terms and conditions. In the analysis which follows, I will refer to all the fairness measures in the Act.

At this point it is important to note that South Africa does not have an administrative body that controls fairness in contracts proactively. Only a 'court' has the power to issue orders in respect of unfair contract terms.⁷⁶ In terms of the definition of 'court' in section 1, a consumer court is not a court, but a body with that name or a consumer tribunal that has been established in terms of applicable consumer legislation. The orders contemplated in section 52 can therefore only be made by a court of law and not by a consumer tribunal or any other administrative body.⁷⁷ However, in terms of section 100(1), the Consumer

⁶⁸ Chapter 2, Part E of the Act.

⁶⁹ Section 29.

⁷⁰ Section 30-38.

⁷¹ Chapter 2, Part F of the Act.

⁷² Section 40.

⁷³ Section 41.

⁷⁴ Chapter 2, Part H of the Act.

⁷⁵ Section 58.

⁷⁶ See section 52 for the powers of court in this regard.

⁷⁷ In section 52(2), where factors which a court must take into account when it has to decide whether a contract or term is unfair are described, the section refers to contracts that were concluded, which makes it clear that the Act does not directly aim at proactively controlling fairness of consumer contracts in general but only of individual contracts which have been concluded. So the Act rather aims at reactive judicial control of unfairness. However, suppliers always have to comply with certain provisions irrespective of whether such provisions form part of the aspects which have to be considered when the court has to decide whether a contract is unfair. A supplier, for example, always has to comply with the plain language requirements set out in section 22. Whether a contract was drafted in plain language is one of the factors which

Commission may issue a compliance notice to any person who engages in prohibited conduct. Should the person then fail to comply with the compliance notice, the Consumer Commission may refer the matter to the National Prosecuting Authority for prosecution in terms of section 110(2), or apply to the Consumer Tribunal⁷⁸ for the imposition of an administrative fine.⁷⁹ In order to enforce any right in terms of the Act or to resolve disputes with suppliers, a consumer or any other party mentioned in section 4(1) may refer the matter directly to the Consumer Tribunal if the Act permits it,⁸⁰ or refer the matter to the relevant ombud, apply to a court, refer the matter to an alternative dispute resolution agent in terms of section 70, file a complaint with the Commission in terms of section 71, or approach a court with jurisdiction, should all other remedies available in terms of legislation have been exhausted.⁸¹ Therefore, sections 52 and 69 are in a way contradictory. In terms of section 69, a court should only be approached in order to enforce consumer rights should all other remedies be exhausted, while in terms of section 52, the right to fair, just and reasonable terms and conditions, and the right to honest and fair dealings can only be enforced by a court. It is problematic that only courts have jurisdiction in disputes regarding so-called 'unfair' contracts, and this will increase the number of court disputes and litigation. It is generally expensive for individual consumers to enforce their rights in court, and suppliers are well aware of this fact. Furthermore, should only courts have jurisdiction in unfair contract disputes, there will be no official body or tribunal with the authority to hear complaints and apply proactive preventative measures in order to ensure that

has to be considered in terms of section 52(2). So, the Act still has measures aimed at proactive fairness (usually procedural factors or measures).

⁷⁸ The Consumer Tribunal was established in terms of s 26 of the National Credit Act 34 of 2005. It conducts hearings into complaints relating to the National Credit Act and the Consumer Protection Act and it may impose a penalty in respect of prohibited or required conduct (see ss 27 and 136-152). It has jurisdiction throughout South Africa, is a juristic person, and is a tribunal of record. An order of the Tribunal may be served, executed and enforced as if it were an order of the High Court and it is binding on the National Credit Regulator, the Consumer Commission, consumer courts and a Magistrate's Court (see s 152).

⁷⁹ Section 100(6).

⁸⁰ Section 69(a).

⁸¹ Section 69(b)-(d).

unfair terms, contracts and unconscionable conduct are prevented in accordance with the principle that prevention is better than cure.⁸² Another issue is that the Act does not make provision for the court to raise the issue of unfairness *mero motu*.

In general, fairness is measured by a general fairness criterion set out in the Act.⁸³ The second way of assessing fairness of contractual terms includes lists disallowing terms with certain substantive features, a list of indicative terms which may be regarded as unfair and other procedural measures.

The general fairness criterion for consumer contracts regulated in terms of the Act is set out in section 48. It provides that, first, a supplier must not supply, offer to supply or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust.⁸⁴ Second, a supplier is not allowed to market any goods or services, or negotiate, or enter into or administer a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable.⁸⁵ Third, a supplier must not require a consumer or a person to whom goods or services are supplied at the consumer's direction to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.⁸⁶ So, to summarise, the general standard is that an offer to supply, the supply, marketing, entering into a contract, negotiation, administration, waiver of rights, assumption of risk or waiver of supplier's liability, terms or a price that is unfair is not allowed. In order to decide whether a contract term was indeed unfair, several substantive and procedural factors play a role and must be taken into

⁸² See also W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 361-362.

⁸³ See section 48.

⁸⁴ Section 48(1)(a).

⁸⁵ Section 48(1)(b).

⁸⁶ Section 48(1)(c).

account by a court. Some of these factors are applied proactively and as preventative measures.⁸⁷

The factors which render a contract unfair, unreasonable or unjust are listed in section 48(2).⁸⁸ This includes that a term or contract is unfair (a) should it be excessively one-sided in favour of any person other than a consumer; (b) should the terms of the agreement or transaction be so adverse to the consumer that they are inequitable; (c) should a consumer have relied, to his/her detriment, on a false, misleading or deceptive representation or a statement of opinion provided by or on behalf of a supplier; or (d) should the transaction or agreement have been subject to a term or condition or a notice for which a notice in terms of section 49(1) is required, and the term, condition or notice is unfair, unreasonable, unjust or unconscionable, or the fact, nature and effect of the term, condition or notice was not drawn to the consumer's attention as required by section 49(1).

Section 52(2) also lists specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where it is alleged that the supplier conducted unconscionably,⁸⁹

⁸⁷ Generally, any reference to the fairness or unfairness of a term or contract in this chapter also means the fairness or unfairness of an offer to supply, the supply, marketing, entering into a contract, negotiation, administration, waiver of rights, assumption of risk or waiver of a supplier's liability, terms or a price.

⁸⁸ The guidelines of factors listed in section 48(2) only apply to 'a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject'. So, it does not apply to price. It must also be noted that section 48(2) states that it (s 48(2)) does not limit the generality of section 48(1). Unfairness therefore goes further than the situations mentioned in the guidelines or factors listed in section 48(2). See also RD Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act' (2010) 22 SA Merc LJ 295 at 308.

⁸⁹ Section 40.

used false, misleading or deceptive representations⁹⁰ or that a contract or contract term is unfair.⁹¹ The latter is discussed below.

The word 'must' indicates that the court always has to consider all these factors in each case. These factors include: (a) the fair value of the goods and services; (b) the nature of the parties to the agreement or transaction; (c) the parties' relationship to each other; (d) the parties' relative capacity, education, experience, sophistication, and bargaining position; (e) the circumstances of the agreement or transaction that existed or which were reasonably foreseeable at the time of the transaction, agreement or conduct, irrespective of whether the Act was in force at that time; (f) the conduct of the supplier and of the consumer; (g) whether the parties negotiated, and if they did, the extent of the negotiation; (h) whether a consumer was required to do anything that was not reasonably necessary for the legitimate interest of the supplier; (i) whether, and the extent to which, the plain and understandable language requirements were complied with; (j) whether a consumer knew or ought reasonably to have known of the existence of a provision of the agreement that is alleged to have been unfair, unreasonable or unjust when having regard to customs of trade and previous dealings between the parties; (k) the amount for and the circumstances under which a consumer could have acquired the same or equivalent goods or service from another supplier; and (l) where goods were supplied, whether the goods were manufactured or adapted to a consumer's special order.

2.2 Substantive Fairness Measures in the Act

Substantive fairness is concerned with the outcome of the contracting process. If a contract is substantively unfair, there is then, at minimum, something objectionable about its terms, or its terms are unfair as between the contracting

⁹⁰ Section 41.

⁹¹ Section 48.

parties. The reference to 'terms' therefore distinguishes substantive fairness from procedural fairness.⁹²

Conceptions of substantive fairness may either be general or individual. If fairness is determined with reference to factors external to the contracting parties, it is generalised, for example, the market price of goods or services or the availability of alternatives from competitors. If fairness is determined with reference to factors related to consumers' welfare, it is individualised, for example, the effect of terms on the consumer.⁹³

2.2.1 General Substantive Fairness

General substantive measures in the Act include the disallowing of terms with certain substantive features and default rules. Such measures also include other factors listed in section 52(2), such as whether the consumer could have acquired identical goods or services from a different supplier or whether goods were manufactured, adapted or processed to the special order of a consumer. Section 52(2) lists the specific factors the court must consider when a person alleges that a supplier contravened sections 40,⁹⁴ 41⁹⁵ or 48 or in other words, when unfairness is alleged.⁹⁶ Some of these factors are generalised factors, while others are individualised factors. It is therefore difficult to consider and apply both generalised and individualised factors without separating these factors. However, in order to simplify the application of these factors they are separated.

⁹² See para 2 in Ch 3.

⁹³ See para 2 in Ch 3.

⁹⁴ Section 40 deals with unconscionable conduct.

⁹⁵ Section 41 deals with false, misleading or deceptive representations.

⁹⁶ Section 48 deals with unfair contract terms.

2.2.1.1 Disallowing Terms with Certain Substantive Features

Disallowing terms with certain substantive features is the most radical form of fairness and the least acceptable from a freedom-oriented perspective. That is because terms are disallowed irrespective of overall substantive or procedural fairness.⁹⁷ This approach thus implies the pre-emptive control of fairness, because certain terms are rendered ineffective irrespective of how and when they are used.⁹⁸ The main reason for disallowing terms with substantive features is the idea that consumers should be given absolute protection where certain substantive interests or irreducible rights are involved. Sometimes the substantive features or the nature of the substance or a term is so serious or detrimental that the risk that procedural fairness did or could work in practice cannot be taken. Disallowing terms is therefore an independent and general substantive fairness measure; the only factor to be considered is whether the substantive features of a specific term are disallowed or presumed to be unfair or whether the term contains a prohibited element. Terms are usually disallowed in terms of a black list. Terms presumed to be unfair are usually listed in a grey list. Black and grey lists are used widely and are supported internationally.⁹⁹

Generally, fairness is measured by a general fairness criterion.¹⁰⁰ As already indicate,¹⁰¹ the best guideline to a general fairness criterion is to assess fairness of contractual terms by using a list disallowing terms with certain substantive features or by comparing the terms to a list of indicative list terms which may be regarded as unfair. Such an indicative list is an invaluable tool for courts, authorities and suppliers.

⁹⁷ See also para 2.3 in Ch 6.

⁹⁸ See also para 2.1 in Ch 3.

⁹⁹ T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 *SALJ* 128 at 129. See also para 3.3 in Ch 6 for a discussion on the grey list of terms in Sch 2 to the Unfair Terms in Consumer Contract Regulations in the UK.

¹⁰⁰ See section 48.

¹⁰¹ See para 2.1 in Ch 5.

2.2.1.1.1 Black List

A black list contains a list of prohibited terms. These terms are void under all circumstances irrespective of any other factors or the circumstances.¹⁰² Since a black list does not take cognisance of the circumstances or overall substantive or procedural fairness, it is the most radical form of fairness or the most radical fairness mechanism. The benefit, as we have seen, is that black lists (and grey lists) enhance the effectiveness of the control of unfair contract terms and lead to greater predictability. At the same time, black lists are also applied proactively, since suppliers apply these lists spontaneously and as a measure of self-imposed control. Proactive control is not fully dependent on judicial control, so the costs and risks of litigation are also reduced by black lists. In practice, black lists therefore function better than a general criterion of fairness which may take a long time to work out in practice or which is difficult to predict.¹⁰³

Since South Africa has practically no experience of the general control of fairness in contracts, it is a good idea to be very careful when drawing up an extensive black list.¹⁰⁴ Where there is doubt as to whether a clause that may seem substantively unfair may sometimes be justified, it is better to put the term in a grey list and then, based on experience, to move it to the black list if required.¹⁰⁵

In order for black lists (and grey lists) to be manageable they should focus on terms which are not desirable across different types of contracts. Terms unique to specific types of contracts should be dealt with in sector-specific legislation.

¹⁰² T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 SALJ 128 at 130.

¹⁰³ See para 2.1 in Ch 3. See also T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 SALJ 128 at 131-132.

¹⁰⁴ See the commentary below.

¹⁰⁵ See T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 SALJ 128 at 137 in this regard and see 147-164 for a discussion on fourteen major categories of terms often encountered in black and grey lists.

The legislation should therefore state that a black or grey list is additional or not intended to replace any other statutory or common-law measures of control. Furthermore, a black list does not only contain certain terms or guidelines, but sometimes certain trade practices may also be blacklisted. A black list should also be updated regularly, because it is impossible to list all unfair clauses at once. Since black lists are used by suppliers as a measure of self-control, they should be written in plain and understandable language.¹⁰⁶

The Act contains a black list in section 51.¹⁰⁷ It does not contain an extensive list of prohibited terms, but a list of factors or guidelines. This reads as follows:

- (1) A supplier must not make a transaction or agreement subject to any term or condition if –
- (a) its general purpose or effect is to –
 - (i) defeat the purposes and policy of this Act;
 - (ii) mislead or deceive the consumer; or
 - (iii) subject the consumer to fraudulent conduct;
 - (b) it directly or indirectly purports to –
 - (i) waive or deprive a consumer of a right in terms of this Act;
 - (ii) avoid a supplier's obligation or duty in terms of this Act;
 - (iii) set aside or override the effect of any provision of this Act; or
 - (iv) authorise the supplier to –
 - (aa) do anything that is unlawful in terms of this Act; or
 - (bb) fail to do anything that is required in terms of this Act;
 - (c) it purports to –
 - (i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;
 - (ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or
 - (iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 18(1);
 - (d) it results from an offer prohibited in terms of section 31;
 - (e) it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by subsection (2)(a);
 - (f) it purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund;
 - (g) it falsely expresses an acknowledgement by the consumer that –
 - (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or
 - (ii) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer;

¹⁰⁶ T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 SALJ 128 at 144-146.

¹⁰⁷ See also the black list in section 90 of the National Credit Act 34 of 2005.

- (h) it requires the consumer to forfeit any money to the supplier –
 - (i) if the consumer exercises any right in terms of this Act; or
 - (ii) to which the supplier is not entitled in terms of this Act or any other law;
 - (i) it expresses, on behalf of the consumer –
 - (i) an authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the agreement relates;
 - (ii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; or
 - (iii) a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with this Act; or
 - (j) it expresses an agreement by the consumer to –
 - (i) deposit with the supplier, or with any other person at the direction of the supplier, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device; or
 - (ii) provide a personal identification code or number to be used to access an account.
- (2) A supplier may not –
- (a) directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision contemplated in subsection (1);
 - (b) request or demand a consumer to –
 - (i) give the supplier temporary or permanent possession of an instrument referred to in subsection (1)(j)(i) other than for the purpose of identification, or to make a copy of such instrument; or
 - (ii) reveal any personal identification code or number contemplated in subsection (1)(j)(ii); or
 - (c) direct, or knowingly permit, any other person to do anything referred to in this section on behalf of or for the benefit of the supplier.’

Transactions, contracts, terms or conditions in contravention of this section are void to the extent that they contravene section 51.¹⁰⁸ If they are void in terms of a section of this Act, this must be regarded as having been of no force or effect at any time, unless a court declared that the relevant provision of the Act does not apply.¹⁰⁹

The main issue with the black list contained in section 51 is that it is not very ‘black’, in other words, it is vague and long. That is mainly because the list is linked to the purpose and policy of the Act, which makes it difficult to determine whether a term is prohibited or not.¹¹⁰ The Act, for example, states the a

¹⁰⁸ Section 51(3).

¹⁰⁹ Section 115(1).

¹¹⁰ See, for example, s 51(1)(a) and (b).

supplier must not make a transaction or contract subject to any terms or condition if its general purpose or effect is to defeat the purposes and policy of the Act, mislead or deceive the consumer or subject the consumer to fraudulent conduct. First, the purpose and policy of the Act are drafted in wide and general terms.¹¹¹ It is therefore very difficult to determine whether a term or its purpose or effect is to defeat the purposes and policy of the Act. Second, whether the purpose or effect of a term is to mislead or deceive, is a subjective question. No formula is prescribed in order to determine whether the purpose or effect of a term is to mislead or deceive a consumer.¹¹² Third, 'fraudulent

¹¹¹ See para 1.2.4.

¹¹² Section 41 deals with false, misleading or deceptive representations in respect of marketing and may therefore be of assistance when one has to determine whether the consumer was misled or deceived. This section states that suppliers are not allowed to use false, misleading or deceptive representations, innuendo, exaggeration or ambiguity, or must not knowingly allow consumers to believe false, misleading or deceptive facts. A representation will be a false, misleading or deceptive representation to falsely state or imply or fail to correct misapprehension on the part of the consumer that (a) a supplier has a particular status or affiliation, connection, sponsorship or approval that he, she or it does not have; (b) that any goods or services have, *inter alia*, ingredients, characteristics, uses, accessories that they do not have; or (c) are of a particular standard, are new or unused if they are not. The same applies to any land or immovable property with regard to (a) characteristics that it does not have; (b) the purpose of the land; or (c) the facilities and features of the land. This list is not exhaustive. When one has to determine whether the consumer was misled or deceived, it will not be of guidance to look at common-law misrepresentation, because it is doubted that the legislature intended to outlaw all terms agreed upon as a result of misrepresentation and whether 'mislead and deceive' is the same as misrepresentation. The common-law rules on misrepresentation are clear, and it is doubted that the legislature intended to further regulate misrepresentation by adding terms, which result from misrepresentation to the black list. However, the Act did not blacklist terms excluding or limiting liability for misrepresentations. Misrepresentation requires an act (a representation made by one contract party to the other party), wrongfulness (the conduct must be wrongful), fault (blameworthiness for the wrongful conduct), causation (the misrepresentation must have caused the party to contract where he/she would not have contracted or on different terms) and an undesirable result (contract or damage) (see S van der Merwe, LF van Huyssteen, MFB Reyneck & GF Lubbe *Contract General Principles* 3 ed (2007) at 108-117 for an analysis of misrepresentation. See also *Wells v SA Alumenite Co* 1927 AD 69, *Trotman and Another v Edwick* 1951 (1) SA 443 (A), *De Jager v Grunder* 1964 (1) SA 446 (A), *Ranger v Wykerd and Another* 1977 (2) SA 976 (A), *Bayer*

conduct' is not defined in the Act.¹¹³ This part of the black list is therefore vague and drafted in terms that are too wide.¹¹⁴ As we have seen, it is very important to use plain and understandable language in black and grey lists in order to use them effectively and for them to have the intended effect. It has been suggested that section 51(1)(a) and (b) could have simply provided that 'any term or notice which directly or indirectly waives or restricts the consumer's rights under this Act or in any other way contravenes this Act shall be void'.¹¹⁵ That is because it seems as if these subsections aim to prohibit the exclusion or limitation of the consumer's rights and the supplier's duties under the Act.

A term or an agreement may also not directly or indirectly purport to waive or deprive consumers of their rights in terms of the Act, avoid a supplier's duty in terms of the Act, or authorise a supplier to do something that is unlawful in terms of this Act or fail to do something that is required in terms of the Act.¹¹⁶ Several types of terms excluding or restricting liability normally imposed by legislation are often encountered in black lists, so this part of the black list is in accordance with international standards and precedent.¹¹⁷ These terms, which are usually prohibited, include terms excluding or limiting the legal liability of the supplier for negligently causing personal injury or death, excluding or limiting

South Africa (Pty) Ltd v Frost 1991 (4) SA 449 (A), *Phame (Pty) Ltd v Paizes* 1973 (3) SA 1019 (A) on misrepresentation. See also par 2.3.1.1.

¹¹³ In section 42, however, the Act prohibits fraudulent schemes and offers. Essentially, section 42 prohibits any person from directly or indirectly promoting, knowingly joining or participating in a fraudulent currency scheme (see s 42(3)), a fraudulent financial transaction (see s 42(4)), fraudulent transfer of property or legal rights (see s 42(5), (6) and (7) or any other scheme declared fraudulent by the Minister of Trade and Industry in terms of section 42(8).

¹¹⁴ Section 51(1)(a) and (b) have also been described as unnecessarily verbose. See T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 SALJ 505 at 519.

¹¹⁵ T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 SALJ 505 at 519.

¹¹⁶ Section 51(1)(b).

¹¹⁷ See T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 SALJ 128 at 147-164 for a discussion on fourteen major categories of terms often encountered in black and grey lists.

liability for intentional harm or gross negligence and excluding or limiting liability for misrepresentations.¹¹⁸ In this regard, section 51(1)(c) prohibits a supplier from using exemption or indemnity agreements or terms that limit or exempt a supplier from liability for any loss directly or indirectly attributable to the gross negligence¹¹⁹ of the supplier or someone on his, her or its behalf. It also prohibits the use of agreements or terms that constitute an assumption of risk or liability by the consumer for these damages. Lastly, an agreement or term may not impose an obligation on a consumer to pay for damage to goods displayed by a supplier. A notice in terms of which a consumer will be liable for the damage to goods displayed will therefore not be permitted in terms of this section.¹²⁰

Furthermore, section 51 has several other prohibitions, such as agreements or terms resulting from an offer prohibited in section 31,¹²¹ requiring consumers to enter into supplementary contracts,¹²² purporting to cede or set off a consumer's right to claim against the Guardian Fund,¹²³ and falsely expressing an acknowledgement by a consumer that no representations or warranties were made before an agreement was made, or that a consumer has received goods,

¹¹⁸ See T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 *SALJ* 128 at 155-158.

¹¹⁹ A term excluding or limiting liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier is greylisted in reg 44(3)(a) (subject to s 61(1) of the Act). However, 'ordinary' negligence is thus greylisted. However, it has to be noted that the South African law generally does not distinguish between levels of negligence.

¹²⁰ See, generally, PN Stoop 'The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract' (2008) 20 *SA Merc LJ* at 496 for a discussion on the status of the enforceability of exemption clauses in terms of common law.

¹²¹ Section 51(1)(d). Negative option marketing is prohibited in terms of s 31. Negative option marketing is the promotion of goods or services to consumers on the basis that an agreement automatically comes into existence unless the consumer declines an inducement or offer. See W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 337 for a discussion on negative option marketing.

¹²² Section 51(1)(e) and (2)(a).

¹²³ Section 51(1)(f). Also see section 86 of the Administration of Estates Act 66 of 1965.

services or a required document.¹²⁴ The latter prohibition implies that a contract may contain an acknowledgement by a consumer that no representations or warranties had been made before an agreement was made, or that a consumer has received goods, services or a required document, but the acknowledgement may not be false. Parties may thus still use a term indicating that no party will be able to rely on alleged representations not recorded in the written agreement.¹²⁵

Other prohibitions include transactions or contracts subject to any term or condition requiring a consumer to forfeit money to a supplier should the consumer exercise his or her rights in terms of this Act or to which the supplier is not entitled.¹²⁶ Terms requiring forfeiture prohibited by the Act or other laws are thus prohibited.¹²⁷

Furthermore, prohibitions include transactions or contracts subject to any term or condition expressing an authorisation for the supplier or someone on his, her or its behalf to enter any premises for the purpose of taking possession of goods, undertaking to sign in advance documents relating to enforcement, or a consent to a predetermined value of costs relating to enforcement,¹²⁸ and expressing an agreement by the consumer to deposit a bank card or identity document or provide a pin code or number to be used to access an account.¹²⁹ A supplier is also not allowed to require a consumer to enter into a supplementary agreement or sign any document in terms of which the consumer enters into an agreement that contains a prohibited term in terms of

¹²⁴ Section 51(1)(g).

¹²⁵ *Contra* T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 SALJ 505 at 523.

¹²⁶ Section 51(1)(h).

¹²⁷ See T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 SALJ 505 at 524 where it is indicated that section 51(1)(h) may be ambiguous.

¹²⁸ Section 51(1)(i).

¹²⁹ Section 51(1)(j).

section 51(1),¹³⁰ or gives temporary or permanent possession of his/her bank card or identification document or reveals his/her pin or other access number to an account to a supplier.¹³¹ The latter is an example of a blacklisted trade practice.

A fourth issue is that the black list does not make provision for it to be updated regularly. It should at least make provision for the Consumer Commission to regularly review the black list and to make recommendations to the Department of Trade and Industry based on case law. Regular updating may result in the effectiveness of the Act and the black list being increased. However, the Act states that the Consumer Commission must report from time to time to the Minister of Trade and Industry recommendations for achieving the progressive transformation and reform of consumer law.¹³² For the black list to stay relevant and in keeping with business, the Act should place a duty on the Consumer Commission or the Department of Trade and Industry to regularly update or review the black list.

It must be noted that the provisions of the black list must not be interpreted so as to preclude consumers from exercising any rights afforded in terms of common law.¹³³

2.2.1.1.2 Grey List

A grey list contains a list of terms which may be unfair. The final decision of a court on whether the term is unfair depends on the circumstances of a particular case.¹³⁴ A grey list is therefore not absolute, but is a very good indication of what fairness or unfairness is. Grey lists therefore effectively limit the open-

¹³⁰ Section 51(2)(a).

¹³¹ Section 51(2)(b).

¹³² Section 94(c).

¹³³ Section 2(10).

¹³⁴ T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 SALJ 128 at 130.

endedness of the concept 'fairness' in legislation and as a result increase certainty.

One of the benefits of grey listing problematic clauses is that it places the burden of convincing a court that a term is fair on the supplier.¹³⁵ Without evidence by the supplier that the use of a greylisted term is not prohibited, a court will therefore not be able to find that a term is fair. It also, as is the case with black lists, has the benefit of proactive control.

Another benefit is that a grey list enhances the effectiveness of the control of unfair contract terms, which leads to greater predictability. A grey list is also applied proactively, since suppliers apply these lists as a measure of self-imposed control. Proactive control is not fully dependent on judicial control, so the costs and risks of litigation are also reduced by grey lists. In practice, grey lists therefore function better than a general criterion of fairness, which may take a long time to work out in practice or which is difficult to predict.¹³⁶

In order to make it easy for suppliers to know what is required and which risks they should bear or insure against, a grey list should give clear guidance and be specific. Re-writing of standard term contracts should then only be a once-off expense as the grey list gives guidance to drafters as to the types of clauses that should be treated with caution.¹³⁷

The grey list in the Act is based on English law. Schedule 2 of the English Unfair Terms in Consumer Contract Regulations also contains a similar indicative and non-exhaustive list or grey list of terms which may be regarded

¹³⁵ T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 *SALJ* 505 at 520.

¹³⁶ See para 2.1 in Ch 3. See also T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 *SALJ* 128 at 131-132.

¹³⁷ T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 *SALJ* 128 at 133-134.

as unfair.¹³⁸ In turn, this list is based on the grey list published in the Unfair Contract Terms Directive adopted by the Council of the European Communities in 1993.¹³⁹

Section 120(1)(d) empowers the Minister of Trade and Industry to make regulations relating to unfair contract terms. The CPA, 2008 Regulations were published accordingly.¹⁴⁰ The grey list to the Act was published in regulation 44(3) to the Act. Ideally, the grey list should have been included in the text of the Act, in the same part as the black list. It would then have had greater legitimacy and would have been more prominent and accessible to consumers.¹⁴¹ The grey list only applies to terms in consumer agreements where the supplier is operating on a profit basis and acting wholly or mainly for purposes related to its business or profession and the consumer is an individual acting for purposes wholly or mainly unrelated to his/her business or profession.¹⁴²

Contract terms are presumed to be unfair if they contain one or more of the purposes or effects listed in regulation 44(3). A supplier may thus still include a greylisted term in a consumer agreement provided that he/she can show that, in light of the circumstances, the term is in fact fair.¹⁴³ The list in regulation 44(3) is non-exhaustive, so other terms may also be unfair for the purpose of section 48.¹⁴⁴ The list is also only indicative since the terms listed may be fair in view of

¹³⁸ See para 3.3 in Ch 6. For a comprehensive discussion on the list of terms, see SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) paras 15-069-5-088. In this regard, see also Office of Fair Trading *Unfair Contract Terms Guidance* (2008) (available at http://www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/off311.pdf)

¹³⁹ EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC). See also para 3.1 in Ch 6.

¹⁴⁰ The regulations were published in GN R 293 in GG 34180 of 1 Apr 2011.

¹⁴¹ T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 *SALJ* 505 at 521.

¹⁴² Regulation 44(1).

¹⁴³ Regulation 44(2)(a).

¹⁴⁴ Regulation 44(2)(b).

the particular circumstances of a case.¹⁴⁵ A court may therefore not limit its control simply to the listed clauses, purposes or effects. The list also does not derogate from provisions in the Act or any other law in terms of or in respect of which a term is prohibited.¹⁴⁶

Again, an issue is that the grey list does not make provision for it to be updated regularly. It should at least make provision for the Consumer Commission to review it regularly and to make recommendations to the Department of Trade and Industry based on case law. Regular updating may result in the effectiveness of the Act and the grey list being increased. However, the Act states that the Consumer Commission must report from time to time to the Minister of Trade and Industry recommendations for achieving the progressive transformation and reform of consumer law.¹⁴⁷

A grey list helps administrative bodies, such as the Consumer Commission or the Office of Fair Trading, to take preventative action against using unfair terms, since a grey list indicates which terms are presumed to be unfair. It can therefore decrease the need for expensive litigation. Suppliers often just stop using greylisted terms or avoid greylisted terms as far as possible. Although a grey list reduces the likelihood of fairness disputes, the fact that South Africa does not have an administrative body that controls fairness in contracts does not serve the aim of prevention. In the United Kingdom, the Office of Fair Trading considers any complaints about the unfairness of a contract term and, if it believes that a term is unfair, it has powers to ask a court for an injunction to prevent the term being used or recommended for use. However, only the courts can finally decide whether a term is unfair or not.¹⁴⁸ South Africa has a negative system for eliminating unfair terms. In terms of this traditional approach, terms are eliminated by court based on actions for interdicts. When a term is presumed to be unfair, a court may order that it is unfair and that it must be

¹⁴⁵ Regulation 44(2)(c).

¹⁴⁶ Regulation 44(2)(d).

¹⁴⁷ Section 94(c).

¹⁴⁸ See para 3.3.1 in Ch 6.

removed from a contract. The supplier will normally replace this term by another term, which may also be unfair. The negative system is therefore not always effective in increasing fairness in contract terms. In order to eliminate unfair terms effectively, there should be a national system and an administrative body for monitoring unfair terms, in other words a positive system for eliminating unfair terms. The administrative body may, for example, once it receives a complaint about a term presumed as unfair, initiate discussions and negotiations in order to persuade the supplier not to use the term in question. Administrative bodies or bodies with a legitimate interest in protecting consumers¹⁴⁹ may also take part in collective negotiations with the drafting of standard form contracts.¹⁵⁰ A threat by an administrative body of a grey list being used against a supplier in interdict proceedings is also likely to spur the supplier into negotiations with the administrative body or consumer bodies.¹⁵¹ An administrative body, such as the Office of Fair Trading, thus plays an important role in the prevention of unfair contract terms.

The aim of this chapter is not to analyse every part of the grey list. However, in order to make it easier to digest, the major categories of terms often encountered in grey lists are listed.¹⁵² They are:¹⁵³ (a) exclusion and limitation

¹⁴⁹ The Act in section 4(1) states that, among others, a person acting on behalf of a group and an association acting in the interests of its members may approach a court, tribunal or the Consumer Commission in the realisation of consumer rights.

¹⁵⁰ See Commission of the European Communities *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* 248 (2000) at 24 (available at http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/uct03_en.pdf) where the benefits of a positive system for eliminating unfair terms are pointed out.

¹⁵¹ T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 *SALJ* 128 at 132.

¹⁵² See Commission of the European Communities *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* 248 (2000) at 13-68 (available at http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/uct03_en.pdf) and SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) paras 15-069-15-088.

clauses ((i) exclusion of liability for death or personal injury;¹⁵⁴ (ii) exclusion or limitation of general liability or liability for contractual obligations;¹⁵⁵ (iii) modifying normal rules on distribution of risk;¹⁵⁶ (iv) exclusion or limitation of vicarious liability;¹⁵⁷ (v) time limits on claims or excluding a right to rely on prescription;¹⁵⁸ (vi) excluding the right of set-off;¹⁵⁹ and (vii) guarantees of operating as exclusion clauses; (b) binding the consumer while allowing the supplier to provide not to perform or binding the consumer while the supplier failed to perform;¹⁶⁰ (c) retention of payment on consumer cancellation;¹⁶¹ (d) financial penalties and excessive damages;¹⁶² (e) cancellation clauses ((i) unequal cancellation rights;¹⁶³ and (ii) supplier's right to cancel without refund;¹⁶⁴ (f) supplier's right to cancel without notice;¹⁶⁵ (g) binding consumers to hidden terms;¹⁶⁶ (h) supplier's right to vary terms generally;¹⁶⁷ (i) right to change what is supplied;¹⁶⁸ (j) price variation clauses;¹⁶⁹ (k) supplier's right of final decision;¹⁷⁰ (l) entire agreement and formality clauses;¹⁷¹ (m) binding

¹⁵³ See also See T Naudé 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 SALJ 128 at 147-164 for a discussion on fourteen major categories of terms often encountered in black and grey lists.

¹⁵⁴ See regulation 44(3)(a).

¹⁵⁵ See regulation 44(3)(b), (3)(c), (3)(e) and (3)(n).

¹⁵⁶ See regulation 44(3)(e) and (3)(g).

¹⁵⁷ See regulation 44(3)(d).

¹⁵⁸ See regulation 44(3)(f) and (3)(z).

¹⁵⁹ See regulation 44(3)(b).

¹⁶⁰ See regulation 44(3)(m) and (3)(n).

¹⁶¹ See regulation 44(3)(g) and (3)(s).

¹⁶² See regulation 44(3)(r), (3)(s) and (3)(aa).

¹⁶³ See regulation 44(3)(h), (3)(k) and (3)(s).

¹⁶⁴ See regulation 44(3)(g).

¹⁶⁵ See regulation 44(3)(l).

¹⁶⁶ See regulation 44(3)(w).

¹⁶⁷ See regulation 44(3)(i).

¹⁶⁸ See regulation 44(3)(i) and (3)(j).

¹⁶⁹ See regulation 44(3)(h).

¹⁷⁰ See regulation 44(3)(i) and (3)(j).

¹⁷¹ See regulation 44(3)(v).

consumers where the supplier defaults;¹⁷² (n) supplier's right to assign without consent; (o) restricting the consumer's remedies or the right to take legal action;¹⁷³ and (p) other terms.¹⁷⁴

2.2.1.2 Default Rules

Substantive fairness can be approached by using default rules, implied terms and remedies as benchmarks of fairness and by comparing terms that are detrimental to consumers to default rules or remedies.¹⁷⁵ This measure therefore overlaps with the factors and guidelines of black and grey lists.

Default rules and remedies, like other measures aimed at substantive fairness, aim at balancing the interest of parties. Implied terms are, for example, sometimes based on what a reasonable person would regard as satisfactory, reasonable or equitable and they therefore contain an element of justice that strives to level the playing field between parties that do not have equal bargaining power. Implied terms are also referred to as *naturalia*, legal

¹⁷² See regulation 44(3)(b) and (3)(m).

¹⁷³ See regulation 44(3)(b), (3)(f), (3)(x), (3)(y), (3)(z), (3)(aa) and 3(bb).

¹⁷⁴ See regulation 44(3)(o) (terms permitting the supplier to renew or not renew, but not the consumer), 44(3)(p) (allowing the supplier an unreasonably long time to perform), 44(3)(u) (restricting the consumer's right to re-sell the goods or restricting transferability) 44(3)(v) (providing that the consumer must be deemed to have made or not have made a statement or acknowledgement to his/her detriment, unless a suitable period of time is granted to him/her for making an express declaration and at the commencement of the period, the supplier draws the attention of the consumer to the meaning that will be attached to his/her conduct), 44(3)(w) (providing that a statement made by the supplier, which is of interest for the consumer, is deemed to have reached the consumer, unless it has been sent via registered post to the address indicated by the consumer), 44(3)(aa) (entitling the supplier to claim legal or other cost on a higher scale than usual where the consumer may not claim costs on the same scale) and 44(3)(bb) (providing that a law other than that of South Africa applies to the contract, where the consumer was residing in South Africa when the contract was concluded).

¹⁷⁵ See para 2.2 in Ch 3. See also C Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 47.

incidents or residual provisions, which are derived from common law, precedent, custom or legislation.¹⁷⁶

The Act does not contain any default rule specifically aimed at increasing fairness in contracts. However, one specific implied term that the Act provides for is the implied warranty of quality.¹⁷⁷ The implied term provides that there is an implied warranty in every agreement pertaining to the supply of goods to a consumer, and that the producer, or importer, the distributor and the retailer warrant that the goods comply with the standard set out in the consumer's right to safe, good-quality goods in terms of section 55.¹⁷⁸ The legislature can therefore, for example, use implied terms in order to increase substantial fairness in contracts of sale.

2.2.1.3 Other Generalised Substantive Factors

As we have seen, conceptions of substantive fairness may be either generalised or individualised. If fairness is determined with reference to factors external to the contracting parties, it is generalised.

The general fairness criterion for consumer contracts regulated in terms of the Act is set out in section 48. In order to decide whether the term was indeed unfair, several substantive and procedural factors play a role and must be taken into account. Some of these factors are applied proactively and as preventative measures. The factors which render a contract unfair, unreasonable or unjust are listed in section 48(2). Section 52(2) also lists factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where it is alleged that the supplier acted in

¹⁷⁶ SJ Cornelius *Principles of the Interpretation of Contracts* 2 ed (2007) 162-163; JP Vorster 'The Bases for the Implication of Contractual Terms' 1988 *TSAR* 161 at 166-167.

¹⁷⁷ Section 56.

¹⁷⁸ See also the detailed discussion of section 56 in W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 370-376.

an unconscionable way,¹⁷⁹ used false, misleading or deceptive representations,¹⁸⁰ or where a contract or contract term is unfair.¹⁸¹ Some of these factors can be regarded as generalised substantive factors. Generalised substantive factors are easy to apply and to consider, because they increase predictability and are not based on the protection of an individual. One concern is that too many individualised factors must be taken into account in terms of the Act, which makes it difficult to ascertain whether a contract or term is unfair or not. The generalised substantive factors are analysed in this paragraph.

2.2.1.3.1 Fair Value of the Goods or Service in Question

The fair value of the goods or services in question is one of the objective substantive factors the court must consider in order to determine whether a contract is unfair.¹⁸²

In terms of this factor, a court has to decide whether the value, in other words the price of goods or services, was unfair.¹⁸³ The incorrect application of this factor may be dangerous because it may cause chaos and uncertainty. It should not be interpreted in such a way that it seems as if the legislature intended courts to control prices or profit making. This factor should not be considered in isolation. Other factors should also always be considered, because a contract or term cannot be declared unfair simply because the price seems to be unfair, especially in circumstances where an excessive price is associated with specific trade marks or regarded as part of the reputation of a product.

The market value of goods or service will always be a good standard against which to measure price. Since market value is a question of fact, it can be

¹⁷⁹ Section 40.

¹⁸⁰ Section 41.

¹⁸¹ Section 48.

¹⁸² Section 52(2)(a).

¹⁸³ See also section 48(1) and para 2.2.1.3.2.

proved by expert evidence. The market price of the relevant goods is also influenced by other aspects such as the risks against which the supplier is seeking to protect him/herself by using the term and the degree of detriment or risk caused to the consumer by the term.¹⁸⁴

In accounting, 'fair value' of assets (goods) for accounting purposes is described as the value of an asset in an arm's-length transaction between unrelated willing and knowledgeable parties. The concept 'fair value' is used in many accounting standards including the International Financial Reporting Standards¹⁸⁵ covering acquisitions, and the valuation of securities, but is not limited to these.¹⁸⁶ The methods used by the International Financial Reporting Standards to measure fair value include: (a) if there are identical transactions in the market, assets should be valued with reference to such transactions; and (b) if identical transactions do not exist, but similar transactions exist, fair value should be estimated making the necessary adjustments and using market-based assumptions.¹⁸⁷

In European and English law, the dangers of controlling the fairness of prices have been avoided or limited. In European law, article 4(2) of the EC Directive on Unfair Terms in Consumer Contracts limits the scope of the Directive since it provides that, insofar as contract terms are in plain, intelligible language, assessment of the unfair nature of the terms shall not relate to the definition of the subject matter of the contract, nor to the adequacy of price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other.¹⁸⁸ In English law, regulation 6(2) of the Unfair Terms in Consumer Contracts Regulations also provides that, insofar as contract terms are in plain, intelligible language, assessment of the unfair nature of the terms shall not relate to the definition of the subject matter of the contract, nor to the

¹⁸⁴ See also para 2 in Ch 3.

¹⁸⁵ These standards are set by the International Accounting Standards Board.

¹⁸⁶ <http://www.ifrs.org/Home.htm>.

¹⁸⁷ <http://moneyterms.co.uk/ifrs/>.

¹⁸⁸ See para 3.1 in Ch 6.

adequacy of price and remuneration, as against the services or goods supplied in exchange. So-called core terms will therefore not be subjected to the fairness test if they are in plain and intelligible language.¹⁸⁹ However, in South Africa, contracts always have to be in plain and understandable language in terms of the Act, and this therefore cannot be a condition for not considering the price. Since the contract price is a core term, a consumer is usually aware of the price. A consumer would rarely buy goods or services without being aware of the price. If a price is, however, vague the normal rules of interpretation should apply. Furthermore, a contract is not a valid contract of sale if the price is not ascertainable or ascertained. It is therefore suggested that the price or the value of goods or services should not be considered when deciding whether a contract is unfair or not.

2.2.1.3.2 Amount for which and Circumstances under which Alternatives could have been acquired

The amount for which, and circumstances under which the consumer could have acquired identical or equivalent goods or services from a supplier is one of the generalised factors the court must consider when it has to judge whether a contract is unfair or not.¹⁹⁰

When assessing the alternatives, the availability of an alternative must be considered as well as whether it would have been reasonably practicable to obtain the advice or goods from an alternative source, taking into account considerations of costs and time. The reality of an alternative is therefore as important a factor as the alternative itself.¹⁹¹

¹⁸⁹ See para 3.2 in Ch 6.

¹⁹⁰ Section 52(2)(i). See also para 2.3.2.1.

¹⁹¹ See para 2.3.3.2 in Ch 6.

The question therefore is whether the consumer could have acquired the same goods or services elsewhere for the same price or at a lower price without the terms alleged to be unfair.¹⁹²

2.2.1.4 The Standard for Generalised Substantive Fairness

There is no overall and general fairness standard for objective substantive fairness. The only standard is the standard in terms of each measure or factor applied in the determination of fairness, such as whether the substantive features of a specific term are disallowed or presumed to be unfair or whether the value of the goods or services is fair. In practice it is therefore easy to determine whether a contract or contract term is substantively unfair or not.

2.2.2 Individualised Substantive Fairness

It is very difficult to apply individualised conceptions in practice, because the required information about a consumer's state of mind and the effect of a term on him/her cannot always be obtained reliably, and consumers' welfare differs from time to time.¹⁹³ One point of critique that can be raised against the fairness provisions in the CPA is that the majority of factors or measures applied in the determination of substantive unfairness are individualised factors, which makes it very difficult to apply them proactively and to predict unfairness.

As we have seen, the general fairness criterion for consumer contracts regulated in terms of the Act is set out in section 48. In order to decide whether a contract or contract term was indeed unfair, several substantive and procedural factors play a role and must be taken into account, of which some are applied proactively and as preventative measures. The factors which render a contract unfair, unreasonable or unjust are listed in section 48(2). Two of the

¹⁹² See also the discussion in RD Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 295 at 313.

¹⁹³ See SA Smith 'In Defence of Substantive Fairness' (1996) 112 *Law Quarterly Review* 138 at 141 where the different conceptions of substantive fairness are analysed.

four factors listed in section 48(2) deal with the content of terms or a contract. Section 52(2) also lists specific factors, which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where it is alleged that the supplier conducted him- or herself in an unconscionably, used false, misleading or deceptive representations, or that a contract or contract term is unfair. In the first part of this discussion, the individualised factors listed in section 48(2), which render a contract unfair will be discussed. The individualised factors which a court must consider in terms of section 52(2) will be covered in the last part of this discussion.

2.2.2.1 Impact of Terms on Consumers' Interests

There are different measures that can be applied in order to determine whether contract terms are substantively fair. One approach is to consider the type of consumer interests involved and whether a term has an effect on the individual consumer's interests. A fairness assessment must, for example, take into account whether a term has the effect of denying liability for injury or death (physical integrity), damage to property (property interests) or economic loss (economic interests) or whether it excludes remedies or access to justice or allows a supplier to vary or terminate a contract at his/her discretion.¹⁹⁴ Factors or measures related to the consumer's (the individual's) substantive interests will be covered in the discussion in paragraph 2.2.2.1.2.

2.2.2.1.1 Is the Contract Term or Contract Excessively One-sided?

One of the factors which renders a contract unfair, unreasonable, or unjust and which is listed in section 48(2), is whether a term of contract is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied.¹⁹⁵ This factor, which may render a term or

¹⁹⁴ See para 2 in Ch 3.

¹⁹⁵ Section 48(2)(a).

contract unfair, requires a balancing of the terms and interests of the parties to a contract.

A consumer pays a 'price' for every term that is favourable to him/her. If there is a term to a consumer's detriment, there should be another term that protects the consumer or which allows the consumer to protect him/herself. There should therefore be a balance between detrimental and favourable terms in order to reduce the detrimental effect of terms on an individual consumer's interests. If there are more detrimental than favourable terms, the contract may be regarded as one-sided. A term may thus be regarded as one-sided if there is a detrimental term regarding a specific aspect but no similar term favourable to the consumer. For example, if the term under scrutiny allows the supplier to increase the contract price at his/her discretion, there should be a term allowing the consumer to cancel in the event of a price increase.¹⁹⁶

In English law, the Unfair Terms in Consumer Contracts Regulations sets a general standard for unfairness. Regulation 5(1) provides that an unfair term is a contractual term which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. The elements of the test for unfairness of a term or the factors which should be taken into account are: (a) an absence of good faith; (b) a significant imbalance in the parties' rights and obligations under the contract; and (c) detriment to the consumer.¹⁹⁷

'A significant imbalance in the parties' rights and obligations under the contract' can be equated to 'excessively one-sided'. 'Significant imbalance' is not defined in the Regulations. The House of Lords in *Director General of Fair*

¹⁹⁶ See para 2 in Ch 3.

¹⁹⁷ See para 3.3 in Ch 6.

*Trading v First National Bank*¹⁹⁸ set out the approach to be taken in deciding whether a 'significant imbalance' existed.¹⁹⁹ It found that:²⁰⁰

'The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the regulations seek to address.'

The case of *Sasfin (Pty) Ltd v Beukes*²⁰¹ may also offer some guidance. The court in this case held that a contract was illegal for being unconscionable and incompatible with public interests and therefore contrary to public policy. The court weighed sanctity of contract against simple justice between man and man, and held that the effect of the contract was to place one party almost entirely within the economic power of the other.²⁰²

Therefore, the terms, rights and obligations of parties must be weighed and compared in order to decide whether the terms, rights and obligations, or the contract is excessively one-sided and the court has a discretion to decide whether the terms, rights and obligations, or the contract was 'excessively' one-sided. A term or contract will, among others, be excessively one-sided if it places one party almost entirely with the economic power of the other party.

¹⁹⁸ [2002] 1 Lloyd's Rep 489; [2001] 3 WLR 1297.

¹⁹⁹ See para 3.3.2 in Ch 6.

²⁰⁰ Paragraph 17.

²⁰¹ 1989 (1) SA 1 (A).

²⁰² At 9-14.

2.2.2.1.2 Is the Term or Contract so Adverse to the Consumer as to be Inequitable?

One of the factors which renders a contract unfair, unreasonable or unjust listed in section 48(2) is whether the terms are so adverse to the consumer that they are inequitable.²⁰³ This factor also relates to the contents of a contract. It however does not provide much guidance as to the meaning of 'fairness' or 'unfairness' because 'inequitable' is merely a synonym of 'unfair'.²⁰⁴ This aspect also overlaps with the question of whether a contract or term is excessively one-sided, because an excessively one-sided term or contract is also unfair (inequitable).

2.2.2.2 The Conduct of the Supplier and Consumer

The conduct of the individual supplier and the individual consumer is one of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and a consumer where unfairness is alleged.²⁰⁵

'Conduct' is not defined in the Act. The court may thus, especially in light of the fact that the Act does not preclude the court from also considering other factors than the factors the court must consider in terms of section 52(2), consider any conduct of the supplier or consumer which resulted in or caused unfairness.²⁰⁶

²⁰³ Section 48(2)(b).

²⁰⁴ See also T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 *SALJ* 505 at 506.

²⁰⁵ Section 52(2)(d).

²⁰⁶ See also RD Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 295 at 314; T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 *SALJ* 505 at 530 where it is indicated that the list in s 52(2) is not exhaustive.

2.2.2.3 Was the Consumer Required to Do Anything that was Not Reasonably Necessary for the Legitimate Interests of the Supplier?

Whether, as a result of conduct engaged by the individual supplier, the individual consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier is one of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.²⁰⁷

Again 'conduct' is not defined in the Act. The court may therefore consider any conduct of the supplier or consumer. It is also not certain if 'required to do anything' would, for example, include a term requiring the consumer to indemnify the supplier against liability. However, it is clear that this factor aims at addressing the issue of imbalance.²⁰⁸ The question could as well have been whether a term is reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.²⁰⁹ First, it must be shown that a term (or conduct) protects the legitimate interests of the supplier. Second, it must be determined whether the term is reasonably necessary to protect the supplier's legitimate interests. The proportionality of a term is therefore considered. A term will only be reasonably necessary to protect the legitimate interests of the supplier where it represents a proportionate response to a risk it addresses. If it does not address a risk, it is not protecting the legitimate interests of the supplier and it will therefore not be necessary or

²⁰⁷ Section 52(2)(f).

²⁰⁸ See also para 2.2.2.1.1 in respect of the balancing of the terms and interests of the parties to a contract.

²⁰⁹ See also para 2 in Ch 3 where it is indicated that, when substantive unfairness is alleged, the question is whether a detrimental term represents a 'fair price' for the detrimental term or whether an imbalanced term is reasonably necessary in order to protect the legitimate interest of the party who would be advantaged by the term.

reasonable. In this inquiry, the court may also look at other conduct or terms, which would be less burdensome to the consumer.²¹⁰

2.2.2.4 Knowledge of a Specific Term

Whether the consumer knew or ought reasonable to have known of the existence and extent of any particular terms of the agreement is one of the specific individualised factors, which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.²¹¹ In terms of the Act, regard must be had to any custom of trade and any previous dealings between the parties under this factor.²¹²

Since this factor is about knowledge, a term in itself may not be unfair, but may be regarded as unfair because the consumer was not aware of or could not reasonably have been aware of its presence or existence. Knowledge extends to knowledge about the existence and knowledge about the extent of a term. A consumer may thus, for example, be aware of the existence of a term but could not have been expected to know the contents of the term. In order therefore to assess fairness against knowledge there should be measures to inform a consumer of the presence or existence of a specific term, such as an obligation to notify the consumer of the presence or existence of a term that purports to limit the risk or liability of a supplier.²¹³ Such a disclosure may therefore curb unfairness. Irrespective of measures obliging the supplier to inform a consumer of the presence or existence of a specific term it would always be easier for a

²¹⁰ See J Paterson 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2003) 33 *Melbourne University Law Review* 934 at 944-945 for a discussion on whether a term is reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

²¹¹ Section 52(2)(h).

²¹² Section 52(2)(h)(i) and (ii).

²¹³ See par 2.3.1.2 for a discussion of section 49, which requires a notice for certain terms and conditions.

supplier to say that he/she reasonably believed that the consumer assented to the term if he/she has taken reasonable steps to bring the term to the consumer's notice.²¹⁴

It is very difficult to prove actual knowledge of a term, because such knowledge is a subjective and individualised requirement. Actual knowledge of the existence and the extent of a term indicates that the term is fair. In order to decide whether the knowledge is 'actual knowledge', the actual extent and quality of the consumer's knowledge should be considered. The requirement of knowledge the consumer ought to have had is a more objective requirement. The law therefore asks whether the supplier could reasonably believe that the consumer was assenting to his/her terms. This part of the test is not wholly objective; the supplier must actually (subjectively) believe that the consumer assents. In the case of the existence of a trade practice, a term is usually sufficiently well known. So, any failure by a consumer to apply his/her mind to the terms cannot be relied on to establish that it was unfair to include such term in the contract. The existence of a trade practice may thus imply the fairness of a term.²¹⁵

The existence of previous dealings between parties may also be an indication of knowledge of a term, and such knowledge may be an indication of fairness. The court has to consider the extent and contents of previous dealings between the parties in order to make a decision in this regard. If the parties, for example, in previous dealings agreed on the same term, it might be an indication of the fairness of the term.

In considering a consumer's knowledge, the following factors may help to assess knowledge more effectively: (a) whether the consumer knew of a particular term; (b) whether the consumer understood the meaning and

²¹⁴ See also para 2.3.3.3 in Ch 6 for a discussion on knowledge of an exemption clause required in terms of the English Unfair Contract Terms Act.

²¹⁵ See also para 2.3.3.3 in Ch 6 for an analysis of actual knowledge and knowledge the consumer ought to have had.

implications of the term; (c) what a person other than the consumer, but in a similar position, would usually expect in the case of a similar transaction; (d) the complexity of the transaction; (e) the information given to the consumer about the transaction before or when the contract was made; (f) whether the contract was transparent; (g) how the contract was explained to the consumer; (h) whether the consumer had a reasonable opportunity to absorb any information given; (i) whether the consumer took professional advice or it was reasonable to expect the consumer to have done so; and (j) whether the consumer had a realistic opportunity to cancel the contract without charge.²¹⁶

2.2.2.5 Were the Goods Special-order Goods?

The question whether goods were manufactured, processed or adapted to a special order by the consumer is one of the specific individualised factors, which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.²¹⁷ The question is thus whether goods are special-order goods. 'Special-order goods' is defined in the Act as 'goods that a supplier expressly or implicitly was required or expected to procure, create or alter specifically to satisfy the consumer's requirements'.

In terms of the English Unfair Contract Terms Act, the question of whether goods were manufactured, adapted, or processed to a special order by a customer is a factor that is relevant in assessing the reasonableness (fairness) of exemption clauses. If a supplier manufactures or adapts goods for a consumer and the consumer indicates standards that the goods have to comply with or how the goods will be used, it will be unfair for the supplier to limit his/her liability in its entirety and to leave the consumer without any remedy. If an exemption clause gives a consumer the right to test and reject the special-order goods and the consumer does not utilise the right to reject the goods, the

²¹⁶ These factors are applied in terms of the English Unfair Contract Terms Bill. In this regard, see paras 1 and 2.3.3.3 in Ch 6.

²¹⁷ Section 52(2)(j).

exemption clause will be reasonable (fair).²¹⁸ However, this factor must not only be considered in terms of exemption clauses. It is suggested that legislature intended that, if a consumer instructed a supplier to manufacture, adapt or process goods with a specific standard, the terms or the contract will rarely be declared as unfair.

2.2.2.6 The Standard for Individualised Substantive Fairness

As we have seen, it is very difficult to apply individualised substantive fairness conceptions in practice, because the required information about a consumer's state of mind and the effect of a term on him/her cannot always be obtained reliably, and consumers' welfare differs from time to time. It is also difficult to prescribe one overall and general fairness standard for individualised substantive fairness. It is, however, clear that the overarching measure against which subjective substantive fairness is measured is the impact of the factor (terms) on the interests of the consumer. The individualised factors or measures that must be considered in order to determine whether a term or contract is unfair are: (a) whether the term or contract is excessively one-sided; (b) whether the contract or term is so adverse to the consumer that it is inequitable; (c) the conduct of the supplier and the consumer; (d) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonable necessary for the legitimate interests of the supplier; (e) knowledge of a term; and (f) whether the goods are special-order goods.

2.3 Procedural Fairness Measures in the Act

Measures aimed at procedural fairness address conduct during the bargaining process, and in general aim at ensuring transparency.²¹⁹ Transparency

²¹⁸ See para 2.3.3.5 in Ch 6.

²¹⁹ See, generally, T Naudé 'Unfair Contract Terms Legislation: The Implications of Why We Need It for Its Formulation and Application' 2006 *Stell LR* 361 at 377; R Lawson *Exclusion Clauses and Unfair Contract Terms* 8 ed (2005) 219.

involves two elements: (a) transparency in relation to the terms of a contract, and (b) transparency in the sense of not being positively misled, pre-contractually or during the performance of a contract, regarding aspects of the goods, service, price and terms. Transparency in relation to the terms of a contract refers to whether the contract terms are accessible, in clear language, well structured and cross-referenced, with prominence being given to terms that are detrimental to the consumer or because they grant important rights. Procedural fairness measures usually enable consumers to protect themselves against substantive unfairness.²²⁰

Irrespective of the noble aims which procedural fairness serves, more focus should be placed on substantive fairness. That is because even if a contract or term is procedurally fair, it is uncertain whether a consumer will really make use of or will be in the position to make use of procedural fairness or measures aimed at procedural fairness. Although procedural fairness may lead to transparency and may therefore increase the levels of consensus, the success of procedural fairness depends on many external factors, such as whether the consumer is going to study the contract. The fact that the majority of factors which are listed in the Act (and which must be taken into account when the court has to decide whether a contract is unfair or not) are procedural factors may reduce the efficiency of the Act. However, in a South African context, where many consumers are illiterate and where consumers are often exploited due to a lack of transparency, substantive fairness on its own can never be used to achieve contractual freedom. In a South African context, procedural fairness and substantive fairness are therefore of equal importance.

In the discussion below, the special factors and measures and guidelines which must be considered in order to decide whether a contract is procedurally fair, will be analysed. Other factors, which may also increase procedural fairness, will also be pointed out.

²²⁰ See para 3 in Ch 3.

2.3.1 Disclosure and Mandatory Terms

2.3.1.1 Did the Consumer rely upon a False, Misleading or Deceptive Representation or a Statement of Opinion to his/her Detriment?

In terms of the widely drafted guidelines for fairness listed in section 48(2), a contract or term will be unfair if the consumer relied upon a false, misleading or deceptive representation,²²¹ or a statement of opinion provided by the supplier, to the detriment of the consumer.²²² The first part of section 48(2) deals with false, misleading or deceptive representations as contemplated in section 41, and the second part relates to a statement of opinion provided by the supplier to the detriment of the consumer.

Section 41 regulates false, misleading or deceptive representations. It states that suppliers are not allowed to use false, misleading or deceptive representation concerning a material fact, use innuendo, exaggeration or ambiguity as to a material fact or fail to disclose a material fact, or must not knowingly allow consumers to believe false, misleading or deceptive facts by failing to correct an apparent misapprehension on the part of the consumer.²²³ While a supplier thus has a duty to properly disclose material facts, failure to do so may be regarded as a false, misleading or deceptive representation. A person acting on behalf of a supplier may also not falsely represent that such person has any sponsorship, approval or affiliation or engage in conduct that the supplier is prohibited from engaging in.²²⁴

Praise of goods or service by a supplier, or sales talk or so-called 'puffing' as to a material fact can be equated to the use of 'exaggeration, innuendo or ambiguity as to a material fact'. In terms of common law, 'puffing' is regarded

²²¹ See section 41 in respect of false, misleading or deceptive representations.

²²² Section 48(2)(c).

²²³ Section 41(1).

²²⁴ Section 48(2) read with section 48(1).

as mere sales talk which has no binding effect.²²⁵ However, in terms of section 41(1)(b), exaggeration, innuendo or ambiguity as to a material fact are prohibited and, if the consumer relied upon exaggeration, innuendo or ambiguity as to a material fact, it renders a contract or term unfair in terms of section 48(2)(c). Puffing as to a material fact is thus prohibited and it renders a contract or term unfair if the consumer relied upon it.²²⁶

The second part of section 48(2)(c) relates to a statement of opinion provided by the supplier to the detriment of the consumer. It states that if a consumer relied upon a statement of opinion provided by or on behalf of a supplier to the detriment of a consumer, the contract or term is unfair. A 'statement of opinion' is any opinion and not only false, misleading or deceptive opinions, since 'statement of opinion' is not qualified by this section. A term or contract can therefore be declared unfair should a consumer have relied on any opinion of the supplier if it caused detriment at the end. Suppliers who normally give opinions, such as medical doctors, attorneys and advocates should therefore take notice of this section.

It is possible that opinion is not qualified because an opinion of a supplier amounts to his/her view or point of view, so it cannot be false or misleading. If it were possible for an opinion to be false or misleading, this would be very difficult to prove. However, it is suggested that 'statement of opinion' should be qualified in one way or another, because it is unacceptable that any statement of opinion could lead to a contract being declared unfair. The words 'any

²²⁵ RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2005) 155, 158 and 273-274 where it is indicated that puffing has no legal effect but that it is difficult to draw a line between mere puffing and misrepresentation. See also S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (2007) 112.

²²⁶ The Advertising Standards Authority (ASA) is the regulatory authority voluntarily regulating the advertising industry in South Africa. In terms of s 97(1)(a), the Consumer Commission may liaise with any other regulatory authority on matters of common interest and may exchange information pertaining to matters of common interest or a specific complaint or investigation. The Consumer Commission may thus ask the ASA to regulate puffing in the advertising industry.

statement of opinion' can, for example, be replaced by the word 'advice', which is a narrower term than 'opinion'.

Section 48(3) contains a non-exhaustive list of guidelines indicating when a representation is false, misleading or deceptive. It states that it will be a false, misleading or deceptive representation to falsely state or imply or fail to correct misapprehension on the part of the consumer that: (a) a supplier has a particular status or affiliation, connection, sponsorship or approval that he/she does not have; (b) that any goods or services have, *inter alia*, ingredients, characteristics, uses, accessories that they do not have; or (c) goods are of a particular standard, are new or unused if they are not. The same applies to any land or immovable property with regard to (a) characteristics that such land or property does not have; (b) the purpose of the land; or (c) the facilities and features of the land.

2.3.1.2 Was the Contract Subject to a Term for Which a Notice is Required?

In terms of 48(2)(d) a contract is unfair if the contract was subject to a term or condition or a notice to a consumer contemplated in section 49(1) and (a) the term, condition or notice is unfair or (b) the fact, nature and effect of that term was not drawn to the attention of the consumer in the manner that satisfied the requirements of section 49.

Procedural fairness requires that consumers be aware of terms that are to their detriment, so that they can protect themselves against it. Disclosure of the presence of detrimental terms and other important information furthermore increases transparency. Informing a consumer of the presence of detrimental terms is therefore a measure aimed at preventing procedural unfairness. However, sometimes a supplier's compliance with notice and disclosure requirements may not increase overall fairness because consumers are disinclined to read detailed contract terms. In order to overcome the problems related to measures aimed at procedural fairness a strong emphasis should be placed on standardisation of the way in which terms should be presented.

However, this will still not address all these issues. For example, it does not make it more likely that a consumer will actually read the terms. Standardisation in presentation, however, makes it slightly easier for a consumer to understand, as information is presented in a standard way. It may also help a consumer to make comparisons between products, suppliers and prices.²²⁷

Section 49 serves the above-mentioned purposes. In terms of this section, should a contract contain the specific terms and conditions as set out in section 49(1), it must be brought to the attention of the consumer in the prescribed manner and form.²²⁸ The information must therefore not only be brought to the consumer's attention, it must also be brought to his/her attention in a standardised manner and form. These specific terms and conditions are those that purport to limit in any way the liability or risk of the supplier or someone else, that constitute an assumption of risk or liability by the consumer, that impose an obligation on a consumer to indemnify the supplier or someone else for any cause, or those which are an acknowledgment of any fact by the consumer.²²⁹ The above-mentioned terms would include clauses to the effect that no representations were made to a consumer, as well as indemnity clauses and exemption clauses.

Furthermore, section 49(2) states that, should a provision concern any activity or facility that is subject to risk of an unusual character or nature, or risks which the consumer could not reasonably be expected to be aware of,²³⁰ or those which could result in serious injury or death, the supplier has to specifically bring the fact, nature and potential effect of the risk to the attention of the

²²⁷ See also para 3 in Ch 3 for a discussion on factors which limit the effectiveness of measures aimed at procedural fairness.

²²⁸ Section 49(1), (3), (4) and (5).

²²⁹ Section 49(1)(a)-(d).

²³⁰ See also *Mercurius Motors v Lopez* 2008 (3) 572 (SCA) para [33], where the Supreme Court of Appeal held that a clause that undermines the essence of a contract and a hidden clause should be clearly and pertinently brought to the attention of a client who signs a standard contract.

consumer in the prescribed form and manner.²³¹ Furthermore, the consumer must have assented to that provision or notice by signing or initialling the provision or by otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.²³² This provision may, however, be to a consumer's detriment where a supplier relies on the consumer's signature in order to show that the contract or term is fair, since the consumer was aware of it. A consumer should thus only sign it if he/she really agrees to the term and not only as a mere formality.

Again, the aims of transparency are served by the disclosure and signature requirements. In respect of form and manner, the notice or provision must be in plain language as contemplated in section 22,²³³ and the consumer must be given sufficient time or an adequate opportunity in the circumstances to receive and comprehend the provision or notice.²³⁴ The Act further places a duty on a supplier or other person to draw the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer to the fact, nature and effect of the provision or notice.²³⁵ This must be done at the earliest before the consumer enters into the agreement or transaction, begins to engage in the activity or enters or gains access to a facility or before the consumer is required to offer consideration for the agreement or transaction.²³⁶ A supplier can therefore minimise his/her liability for unfair contract terms by (a) drawing the attention of the consumer to the fact, nature or effect of a clause or notice (b) in plain language and (c) by giving a consumer adequate opportunity to comprehend the notice or provision.²³⁷

²³¹ Section 49(2).

²³² Section 49(2).

²³³ See para 2.3.1.2 below.

²³⁴ Section 49(3) and (5).

²³⁵ Section 49(4)(a).

²³⁶ Section 49(4)(b).

²³⁷ See also W Jacobs, P Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 357-358.

2.3.1.3 The Extent to which any Documents Satisfied the Plain and Understandable Language Requirements

The extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22 is one of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.²³⁸

Measures aimed at procedural fairness increase transparency. Transparency in relation to the terms of a contract refers to the question whether the contract terms are accessible, in clear language, well structured and cross-referenced, with prominence being given to terms that are detrimental to the consumer or terms which grant important rights. One could therefore say that, in general, a procedurally fair contract is transparent and entered into voluntarily. Although procedural fairness and measures aimed at procedural fairness have limitations,²³⁹ the plain and understandable language requirements as set out in section 22, in a multilingual South African context, where consumers are often only functionally literate, are probably the most important pro-active fairness measure contained in the Act. The plain language provisions provisions will therefore be analysed in detail below.

As we have seen, unfairness often results from standard term contracts. Consumers and suppliers do not always reach true consensus on the terms of standard term contracts, because the terms are not well structured and are written in formal language. If contracts are written in plain and understandable language, it may result in 'true' consensus being reached, since the contract is written in language that the consumer understands. Real consensus can only exist if a consumer really understands the terms of a contract.²⁴⁰

²³⁸ Section 52(2)(j).

²³⁹ See para 3 in Ch 3.

²⁴⁰ Real consensus is the coincidence of contract parties' wills or a meeting of the minds. The will or intention of the parties must therefore be considered. However, it must be noted that,

Section 22 requires notices, documents or visual representations that are required in terms of the Act or other law to be provided in plain and understandable language as well as in the prescribed form, if any. Section 50 also makes plain language compulsory in all consumer agreements.²⁴¹

The right to information in plain and understandable language²⁴² is classified under the umbrella right of information and disclosure in the Act.²⁴³ In interpreting section 22, effect must be given to certain purposes set out in section 3, several of which are served by protection of the right to information in plain and understandable language.²⁴⁴ These include the purpose of 'reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented'.²⁴⁵ Section 22 also serves the purpose of 'improving consumer awareness and information and encouraging responsible and

although true agreement is required, courts only concern them with the external manifestation of their minds. See *SA Railways and Harbours v National Bank of SA Ltd* 1924 AD 704 at 715 and *Trollip v Jordaan* 1961 (1) SA 238 at 248. It must, however, never be assumed that true consensus exists or that consensus was not obtained in an improper way simply because misrepresentation, duress, undue influence or mistake was not proved or raised. In fact, the abuse of standard term contracts urges one to require courts to, in future, approach consensus from a subjective angle (the theory of consensuality) in order to determine whether true consensus exists.

²⁴¹ The National Credit Act 34 of 2005 was the first piece of South African legislation that required agreements to be drafted in plain language (s 64).

²⁴² Section 22 does not merely require the use of plain and understandable language; the plain language requirement is elevated to a fundamental consumer right (see the heading of s 22 where the word 'right' is used). See also M Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 79 at 85.

²⁴³ Chapter 2, Part D of the Consumer Protection Act.

²⁴⁴ Section 2(1).

²⁴⁵ Section 3(1)(b)(iv). See also DTI *Draft Green Paper on the Consumer Policy Framework (09/04)* in GenN 1957, GG 26774 of 9 Sept 2004 at 31.

informed choice and behaviour'.²⁴⁶ Enabling consumers to make informed choices means that consumers are able to compare products and the prices they are willing to pay, which makes markets more efficient (proper disclosure can drive down prices by allowing consumers to shop around and compare prices).²⁴⁷ Accessible information in required notices and documents and in consumer agreements is also important for the purpose of 'promoting consumer confidence, empowerment and the development of a culture of consumer responsibility'.²⁴⁸ The prescription of standardised forms for notices and documents that are required in terms of legislation enhances consumer protection because basic information is to be presented in a uniform format, making it less likely that consumers will be misled.²⁴⁹

The plain language requirement therefore seeks to advance procedural fairness. The purpose of measures aimed at procedural fairness is to enable consumers to look after their own interests when dealing with suppliers. One important aspect of procedural fairness is transparency. Several aspects form part of transparency, such as prominence given to certain terms, size of print, language and structure of the contract as well as an adequate opportunity for reflection.²⁵⁰ Plain language is vital to transparency and therefore also to procedural fairness. Thus, many countries have adopted plain language legislation, which requires consumer agreements to be in plain language.²⁵¹

²⁴⁶ Section 3(1)(e).

²⁴⁷ DTI Draft Green Paper on the Consumer Policy Framework (09/04) in GenN 1957, GG 26774 of 9 Sept 2004 at 28.

²⁴⁸ Section 3(1)(f).

²⁴⁹ DTI Draft Green Paper on the Consumer Policy Framework (09/04) in GenN 1957, GG 26774 of 9 Sept 2004 at 28.

²⁵⁰ C Willet *Fairness in Consumer Contracts* (2007) 321-375.

²⁵¹ See also M Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 79 at 80.

2.3.1.3.1 The Documents which must be in Plain and Understandable Language

Section 22(1) provides that any notice, document or visual representation that is required in terms of the CPA or any other law should be in the form prescribed by the Act.²⁵² If no form is prescribed, the document must be in plain language.²⁵³ Therefore, this section only applies to notices required by legislation, visual representations and written agreements and not to oral agreements.²⁵⁴ Section 50 deals with written consumer agreements, and it states that the Minister of Trade and Industry may prescribe categories of agreements required to be in writing.²⁵⁵ It further states that even where an agreement between a supplier and a consumer has been put in writing voluntarily, it must satisfy the plain language requirement and the supplier must then send a copy of the agreement to the consumer.²⁵⁶

²⁵² Section 22(1)(a). The Consumer Protection Act requires certain information to be made available to consumers, so the required notices, provisions or agreements should be written in plain and understandable language: see section 24 read with regulations 6-7 (prescribed product labelling and trade descriptions). In this regard, see also section 15 of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, section 25 read with regulation 8 (notice disclosing reconditioned or grey market goods), section 27 read with regulation 9 (notice disclosing prescribed information in respect of intermediaries), section 37 read with regulation 12 (cautionary statement disclosing prescribed information in respect of alternative work schemes), section 49 (notice required for certain terms and conditions), and section 50(1) (categories of agreements required to be in writing).

²⁵³ Section 22(1)(b).

²⁵⁴ See M du Preez 'The Consumer Protection Bill: A few Preliminary Comments' 2009 *TSAR* 58 at 75-76.

²⁵⁵ See the discussion of section 50 in para 2.3.3.3.1 below.

²⁵⁶ Section 50(2)(a)-(b). *Contra* M Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 79 at 86, where it is stated that '[a]lthough signature of an agreement signifies the parties' assent to it, s 50(2)(a) is an exception with a view to protecting the consumer, and not the supplier. However, to avoid creating a 'ticket case', and because the Act contemplates an agreement signed by both the consumer and the supplier, an agreement that is not signed by the supplier has to be signed by the consumer for s 22 to apply'.

2.3.1.3.2 The Definition of Plain and Understandable Language

‘Plain language’ is language that enables an ordinary consumer (of the class of persons for whom a notice, document or visual representation is intended), with average literacy skills and minimal experience as a consumer of the relevant goods or services, to understand the content, significance and import of a document, notice or visual representation without undue effort.²⁵⁷

When determining whether a document or representation is in plain and understandable language, the following aspects must therefore be taken into account:²⁵⁸ (a) the context, comprehensiveness and consistency of the notice, document or visual representation;²⁵⁹ (b) the organisation, form and style of the notice, document or visual representation;²⁶⁰ (c) the vocabulary, usage and sentence structure of the notice, document or visual representation;²⁶¹ and (d) aids used to assist the consumer in the reading and understanding of the notice, document or visual representation.²⁶²

The definition of ‘plain language’ in section 22 has been analysed and has been lauded internationally, since it speaks about grammar and wording as well as structure, content, design and style of the document.²⁶³

The elements of plain and understandable language are therefore as follows: (a) ‘An ordinary consumer’ indicates that not only lawyers and judges should be

²⁵⁷ Section 22(2).

²⁵⁸ See M Gouws ‘A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act’ (2010) 22 *SA Merc LJ* 79 at 89, where he states that the features listed in section 22(2)(a)-(d) are merely guidelines and that non-compliance with them will not without more ado render the agreement not plain.

²⁵⁹ Section 22(2)(a).

²⁶⁰ Section 22(2)(b).

²⁶¹ Section 22(2)(c).

²⁶² Section 22(2)(d).

²⁶³ F Gordon & C Burt ‘Plain Language’ 10.4 (2010) *Without Prejudice* 59-60.

able to understand a document sent to consumers.²⁶⁴ 'For whom a notice, document or visual representation is intended' indicates that suppliers will have to draft more than one set of standard contracts for a specific situation in order to cater for those consumers for whom it is intended. Suppliers must therefore know their target audience in advance. (b) 'Average literacy skills' implies that documents must cater for average South African consumers of the class for whom the notice, document or representation is intended. A total of eighteen per cent of South Africans are illiterate. Only 82% are at least functionally literate, that is, they have at least some basic reading and writing skills.²⁶⁵ However, that does not equip South African consumers to understand business and legal documents.²⁶⁶ (c) 'Minimal experience' indicates that drafters should write for first-time consumers of the particular goods or services.²⁶⁷ (d) 'Content, significance and import' indicates that consumers must not only understand what the document says, but also how it applies to them as well as what the effect of the document will be.²⁶⁸ (e) 'Without undue effort' indicates that, if consumers need to consult an advisor or dictionary to understand the terms of a document it would be considered that their understanding cost them undue

²⁶⁴ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333.

²⁶⁵ J Aitchison & A Harley 'South African Illiteracy Statistics and the Case of the Magically Growing Number of Literacy and ABET Learners' (2006) 39 *Journal of Education* 89 at 93-94; HS Sibiyi *A Strategy for Alleviating Illiteracy in South Africa: A Historical Inquiry* (2004) (unpublished PhD thesis: University of Pretoria) 1 (available at <http://upetd.up.ac.za/thesis/available/etd-03102005-124313/unrestricted/00front.pdf>).

²⁶⁶ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333.

²⁶⁷ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333.

²⁶⁸ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333.

effort and such document would not be in plain language.²⁶⁹ (f) 'Context' indicates that it is necessary to take account of how and when consumers read a document.²⁷⁰ Therefore, it can be taken into account what the consumer would reasonably be expected to know from previous transactions. Gordon and Burt use the example of a DVD. With a DVD rental contract, it would be reasonable that consumers would know what a DVD is, as it is unlikely that they would be in this context if they did not.²⁷¹ (g) 'Comprehensiveness' indicates that the document must give full information.²⁷² (h) 'Consistency' indicates that the terminology and style must be consistent throughout a document.²⁷³ (i) 'Organisation, form and style' refers to the way a document is structured, for example, no hidden small print should be used and important information should be given at the top of the document.²⁷⁴ (j) 'Vocabulary, usage and sentence structure' refers to general readability principles, such as using short sentences, the active voice and short words.²⁷⁵ (k) 'Illustrations, examples, headings or other aids to reading and understanding' refers to devices to make

²⁶⁹ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333; and M Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 79 at 88-89.

²⁷⁰ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 33.

²⁷¹ N Melville *The Consumer Protection Act Made Easy* (2010) 163.

²⁷² F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333.

²⁷³ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333.

²⁷⁴ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333-334.

²⁷⁵ F Gordon & C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 334.

a document more inviting and to good techniques for communicating complex information.²⁷⁶

A question that can be raised is whether a contract must be in an official language in order to be in plain and understandable language. Unlike section 63 of the National Credit Act,²⁷⁷ the Act does not require information to be provided in more than one of the official languages. In terms of the Constitution of the Republic of South Africa, 1996, South Africa has eleven languages.²⁷⁸ The state has a constitutional duty to take positive and practical measures to elevate and advance the use of languages that, historically, have had diminished status.²⁷⁹ All official languages must enjoy parity of esteem and be treated equitably.²⁸⁰ An official language requirement would have placed an enormous burden on suppliers in South Africa. However, it is uncertain what the position will be in respect of South Africans who do not speak English (sometimes regarded as the *lingua franca* of the country and also the language commonly used in agreements) and foreigners in South Africa (who only speak a foreign language).²⁸¹ How would the requirements of plain language ever be complied with if consumers do not understand the language used in agreements or other communications? Such consumers presumably have to consult an advisor or dictionary and it would be considered that their understanding cost them undue effort, and such document would not be in plain language. Furthermore, section 40(2) provides that it is unconscionable for a supplier to knowingly take advantage of the fact that a consumer is substantially

²⁷⁶ F Gordon and C Burt 'Plain Language' 10.4 (2010) *Without Prejudice* 59-60; PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 334.

²⁷⁷ 34 of 2005.

²⁷⁸ Section 6.

²⁷⁹ Section 6(2).

²⁸⁰ Section 6(4). See also M Alberts 'Plain Language in a Multilingual Society' in F Viljoen & A Nienaber (eds) *Plain Language for a New Democracy* (2001) 89-118.

²⁸¹ See the discussion in PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 334.

unable to protect his or her own interests because of an inability to understand the language of an agreement.

The draft of the Consumer Protection Bill contained a section on the right to information in an official language.²⁸² However, it was omitted from the final Bill, after certain industry stakeholders made submissions that the requirement of information in all official languages would have been too onerous.²⁸³ In light of this omission, one can conclude that a notice, document or visual representation does not need to be written in an official language in order for it to be in plain language. It will, however, be to a supplier's advantage to translate documents, notices or visual representations into the official languages spoken by the class of persons for whom it is intended.

2.3.1.3.3 Guidelines for the Assessment of Plain and Understandable Language

The three most common plain language standards or assessment measures that may be applied to assess whether agreements comply with plain language requirements are: (a) informal assessment; (b) formal assessment; and (c) using assessment software.²⁸⁴

Informal assessment guidelines include in-house style guides and any other in-house assessment measures. Informal assessment would be difficult to regulate, but is a valuable in-house assessment tool for plain language.

²⁸² Section 33 of the Consumer Protection Bill, 2006 (Second Discussion Draft) published in GenN 418 in GG 28629 of 15 Mar 2006.

²⁸³ See, for example, the submissions made by Business Unity South Africa *Consumer Protection Bill, Submissions by Business Unity South Africa* (May 2006) at 45-46 (available at <http://www.busa.org.za/docs/Final%20BUSA%20Submissions%20%20Consumer%20Protection%20Bill.pdf>).

²⁸⁴ PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 335.

A formal and objective style guide gives more substance to general provisions and is a valuable test mechanism or guideline that a legislator or a regulator may use to give concrete guidance to drafters.

The Act provides that the National Consumer Commission may publish guidelines on methods of assessing plain language. No objective guidelines have been published yet that should be met in terms of language, style and structure. In the absence of guidelines, it will be difficult to tell whether suppliers meet the requirements of plain language. In order to proactively give effect to requirements of plain language, to improve levels of disclosure and to increase procedural fairness, objective assessment mechanisms or guidelines must be put in place.²⁸⁵

Lawyers have raised their concerns about the lack of such guidelines, and it has been indicated that the requirement that documents be presented in plain and understandable language is challenging lawyers to find a legally acceptable consensus on how such language can be defined and applied in a way that complies with the law. The right to plain and understandable language sounds well and good and it may contribute to procedural fairness, but one will not be able to tell whether this has been achieved due to the lack of guidelines.²⁸⁶

It is also a concern that the definition of plain language is too flexible and is subject to discretion and interpretation.²⁸⁷ Guidelines on methods of assessing plain language might solve or address these concerns and will help in testing compliance with the plain language provisions and preventing non-compliance.

²⁸⁵ See also M Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 79 at 86-90, where he states that an agreement would be in plain language if the language used is semantically clear and coherent and contains at least some of the features listed in the Act, resulting in the agreement being legible.

²⁸⁶ See N Kirby CPA 'Plain Language Poser' at <http://www.fin24.com/Economy/CPA-plain-language-poser-20111115>.

²⁸⁷ PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333.

The National Consumer Commission may consider examples of style guides on plain language in foreign legislation when drafting guidelines for South Africa. In any event, such foreign legislation may be relevant to the interpretation of the plain language standard in section 22. Section 2(2) provides that '[w]hen interpreting or applying this Act, a person, court or tribunal or the Commission may consider appropriate foreign and international law ...'

In English law, regulation 5(1) of the Unfair Contract Terms in Consumer Contract Regulations provide that an unfair contract term is a contract term which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.²⁸⁸ Good faith requires fair and open dealing. Openness requires that the terms be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Regulation 6(1) furthermore sets out the circumstances to be considered in the application of the unfairness test in regulation 5(1). One of the factors that must be taken into account is all the circumstances attending the conclusion of the contract. 'Circumstances attending the conclusion of the contract' encompasses factors such as whether the terms were expressed in plain language, whether the terms were presented clearly, bargaining power and the availability of alternatives. Deciding whether a term is fair and whether such term was expressed in plain and intelligible language is one of the factors which is considered. Above that, regulation 7(1) requires that a seller or supplier ensure that any written term of a contract is expressed in plain, intelligible language. In this context, 'plain' language is language that cannot be misunderstood or that does not give rise to doubts and 'intelligibility' encompasses the style used and the way a contract is printed on paper. The Office of Fair Trading issued some guidelines in relation to plain language: (a) the contract should be comprehensible by the consumer without recourse to legal advice; (b) legal jargon should be avoided; (c) the contract should be in direct and ordinary language; (d) the first (I/me) and second person (you/your) should be used rather than naming and defining the parties; (e) cross-

²⁸⁸ See para 3.3 in Ch 6.

references should be minimised; (f) headings should be used; and (g) the size of the print should be large enough to be legible without difficulty. Regulation 7(2) deals with the effect of failure to comply with the requirement of plain and intelligible language. It provides that if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail.²⁸⁹ Furthermore, if a 'core term' is not written in plain and intelligible language, it will be subjected to the fairness test of regulation 5. Non-compliance may also constitute an important factor in the assessment of the fairness of a term.²⁹⁰ English law does therefore not have detailed guidelines which could easily be applied in a multilingual South Africa with a large number of its consumers who are merely functionally literate and which may address all the elements set out in the definition of plain and understandable language. However, other jurisdictions offer very good examples of formal, general and visual guidelines for the assessment of plain and understandable language, which can also be applied in a multi-lingual context.

Very good examples of formal, general and visual style guides that have been adopted by legislators can be found in the law of the states of Pennsylvania²⁹¹ and Connecticut²⁹² in the United States of America.²⁹³ The legislator of

²⁸⁹ See also s 4(4) of the CPA.

²⁹⁰ See para 3.5 in Ch 6.

²⁹¹ Pennsylvania Plain Language Consumer Contract Act (Pa Stat Ann Tit. 73 (1997)). S 2205(a) requires that 'all consumer contracts ... shall be written, organized and designed so that they are easy to read and understand'. See also the discussion in PM Tiersma *Legal Language* (1999) 224-225, PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 336; E Louw *The Plain Language Movement and Legal Reform in the South African Law of Contract* (2010) (unpublished LLM dissertation: University of Johannesburg) 140-141.

²⁹² Connecticut General Statutes (Conn Gen Stat s 42-152 (1999)). S 152(a) requires that all consumer contracts 'shall be written in plain language'. See also PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 336-337 and E Louw *The Plain Language Movement and Legal Reform in the South African Law of Contract* (2010) (unpublished LLM dissertation: University of Johannesburg) 139-140.

²⁹³ See also F Viljoen 'The Plain Language Experience in the USA' in F Viljoen & A Nienaber (eds) *Plain Language for a New Democracy* (2001) 45-51.

Pennsylvania prescribed a broad and general standard for plain language. In section 2205(b)-(d) of the Pennsylvania Plain Language Consumer Contract Act, guidelines are listed to determine whether the general standard has been met. The guidelines that should be applied in order to determine whether a document meets the plain language requirement are: (a) the contract should use short words, paragraphs and sentences and active verbs; (b) it should not use technical legal terms other than commonly understood legal terms; (c) Latin and foreign words may not be used; (d) if the document defines words, it must be defined by using commonly understood meanings; (e) sentences may not contain more than one condition; and (f) cross-references may not be used, except cross-references that briefly and clearly describe the substance of the item to which reference is made.

Section 2205(c) contains visual guidelines. In determining whether a contract meets these requirements, a court must consider the visual guidelines. These guidelines, among others, require that the contracts should have type size, line length, column-width margins and spacing between lines and paragraphs that make the contract easy to read, that the contract should have caption sections typed in bold and that the contract should use ink that contrasts sharply with the paper. If a creditor, lessor or seller does not comply with the plain language requirements of the Pennsylvania Plain Language Consumer Contract Act²⁹⁴ (Pa Stat Ann Tit. 73 (1997)), he or she will be liable to that consumer for the following: (a) compensation in an amount equal to the value of the actual loss caused by the violation of the Act; (b) statutory damage of US\$100 (or less if the total amount of the contract is less than US\$100); (c) court costs; (d) reasonable attorney fees; and (e) any equitable and other relief ordered by court.²⁹⁵

²⁹⁴ Section 2205 of the Pennsylvania Plain Language Consumer Contract Act (Pa Stat Ann Tit. 73 (1997)).

²⁹⁵ Section 2207.

In Connecticut, very similar guidelines to those that apply in Pennsylvania are used, but a more objective alternative approach may also be followed.²⁹⁶ An objective test is more because it stipulates specific numbers and sizes to which words, sentences and syllables should adhere.²⁹⁷ The Connecticut General Statutes in the alternative objective approach state that a consumer contract is also written in plain language if it fully meets the requirements of the objective test. The objective test requires the following: (a) the average number of words per sentence must be less than 22; (b) no sentence in the contract may exceed 50 words; (c) the average number of words per paragraph must be less than 75; (d) no paragraph in the contract may exceed 150 words; (e) the average number of syllables per word must be less than 1.55; (f) the contract must use personal pronouns, the actual or shortened names of the parties to the contract, or both, when referring to those parties; (g) no typeface of less than eight points in size may be used; (h) at least three sixteenths of an inch (one inch equals 2.5 centimeters) of blank space must be allowed between each paragraph and section; (i) at least half an inch of blank space must be allowed at all borders of each page; (j) if the contract is printed, each section must be captioned in boldface type at least ten points in size. If the contract is typewritten, each section must be captioned and the captions underlined; and (k) the average line length in the contract must be no more than 65 characters.

The advantage of this alternative approach is that it can be applied easily and computers can be used to do the required calculations irrespective of the language of the contract.

There are software programs that use well-known readability tests to test whether a document is written in plain and understandable language. Readability formulas are mathematical equations that predict the level or reading ability needed to understand a specific document, and are based on

²⁹⁶ See PM Tiersma *Legal Language* (1999) 225; and PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 336-337.

²⁹⁷ See also E Louw *The Plain Language Movement and Legal Reform in the South African Law of Contract* (2010) (unpublished LLM dissertation: University of Johannesburg) 140.

correlations with some measure of comprehension, such as scores on a reading test. Therefore, these formulas predict readability rather than measuring it. Another drawback is that they do not address the causes of problems people might have in understanding a document in order to deal with these problems proactively, i.e. legal language is hard to understand and it cannot be improved by only using shorter words and sentences.²⁹⁸ Readability formulas therefore have limited use, because they are not accurate in the context of law, nor are they proactive.²⁹⁹ Furthermore, these tests are not specifically adapted in order to test compliance with the plain language requirements of different sets of legislation. The Flesch reading ease test³⁰⁰ is probably the most common readability test that is used in software packages such as Microsoft Office, and it is sometimes incorporated into legislation through the requirement of a minimum score.³⁰¹ Basically, the test scores the readability of documents and a score of 100 would be simple and a score of zero would be very difficult. The average number of words in every sentence and the average number of syllables per word are taken into account.³⁰² A document with a very good score will therefore contain shorter words and sentences.

The Flesch reading ease test can be criticised from a legal perspective. Legal language is hard to understand and that it cannot be improved by only using

²⁹⁸ PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 337-338. See also J Redish 'Readability Formulas have even More Limitations than Klare Discusses' (2000) 24 *ACM Journal of Computer Documentation* 132; and GR Klare 'Assessing Readability' (1974) 10 *Reading Research Quarterly* 62.

²⁹⁹ See MM Asprey *Plain Language for Lawyers* (2003) 299.

³⁰⁰ The Flesch reading ease test was proposed in R Flesch 'A New Readability Yardstick' (1948) 32 *Journal of Applied Psychology* 221.

³⁰¹ See, for example, Florida's requirements on readable language in insurance policies, where a minimum score of 45 on the Flesch reading ease test is required (Florida Stats Ann s 627.4145). See also PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 338. See also PM Tiersma *Legal Language* (1999) 226; GM Klare 'Assessing Readability' (1974) 10 *Reading Research Quarterly* 62-102 for an analysis of readability formulas.

³⁰² PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 338; PM Tiersma *Legal Language* (1999) 226.

shorter words and sentences.³⁰³ This means that a document can pass the Flesch reading ease test without being written in plain language. Readability tests, such as the Flesch reading ease test, were not developed for technical documents because they ignore content, layout, organisation, word order, visual aids and the intended audience, and they emphasise countable features of the document, rather than comprehensibility of the text.³⁰⁴ Readability formulas assume that all consumers are alike, while the Act requires that an ordinary consumer of the class of persons for whom the notice, document or representation is intended, with average literacy skills and minimal experience as a consumer would be able to understand the contents without undue effort.³⁰⁵ In the South African consumer context, general text-based readability tests can therefore not be applied in order to test compliance with the plain and understandable language requirements as set out in the Act.

The plain and understandable language requirements in the Act are not mere factor or measure that should be taken into account when the court has to decide whether a contract is unfair or not. It is also, as we have seen, an independent right, which contributes towards procedural fairness. Suppliers therefore have to comply with the plain and understandable language requirements at all times. Non-compliance therefore has serious consequences for suppliers.

Section 51(1)(a)(i) states that a supplier may not enter into a transaction or agreement subject to a term or condition if the contract or transaction's general purposes is to defeat the policy of the Act. Section 3(1)(b)(iv) of the Act states that it is the purpose of the Act to promote and advance the social and economic welfare of consumers by –

³⁰³ PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 338; PM Tiersma *Legal Language* (1999) 227.

³⁰⁴ PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 338; J Redish 'Readability Formulas have even More Limitations than Klare Discusses' (2000) 24 *ACM Journal of Computer Documentation* 132-137.

³⁰⁵ PN Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 338.

'... reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented'.

Furthermore, section 51(1)(b)(i)-(iii) states that a supplier may not enter into a transaction or agreement subject to a term or condition if it directly or indirectly purports to waive or deprive a consumer of a right in terms of the Act or avoid a supplier's obligation or duty in terms of the Act or override the effect of any provision of the Act. Section 50(2)(b)(i) requires agreements to be written in plain and understandable language. Section 50(3) states that a transaction or agreement, provision, term or condition of a transaction or agreement is void to the extent that it contravenes section 51. Therefore it can be argued that, if an agreement is not written in plain and understandable language as required in terms of section 50(2)(b)(i), the agreement, provision, term or condition of the agreement will be void in terms of section 51(3), since it overrides the effect of the right to plain and understandable language.³⁰⁶ If an agreement, term or condition of an agreement is void, the court may sever any part of the agreement or provisions or alter it to the extent required to render it lawful, or it may declare the entire agreement or provision void as from the date it purportedly took effect.³⁰⁷ The court may also make any further order that is just and reasonable in the circumstances with respect to the agreement.³⁰⁸

³⁰⁶ See also M Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 SA Merc LJ 79 at 90-91. *Contra* T Naudé 'The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 SALJ 505 at 513.

³⁰⁷ Section 52(4)(a). See also M Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 SA Merc LJ 79 at 90-91.

³⁰⁸ Section 52(4)(b). See also M Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 SA Merc LJ 79 at 90-91.

In terms of section 71(1), any person may file a complaint with the Consumer Commission,³⁰⁹ alleging that a person has acted in a manner inconsistent with the Act. After concluding an investigation into a complaint, the Consumer Commission may refer the matter to the National Prosecuting Authority if the Consumer Commission alleges that a person has committed an offence.³¹⁰ If the Commission believes that a person has engaged in prohibited conduct,³¹¹ it may refer the matter to the Equality Court,³¹² propose a draft consent order in terms of section 74,³¹³ make a referral to the National Consumer Tribunal³¹⁴ or a consumer court or issue a compliance notice in terms of section 100.³¹⁵ It is an offence to fail to act in accordance with a compliance notice.³¹⁶ If a person to whom a compliance notice has been issued fails to comply with the notice, the Consumer Commission may either apply to the Consumer Tribunal for the imposition of an administrative fine or refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 110(2).³¹⁷ A person convicted of an offence may be liable for a fine or imprisonment for a period not exceeding twelve months, or both a fine and imprisonment.³¹⁸ If the National Consumer Tribunal imposes an administrative fine in respect of prohibited or required conduct, the fine may not exceed the greater of ten per cent of the respondent's annual turnover during the preceding financial year or R1 million.³¹⁹

³⁰⁹ See section 99 where the enforcement functions of the Consumer Commission are set out.

³¹⁰ Section 73(1)(b).

³¹¹ See the definition of 'prohibited conduct' in section 1.

³¹² Section 73(1)(c)(i).

³¹³ Section 73(1)(c)(ii).

³¹⁴ Section 73(1)(c)(iii).

³¹⁵ Section 73(1)(c)(iv).

³¹⁶ Section 110(2).

³¹⁷ Section 100(6).

³¹⁸ Section 111(1)(b). See also I Meiring 'Consequences of Non-compliance with the Consumer Protection Act 68 of 2008' 10.11 (2010) *Without Prejudice* 28 at 29.

³¹⁹ Section 112(3). See also I Meiring 'Consequences of Non-compliance with the Consumer Protection Act 68 of 2008' 10.11 (2010) *Without Prejudice* 28 at 29.

Plain language is not directly addressed in section 40(2). It, however, provides that it is unconscionable for a supplier to knowingly take advantage of the fact that a consumer was substantially unable to protect his or her own interests because of an inability to understand the language of an agreement.³²⁰ If a consumer alleges that a supplier acted unconscionably,³²¹ made false, misleading or deceptive representations³²² or that a contract's terms or terms are unfair, unreasonable or unjust,³²³ the court must consider the extent to which any documents relating to the transaction or agreement satisfied the plain language requirement.³²⁴

2.3.2 *Bargaining Position of the Parties and Choice*

A weak bargaining position and a lack of choice³²⁵ count against a finding of procedural fairness, because a weak bargaining position and a lack of choice implies that the consumer could not have done anything or was not in a position to protect his/her own interests. However, a supplier is usually in a stronger bargaining position than a consumer simply because a single consumer is not important enough to a supplier to give him/her leverage. A lack of choice and inequality of bargaining positions should not be regarded as the only measures of procedural fairness, since suppliers are usually in a stronger bargaining position.

2.3.2.1 The Nature of the Parties and Bargaining Position

The nature of the parties to the contract or transaction, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position form part of the specific factors which a court must consider

³²⁰ See the discussion of section 40 in para 2.3.3.1.

³²¹ Section 40.

³²² Section 41.

³²³ Section 48.

³²⁴ Section 52(2)(g).

³²⁵ See also the consumer's right to choose in Ch 2 part C of the Act (s 13-21).

in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.³²⁶

As indicated, a mere inequality of bargaining positions cannot lead a court to conclude that a contract is unfair and vice versa. However, if a supplier exploits a consumer's lack of education, experience and sophistication, the inequality of the bargaining position may lead the court to the conclusion that the contract is unfair.³²⁷

Several broad considerations or individualised elements may play a role when bargaining positions must be judged. These considerations or elements includes whether the injured party had an opportunity to enter into a similar contract with other persons without having to accept a similar term. In terms of section 52(2)(i), the amount for which and the circumstances under which the consumer could have acquired identical or equivalent goods or services from a supplier is one of the individualised factors the court must consider when it has to decide whether a contract is substantively unfair.³²⁸ In respect of the relationship between the parties, the existence of a continuing close working relationship and earlier collaboration may indicate that the bargaining positions of the parties are equal or that inequalities in bargaining positions have not been exploited. Previous dealings may also be a consideration. The existence of previous dealings between parties may be an indication of knowledge of a term, and knowledge may imply fairness.³²⁹

The nature of the parties should also be considered. The court therefore has to consider whether the parties have equal power. Among others, the size of the supplier has to be considered.

³²⁶ Section 52(2)(b).

³²⁷ See also RD Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 295 at 310-311.

³²⁸ See para 2.2.1.3. where this factor is discussed.

³²⁹ See para 3.3.2.4 for a discussion on previous dealings between a supplier and a consumer.

2.3.2.2 The Circumstances of the Transaction or Agreement

The circumstances of the transaction or contract that existed or which were reasonably foreseeable at the time that the conduct or transaction occurred or when the contract was entered into form part of the specific factors, which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged. Such circumstances must be considered, irrespective of whether the Act was in force at that time or not.³³⁰

The court therefore has to consider only the circumstances of the transaction or contract that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or when the contract was entered into and not the circumstances at a later stage. In general, circumstances arising after the conclusion of the contract are irrelevant, because the Act limits circumstances to circumstances which existed or were reasonably foreseeable *at the time that the conduct or transaction occurred or contract was made*. Only the current circumstances that were reasonably foreseeable may be taken into account. Whether circumstances were reasonably foreseeable is a question of fact.³³¹ It is doubtful whether a court will ever ignore what has actually happened even if the Act clearly requires that fairness must be judged having regard to circumstances which existed or which were reasonably foreseeable when the contract was made. The court should, however, as far as possible ignore circumstances that arose after the conclusion of the contract or a change in circumstances in order to protect contractual certainty.

³³⁰ Section 52(2)(c). In this regard, the Act is therefore applied retrospectively.

³³¹ See also RD Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act' (2010) 22 SA Merc LJ 295 at 311 where Sharrock referred to the case of *Ex Parte Lebowa Development Corporation* 1989 (3) SA 71 (T), which dealt with the issue of commercial insolvency. In this case (at 105-106), the court pointed out business risks that are reasonably foreseeable in modern business conditions.

'Circumstances' is not defined, since the definition would differ from contract to contract. When a court has to assess whether a contract or term is fair in light of the circumstances, different relevant factors, including procedural and substantive matters, must be gathered and weighed to decide on which side the balance comes down. The question is always whether a contract or term satisfies the requirement of fairness in relation to the circumstances of each particular contract or case. It may be argued that this contextual approach may lead to uncertainty because a term may be fair against X, but not against Y.³³² However, the circumstances differ from contract to contract and from case to case. The fact that the time frame against which an assessment is made is that of the conclusion of the contract at least creates certainty in the sense that it creates an opportunity for contract planning.

English law has similar provisions on circumstances that should be considered when fairness of a contract is judged. In terms of section 11(1) of the Unfair Contract Terms Act, an exemption clause or notice shall have been fair to include in a contract, having regard to all the circumstances which were or ought to have been known to or in the contemplation of the parties when the contract was made. The fact that fairness (reasonableness) is to be judged at the time the contract was entered into can be criticised, because it prevents the court from taking into account what has actually happened. Where a term seems to be fair when the contract was made, the court will not be able to consider fairness if the contract later on operates harshly. However, assessing the fairness of a term in relation to circumstances at the time of contracting helps with contract planning, because it will cause uncertainty and make contract planning a difficult task if a term is rendered unfair because it appears unfair in the light of unforeseeable events occurring after the contract was made.³³³ It is important to note that the question is not whether the circumstances were fair, but whether the contract was fair having regard to all the circumstances. The same applies to the CPA. Furthermore, regulation 6(1) of the Unfair Contract Terms in Consumer Contracts Regulations sets out the

³³² See para 4 in Ch 3 for a discussion on a contextual approach to fairness.

³³³ See para 2.3.1 in Ch 6.

circumstances to be taken into account in the application of the unfairness tests. The Regulations differs slightly from the Act because the Regulations does not explicitly require circumstances which were reasonably foreseeable at the time of the conclusion of the contract to be taken into account. The Regulations states that the unfairness of a contract term shall be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all circumstances attending the conclusion of the contract. Circumstances attending the conclusion of the contract include factors such as whether the contract was expressed in plain language, whether the terms were presented clearly, bargaining power and the availability of alternatives. The degree of genuine opportunity the consumer had to read and consider the terms of a contract is also an important factor.³³⁴

2.3.2.3 Negotiation between the Parties and the Extent of Negotiation

Whether there was any negotiation between the parties and the extent of it form part of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.³³⁵

This factor leads one to the conclusion that the use of standard terms in contracts may be an indication of unfairness due to a lack of negotiation. That is because non-negotiated terms or standard terms cannot always be regarded as the proper expression of the self-determination of both parties, and fairness intervention is therefore justified.³³⁶ Genuine negotiation may therefore be an indication of fairness. However, that does not mean that all non-negotiated terms are unfair or that all negotiated terms are fair.

³³⁴ See para 3.4.3 in Ch 6 for a discussion of circumstances attending the conclusion of a contract.

³³⁵ Section 52(2)(e).

³³⁶ See para 2.1 in Ch 3.

'Negotiation' is not defined in the Act. In light of the other factors, the court must consider it is assumed that this factor has to do with choice. The question is therefore whether the consumer had a real opportunity to influence the contents of a contract or term. The mere fact that a supplier presents the consumer with more than one pre-formulated alternative to choose from therefore does not qualify as 'negotiation'.

In English law, negotiation is not a factor which has to be taken into account when the fairness of a contract is judged. That is because the Unfair Contract Terms in Contract Regulations apply only to non-negotiated consumer contracts.³³⁷ The Act therefore goes much further than English law, since its aim is not only to address the fairness of standard term contracts.³³⁸ In fact, the general fairness criterion also set out in section 48(1) that a supplier must not negotiate in a manner that is unfair.³³⁹

Taking into account this factor (and the other factors discussed above), it is clear that the court has to consider many factors extrinsic to a contract when making a determination of the fairness of a contract.³⁴⁰ The court must, for example, also take cognisance of circumstances which existed or which were reasonably foreseeable at the time of the conclusion of the contract, the negotiations between the consumer and supplier and the extent of the negotiations. In order to determine whether the consumer had knowledge of a specific term in the contract, regard may be had to trade custom and past dealings between the consumer and the supplier. Facts which may contradict the terms of a contract or the intention of the parties or are extrinsic to a contract must be taken into account by the court. Although such evidence or

³³⁷ See paras 1 and 3.3 in Ch 6.

³³⁸ The fact that the fairness of a negotiated contract is also regulated may be criticised by some as being in conflict with private autonomy. It may also be contended that it is irrational to affect the contents of individually negotiated contracts. However, the mere fact that negotiation takes place does not ensure that fair terms are used. Not all consumers in South Africa are able and free to protect their interests, so an opportunity to negotiate may be meaningless for them.

³³⁹ See para 2.1 for a discussion on the general fairness criterion.

³⁴⁰ See the factors listed in s 52(2).

facts may contradict the terms of the contract or the intention of the parties such evidence or facts may also shed light on the true nature of the contract between the consumer and the supplier. In terms of the common law parol evidence rule, a contract document is regarded as the sole evidence of the terms of a contract.³⁴¹ However, this rule now does not prevent the court from taking extrinsic evidence into account in order to determine whether a contract or term was unfair or not. The parol evidence rule merely prevents one from adding, contradicting or modifying a contract on the basis of extrinsic evidence. In terms of section 52(3)(b)(iii), a court may now make an order requiring the supplier to alter a form or document if the court determined that a term or contract was unfair. The fairness provisions of the Act therefore have an impact on the parol evidence rule. If the Act applies to a contract and the court determined the contract or terms to be unfair, based on the extrinsic evidence it had to consider, the parol evidence does not apply and the court may order the supplier to alter the contract or term.

2.3.3 Other Factors which May Increase Procedural Fairness which are not Listed in Section 48(1) and 52(2)

There are also other measures in the Act, which may contribute to fairness. However, these other factors are not part of the specific factors the court has to consider when it has to determine whether a contract is unfair or not. Some of these factors will be pointed out and discussed below.

In terms of section 52(2), the factors discussed above must be considered when the court has to decide on the fairness of a term or contract. However, these factors must not only be considered when a contravention of section 48 (the general fairness criterion) is alleged, but also when a contravention of section 40 (prohibition of unconscionable conduct) and section 41 (false, misleading or

³⁴¹ See *Johnston v Leal* 1980 (3) SA 927 (A) at 943, where the court held that the aim and effect of the parol evidence rule 'is to prevent any party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way redefine the terms of the contract...'.

deceptive representations) is alleged.³⁴² It must also be considered when the Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct or unfairness.³⁴³ In itself, the measures contained in section 40 and 41 may also contribute to procedural fairness.

Other factors dealing with disclosure of information will also be discussed below. These factors may pro-actively contribute towards the increase of openness or transparency and therefore towards procedural fairness. Since consumer protection through the disclosure of information involves minimal interference with party autonomy, information disclosure requirements cannot even be criticised from a supplier's point of view.³⁴⁴ Consumer protection in South Africa in terms of the Act is not mainly information-based, which can be welcomed because the effectiveness of consumer protection solely through the disclosure of information can be questioned. It can be questioned because it is uncertain whether all South African consumers, especially the vulnerable ones, have the capacity to respond to information or whether they act rationally on the basis of information received.³⁴⁵ Disclosure of information therefore does not necessarily empower the vulnerable consumer. The Act specifically aims at reducing and ameliorating any disadvantages experienced in accessing any supply of goods and services by low-income consumers or communities, minors, seniors and other similarly vulnerable consumers, and most important, consumers whose ability to read and comprehend advertisements, contracts, marks, notices, warnings, labels or instructions is limited by reason of low literacy, visual impairment or limited fluency in the language of the

³⁴² Section 52(1)(b)

³⁴³ Section 52(1)(a).

³⁴⁴ See also para 3 in Ch 3.

³⁴⁵ See also M Donnelly & F White 'The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market' in C Twigg-Flesner, D Parry, G Howells & A Nordhausen (eds) *The Yearbook of Consumer Law 2008* (2008) 271, where the limits of transparency are pointed out and where it is indicated that an essential presumption underlying fairness in the form of disclosure is that consumers will act in a rational way on the information received.

representation.³⁴⁶ However, one must keep in mind that, due to the use of standard terms contracts, the tide has shifted to consumer protection based on a paternalistic attitude towards society, which in turn is based on the view that consumers do not have sufficient information to help the consumers to protect their interests. The disclosure of information enabling a consumer to protect his/her own interests is therefore very important to ensure procedural fairness. Procedural fairness measures therefore oblige suppliers, among others, to disclose specific information. The preamble to the Act also states that it is necessary to develop and employ innovative means to protect the interests of all consumers and to ensure redress for consumers who are subjected to abuse or exploitation in the marketplace. It further states that the Act was enacted in order to promote and protect the economic interests of consumers and to improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual needs.

2.3.3.1 Unconscionable Conduct

One of the aims of the Act is to protect consumers from unconscionable, unfair, unreasonable, unjust or improper trade practices and from any deceptive, misleading, unfair or fraudulent conduct. In order to fulfil this aim, consumers have a right to fair and honest dealing.³⁴⁷ Under this right, the following matters are forbidden: unconscionable conduct such as duress or harassment,³⁴⁸ false,

³⁴⁶ Section 3(1)(b).

³⁴⁷ Section 3(1)(c)–(d). For a full discussion on the right to fair and honest dealing, see E van Eeden 'Consumer Protection' in *LAWSA* vol 5(1) 2 ed (replacement volume) (2010) (ed WA Joubert & JA Faris) par 244–245, 247, 251, 254, 265–266, 294 and 300.

³⁴⁸ Section 40.

misleading and deceptive representations,³⁴⁹ fraudulent schemes and offers,³⁵⁰ and pyramid and related schemes.³⁵¹

The prohibition of unconscionable conduct in marketing, supply, negotiation, conclusion, execution or enforcement of a contract or the demand for payment or the recovery of goods from a consumer aims at preventing unconscionable (unfair) conduct in contractual procedures. This section of the Act may therefore increase procedural fairness.

Unconscionable conduct is conduct having a character contemplated in section 40 or other improper or unethical conduct that would be improper or unethical to a degree that would shock the conscience of a reasonable person.³⁵² Section 40 prohibits the use of physical force against consumers, coercion, undue influence, pressure, duress or harassment, unfair tactics or any similar conduct in connection with the marketing and supply of goods or services, negotiations, conclusion, execution or enforcement of a contract for the supply of goods or services to consumers or demand or collection of payment for goods or services or recovery of goods from consumers.³⁵³ Common law also covers duress and undue influence.³⁵⁴

³⁴⁹ Section 41.

³⁵⁰ Section 42.

³⁵¹ Section 43.

³⁵² See the definition of 'unconscionable' in s 1.

³⁵³ Section 40(1).

³⁵⁴ See para 3.1.4.2 in Ch 2 and para 4 in Ch 4. See also *Broodryk v Smuts* 1942 TPD 47 for an example of duress. Also see *Preller v Jordaan* 1956 (1) SA 483 (A). Under common law, duress and undue influence are based on the idea that undue influence and duress render a contract void or voidable, depending on the facts, because such duress and undue influence influence a person's will and leads to improper obtaining of consensus. When absolute force is used, an agreement will be void *ab initio*, and when relative force or undue influence is used, the agreement will be voidable at the choice of the consumer. Section 40, therefore, in a sense codifies the common law. However, s 40 has a wider ambit. Section 40 deals not only with consensus obtained by improper means, but also with other improper or unethical conduct in marketing, supply, negotiation, execution and enforcement. Section 40 reinforces the idea that

The Act further expands the ambit of the unconscionable conduct provision by stating that it is also unconscionable for suppliers to knowingly take advantage of a consumer because a consumer was unable to protect his/her own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement or any similar factor.³⁵⁵ In order to avoid taking advantage of a consumer's inabilities in such a way, suppliers must make sure that the consumer understands the agreement and is able to protect his/her interests.

2.3.3.2 False, Misleading or Deceptive Representations

The prohibition of false, misleading or deceptive representations in relation to the marketing of goods and services aims at preventing unfair pre-contractual conduct in the process of marketing. It may therefore increase procedural fairness.³⁵⁶

In terms of section 41, suppliers are not allowed to use false, misleading or deceptive representation, innuendo, exaggeration or ambiguity, or must not knowingly allow consumers to believe false, misleading or deceptive facts in relation to the marketing of the goods and services.³⁵⁷ A representation will be a false, misleading or deceptive representation if it falsely states or implies or fails to correct misapprehension on the part of the consumer that: (a) a supplier has a particular status or affiliation, connection, sponsorship or approval that he, she or it does not have; (b) that any goods or services have, *inter alia*, ingredients, characteristics, uses, accessories that they do not have; or (c) are of a particular standard, are new or unused if they are not. The same applies to

parties to a contract should act in good faith and that their conduct should not be improper, unconscionable and against the *boni mores*.

³⁵⁵ Section 40(2).

³⁵⁶ See also para 2.3.1.1. Section 48(2) sets out guidelines, which indicate that a contract or term is unfair. In terms of section 48(2)(c), a contract or term is unfair when the consumer relied upon a false, misleading or deceptive representation.

³⁵⁷ Section 41(1).

any land or immovable property with regard to (a) characteristics that it does not have; (b) the purpose of the land; or (c) the facilities and features of the land.³⁵⁸

2.3.3.3 Other Forms of Disclosure Required by the Act

In consumer protection law, there are usually three levels of information disclosure. These levels aim at helping consumers to make informed choices. They also increase transparency and therefore procedural fairness. The three levels of disclosure are pre-agreement disclosure, entering into a contract and post-contractual disclosure.³⁵⁹

The first level of disclosure entails seeking business in the form of marketing, issuing quotations or estimates, disclosure of prices and disclosure in trade descriptions and labels and the disclosure of re-conditioned or grey market goods. The second level is where the parties enter into a contract, and this level entails formalities and disclosure in the contract document, for example a requirement that a contract must be in writing or that the contract must set out the financial obligations of the party or contain a cautionary statement. The third level of disclosure entails post-contractual disclosure where copies of the contract and sales records are provided to the consumer. All three levels of information disclosure are now made compulsory by the Act. Some of these information disclosure measures will be pointed out below.

2.3.3.3.1 Written Contracts

In terms of section 50(1), the Minister of Trade and Industry may prescribe categories of contracts that should be in writing. It further states that even where an agreement between a supplier and a consumer has been put in

³⁵⁸ Section 41(3)(a)-(c). See also section 41(3)(d)-(k).

³⁵⁹ See PN Stoop 'South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness' (2009) 21 SA Merc LJ 365 at 377-385 for a discussion on the three levels of disclosure.

writing voluntarily, it must satisfy the plain language requirements of the Act³⁶⁰ and the supplier must then send a copy of the agreement to the consumer.³⁶¹ The contract must also set out an itemised breakdown of the financial obligations of the consumer under the contract.³⁶²

Since this section requires a written contract to be in plain and understandable language, it contributes towards procedural fairness. The fact that it requires an itemised breakdown of the consumer's financial obligations increases transparency. It puts suppliers in a position where they have to make informed choices to protect their own interests given their current financial situation.

Section 50(2)(a) states that if a contract between a supplier and consumer is in writing, whether voluntarily or as required by the Act, the contract applies irrespective of whether or not the consumer had signed the agreement. It is dangerous to hold a consumer to a written contract he/she did not sign and it may even open doors to fraud.

2.3.3.3.2 Miscellaneous Disclosure Measures

To ensure sufficient disclosure of information, the CPA requires that certain minimum information must be disclosed to consumers.³⁶³ Under the right to information and disclosure,³⁶⁴ the Act deals with the right to information in plain and understandable language,³⁶⁵ disclosure of the price of goods or services,³⁶⁶

³⁶⁰ Section 22. See also the discussion on plain and understandable language in para 2.3.1.3.

³⁶¹ Section 50(2)(b)(i).

³⁶² Section 50(2)(b)(ii).

³⁶³ For a detailed discussion on all the disclosure measures contained in the Act see W Jacobs, PN Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PELJ* 302 at 324, 329-336, 344 and 358.

³⁶⁴ Chapter 2 Part D of the Act.

³⁶⁵ Section 22. See also para 2.3.1.3.

³⁶⁶ Section 23.

product labelling and trade descriptions,³⁶⁷ disclosure of reconditioned or grey market goods,³⁶⁸ sales records,³⁶⁹ disclosure by intermediaries³⁷⁰ and identification of deliverers and installers.³⁷¹

In addition, the Act also requires that repair or maintenance services may only be conducted once a binding estimate has been provided and the consumer had pre-authorised the charge up to a specific amount.³⁷²

The Act furthermore sets a general standard for marketing. In essence, section 29 prohibits a producer, importer, distributor or service provider from marketing goods or services in a manner that is misleading, fraudulent or deceptive with regard to the nature, properties, advantages or uses of the goods or services, the conditions on or manner in which the goods or services may be supplied, the price of the goods, the existence of a relationship of the price to a previous price or a competitor's price, the sponsoring of an event, or any material aspect of the goods or services.³⁷³

Section 37 prohibits any person from making false representations in respect of the availability, actual or potential profitability, risk or any material aspect of work, business or activity involved in any arrangement for gain.³⁷⁴ Arrangements in terms of which a person invites, solicits or requires persons to conduct work or business from their homes, represents to others as being practicable to conduct the business or work from their homes, or invites, solicits or requires persons to perform work or business or invest money from their homes are regulated in terms of the section.³⁷⁵ Advertisements promoting

³⁶⁷ Section 24.

³⁶⁸ Section 25.

³⁶⁹ Section 26.

³⁷⁰ Section 27.

³⁷¹ Section 28.

³⁷² Section 15.

³⁷³ Section 29(b).

³⁷⁴ Section 37(1).

³⁷⁵ Section 37(1).

these arrangements must be accompanied by a cautionary statement in the prescribed wording and form. The cautionary statement must disclose the uncertainty of the extent of the work, business or activity and the income or benefit to be derived from it. The full name or registered business name of the promoter, as well as the address and contact number of his, her or its primary place of business and the nature of the work, business or activity must be disclosed in the advertisement.³⁷⁶

Direct marketing is also regulated by the Act.³⁷⁷ The Act provides that, should a person directly market goods or services and as a result conclude an agreement or enter into a transaction, the person then has a duty to, in the prescribed form and manner, inform the consumer of his/her cooling-off right in terms of the Act.³⁷⁸

2.3.4 The Standard for Procedural Fairness

The Act does not set an overall and general fairness standard for procedural fairness. The only standard or question to be asked is that concerning the standard required in terms of all the factors or measures which must be applied in the determination of procedural fairness. However, due to the nature of all factors and measures related to procedural fairness, it is clear that openness and transparency are required. Openness and transparency require that terms should be expressed fully, clearly and legibly, with no pitfalls, and that prominence should be given to certain terms which might operate to a consumer's disadvantage.

Under English law, good faith is the overarching standard for procedural fairness imposed by the Unfair Terms in Consumer Contracts Regulations.³⁷⁹ In deciding whether a clause complies with the requirement of good faith in

³⁷⁶ Section 37(2).

³⁷⁷ Sections 11, 12, 16 and 32.

³⁷⁸ Sections 16 and 32(1).

³⁷⁹ See para 3.3 in Ch 6.

terms of the Unfair Terms in Consumer Contracts Regulations, mainly procedural matters or matters related to procedural fairness are taken into account, such as: (a) the strength of the bargaining position of the parties; (b) inducement offered to the consumer; (c) whether the goods were made to the special order of the consumer; (d) whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the general requirement of open and fair dealing; (e) whether a clause came as a surprise to a consumer; (f) whether the supplier took steps to bring a clause to the consumer's attention and to explain it; (g) whether the consumer had a real choice, or whether he/she was in a position to make a real choice; (h) whether the terms were reasonably transparent and whether the terms operated to defeat the reasonable expectations of the consumer; and (i) whether the terms were expressed fully, clearly and legibly.

Good faith seeks to promote fair and open dealing and to prevent unfair surprise and the absence of real choice.³⁸⁰ The majority of these aspects are also addressed by measures or factors aimed at procedural fairness in terms of the South African CPA. These factors also significantly overlap with the procedural factors that must be taken into account by a court in terms of section 52(2) when it has to decide whether a contract or term is unfair or not. The House of Lords in *Director General of Fair Trading v First National Bank*³⁸¹ found that:

'The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations'.

So, good faith can be described as an overarching standard for procedural fairness in terms of the CPA.

³⁸⁰ See para 3.3.1 in Ch 6 for a discussion on good faith.

³⁸¹ [2002] 1 Lloyd's Rep 489 at para 17; [2001] 3 WLR 1297 at para 17.

3 Conclusion

The CPA came into force on 31 March 2011. The Act applies to every transaction occurring within South Africa for the supply of goods and services or the promotion of goods and services, and to the goods and services themselves, unless the transaction is exempted from the application of the Act. The Act, among others, aims at promoting fair business practices and protecting consumers from unconscionable, unfair, unreasonable, unjust or improper trade practices and deceptive, misleading, unfair or fraudulent conduct. The Act also aims at improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour. When one has to interpret the Act, the traditional approaches may not be followed. The Act, in section 2(1) expressly provides that the Act must be interpreted in a manner that gives effect to the purposes of the Act. Furthermore, when interpreting the Act, applicable foreign law, international law, conventions, declarations or protocols may be considered.

Chapter 2 Part G of the Act contains measures dealing with unfair, unjust and unreasonable contract terms. The right to fair, just and reasonable terms and conditions is the first general fairness measure introduced in South African contract law whereby one party can rely on legal assistance if a bargain is unreasonable, unfair or onerous to him/her. However, the Act also contains other provisions related to fairness.

What exactly should be understood under 'fairness', has never been an easy question to answer. The problem with fairness as provided for in the Act, is that it is very difficult to predict with certainty whether a contract is fair. Suppliers therefore struggle to comply with fairness requirements in a pro-active manner. In order to bring some clarity, the concept 'fairness' was analysed in this chapter with reference to substantive and procedural fairness. It was also put within a framework, so as to allow suppliers to understand what 'fairness' entails.

The concepts 'fair', 'just' and 'reasonable' are not defined in the Act. Since these concepts seem to overlap significantly, it is not clear why the legislature used all these concepts to describe and regulate fairness in contracts. It has been submitted that the concept 'unfairness' or 'fairness' would have served this purpose equally well.

Under the right to fair, just and reasonable terms and conditions, the following sections are important: (a) section 48 describes when terms and conditions will be unfair; (b) section 49 sets out when a notice is required for certain terms and conditions; (c) section 50 gives details on when consumer contracts must be in writing; (d) section 51 sets out which transactions, agreements, terms or conditions are prohibited; and (e) section 52 describes what the powers of court are to ensure fair conduct, terms and conditions.

Over and above the fairness provisions contained under the right to fair contracts, the Act contains other provisions related to fairness. To ensure sufficient disclosure of information, the Act requires that certain minimum information must be disclosed to consumers. This ensures transparency and puts consumers in a better position to protect their own interests. Under the right to disclosure and information, the Act, among others, deals with the right to information in plain and understandable language which significantly and proactively contributes towards procedural fairness.

South Africa does not have an administrative body that controls fairness in contracts proactively. Only a court has the power to make orders in respect of unfair contract terms. There is no official body or tribunal with the authority to hear complaints and apply proactive preventative measures in order to ensure that unfair terms, contracts and unconscionable conduct are prevented in accordance with the principle that prevention is better than cure. The Act rather aims at reactive judicial control of unfairness. However, the Act does not make provision for the court to raise the issue of unfairness *mero motu*. A court can only assess fairness if the unfairness is alleged.

Section 48 sets out the general fairness criterion. First, a supplier must not supply, offer to supply or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust. Second, a supplier is not allowed to market any goods or services, or negotiate, or enter into or administer a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable. Third, a supplier must not require a consumer or a person to whom goods or services are supplied at the consumer's direction to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction. To summarise, the general standard provides that an offer to supply, the supply, marketing, entering into a contract, negotiation, administration, waiver of rights, assumption of risk or waiver of supplier's liability, terms or a price that are unfair are not allowed. In order to decide whether a term or contract was indeed unfair, several substantive and procedural factors play a role and must be taken into account, of which some are applied proactively and as preventative measures.

Section 48(2) contains a few guidelines on fairness. If one of these factors exists or is present, it renders a contract or term unfair. This includes that a term or contract is unfair – (a) should it be excessively one-sided in favour of any person other than a consumer; (b) should the terms of the agreement or transaction be so adverse to the consumer that they are inequitable; (c) should a consumer have relied to his/her detriment on a false, misleading or deceptive representation or a statement of opinion provided by or on behalf of a supplier; or (d) should the transaction or agreement have been subject to a term or condition or a notice for which a notice in terms of section 49(1) is required, and the term, condition or notice is unfair, unreasonable, unjust or unconscionable, or the fact, nature and effect of the term, condition or notice was not drawn to the consumer's attention as required by section 49(1).

Section 52(2) also lists specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier

and consumer where it is alleged that the supplier conducted unconscionably, used false, misleading or deceptive representations, or that a contract or contract term is unfair.

All of these guidelines or factors are related either to substantive or to procedural fairness. In order to convert the right to fair contracts or terms from a right to a reality, it is necessary to distinguish between substantive and procedural fairness.

Fairness entails substantive and procedural fairness. Substantive fairness is a distinct virtue of good contracts, which can be measured, as we have seen, against the 'price' of a contract, by a balancing of interests, default rules, reasonable expectations, or pro-actively, by disallowing terms with certain substantive features. Conceptions of substantive fairness may either be generalised or individualised. If fairness is determined with reference to factors external to the contracting parties it is generalised, for example, the market price of goods or services or the availability of alternatives from competitors. If fairness is determined with reference to factors related to consumers' welfare, it is individualised, for example, the effect of terms on the consumer. Procedural fairness is fairness in the formation of a contract, which can be measured against the requirement of transparency. Transparency involves two elements, namely transparency in relation to the terms of a contract and transparency in the sense of not being positively misled, pre-contractually or during the performance of a contract, about aspects of the goods, service, price and terms. Transparency in relation to the terms of a contract refers to whether the contract terms are accessible, in clear language, well-structured and cross-referenced, with prominence being given to terms that are detrimental to the consumer or because they grant important rights to the consumer. Procedural fairness measures usually enable consumers to protect themselves against substantive unfairness.

Chapter 6: The English Law and Unfairness in Contracts

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1 Introduction

There are two basic contractual fairness-oriented regimes in the United Kingdom. The first regime is contained in the Unfair Contract Terms Act 1977 and the second regime is contained in the Unfair Terms in Consumer Contracts Regulations 1999.¹ These two sets of legislation have very different fields of application, although both deal with contractual fairness.² The Unfair Contract Terms Act 1977 basically deals with exemption and limitation clauses and the Unfair Terms in Consumer Contract Regulations 1999 with non-negotiated consumer contracts or so-called standard term contracts. In 2001 the Department of Trade and Industry asked the Law Commission and the Scottish Law Commission to rewrite the law of unfair contract terms into one regime. In 2005 the law commissions published the Unfair Contract Terms Bill and a report on unfair contract terms.³ To date, it has not been accepted. Even if accepted in the future, much can, from a South African perspective, be learnt from the application of the current two fairness-oriented regimes, such as the interpretation and application of the concept of reasonableness under the Unfair Contract Terms Act and the concept of good faith under the Unfair Terms in Consumer Contract Regulations 1999. Furthermore, section 2(2) of the South African Consumer Protection Act provides that '[w]hen interpreting or applying this Act, a person, court or Tribunal or the Commission may consider appropriate foreign and international law ...'.

¹ Statutory Instrument 1999 no 2083.

² See a discussion on differences between these sets of legislation in AG Guest 'The Terms of The Contract' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 14-125; C Willet *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 75-81.

³ Law Commission No 298 and Scottish Law Commission No 199 *Unfair Terms in Contracts* (2005). See also E Macdonald 'Unifying Unfair Terms Legislation' 67 (2004) *Modern Law Review* at 69-93 for an outline of the proposed legislation.

2 The Unfair Contract Terms Act 1977

2.1 Introduction and Background

The Unfair Contract Terms Act 1977 came into force on 1 February 1978.⁴ It consists of three parts:⁵ Part I applies to England, Wales and Northern Ireland, Part II applies only to Scotland and Part III to the whole United Kingdom. The Unfair Contract Terms Act 1977 followed on the Law Commission's reports on exemption clauses.⁶ The aim of the law commissions was to examine the desirability of prohibiting, invalidating or restricting the effects of clauses that exempt or limit liability for negligence and the extent to which the manner of incorporating such terms should be regulated.⁷ The law commissions found that these clauses in many cases operated against public interest and that the judicial attitude of suspicion of such clauses was well founded.⁸ It also found that these clauses were often introduced in such way that the affected party remained ignorant of their presence or import and that, even if the party knew of the existence of such clause, was unable to appreciate such clause.⁹ Further, the party may not have had sufficient bargaining power to refuse to accept certain terms.¹⁰ Another problem was that the risk of carelessness or of failure to deliver the appropriate standards of performance was moved onto the party who was not liable for it or who was unable to guard against it, which in fact reduced the economic pressure to maintain high standards of performance.¹¹ So, the misuse of these clauses and the need for devising satisfactory

⁴ See section 31(1).

⁵ Section 32 of the Unfair Contract Terms Act 1977.

⁶ Law Commission No 69 and Scottish Law Commission No 39 *Exemption Clauses in Contract, Second Report* (1975) and Law Commission No 24 and Scottish Law Commission No 12 *Exemption Clauses in Contract, First Report* (1969).

⁷ Law Commission No 69 and Scottish Law Commission No 39 *Exemption Clauses in Contract, Second Report* (1975) at iii.

⁸ *Idem* at 4.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

methods of controlling the use of these clauses were clear.¹² The Unfair Contract Terms Act 1977 was also enacted in order to bridge the gap between the classical theory of contract law and the social reality. The gap was created by the rule that a person who signs a contract without fraud or duress should be bound by its contents because contracts are individually negotiated agreements and that the absence of fraud, misrepresentation or duress implies freedom of consent.¹³ Before I discuss the concept of unfairness in contract law with reference to the Unfair Contract Terms Act 1977, it is necessary to give a cursory analysis of the Act's field of application and scope.

2.2 Field of Application of the Unfair Contract Terms Act 1977

The name of the Unfair Contract Terms Act 1977 is misleading, because the Act does not deal with unfair terms as such, but rather with exemption and limitation clauses (so-called 'exemption clauses'), dealing with the exclusion or the limitation of certain responsibilities of traders to consumers, and with non-contractual notices which exclude or restrict delictual liability. It also does not affect every exemption clause in all contracts. The Act only addresses certain situations.¹⁴ The situations in which the Act may be relevant are: (1) cases of negligence and breach of contract;¹⁵ (2) contracts in which one party deals as consumer or on the other party's written standard terms of business;¹⁶ (3) indemnity clauses;¹⁷ (4) guarantees of goods in consumer contracts;¹⁸ contracts for the sale of goods or hire-purchase;¹⁹ (5) other contracts under which

¹² *Ibid.*

¹³ H Beale 'Unfair Contract Terms Act 1977' (1978) 5 *British Journal of Law and Society* 114 at 114-115.

¹⁴ The provisions of the Act that regulate specific situations are sometimes referred to as the 'active sections' of the Act. See E Macdonald *Exemption Clauses and Unfair Terms* (1999) 78.

¹⁵ Section 2.

¹⁶ Section 3.

¹⁷ Section 4.

¹⁸ Section 5.

¹⁹ Section 6

possession or ownership of goods passes;²⁰ (6) liability for misrepresentation;²¹ (7) the effect of breach of contract;²² (8) and evasion by means of secondary contracts.²³ The first part of the Act²⁴ applies to exclusion and limitation clauses; and to notices making liability or its enforcement subject to restrictive or onerous conditions, or excluding any right or remedy, or excluding or restricting rules of evidence or procedure.²⁵ The Act applies to business and consumer contracts.

Certain contracts are specifically excluded from the application of the Act.²⁶ The exclusions include (a) contracts of insurance;²⁷ (b) any contract so far as it relates to the creation, transfer, or termination of interest in land;²⁸ (c) any contract so far as it relates to the creation, termination or transfer of a right or interest in any patent, trade mark, copyright, design, technical or commercial information or other intellectual property;²⁹ (d) any contract so far as it relates to the formation or dissolution of a company or relating to its constitution or rights or obligations of its members;³⁰ (e) any contract so far as it relates to the creation of transfers of securities or of any right or interest in securities;³¹ (f) contracts of charterparty or carriage of goods by sea except for personal injury or death of a resulting from negligence (in favour of consumers);³² (g) contracts of

²⁰ Section 7.

²¹ Section 8.

²² Section 9.

²³ Section 10.

²⁴ Sections 1-14.

²⁵ Section 13(1). The reference to excluding or restricting rules of evidence or procedure in section 13(1)(c) does not refer to a written agreement to submit differences to arbitration. See section 13(2).

²⁶ Sections 2-4 of the Act do not apply to the excluded contracts. For a full discussion of these and other exclusions under the Act see E Macdonald *Exemption Clauses and Unfair Terms* (1999) 89-95.

²⁷ Section 1(2) and item 1(a) of Sch 1 to the Act.

²⁸ Section 1(2) and item 1(b) of Sch 1 to the Act

²⁹ Section 1(2) and item 1(c) of Sch 1 to the Act.

³⁰ Section 1(2) and item 1(d) of Sch 1 to the Act.

³¹ Section 1(2) and item 1(e) of Sch 1 to the Act.

³² Section 1(2) and item 2 of Sch 1 of the Act read with s 2(1).

employment;³³ (h) international supply contracts;³⁴ and (i) contracts in which English law is the proper law of the contract only by choice of the parties.³⁵

Sections 2-7 which deal with the abovementioned issues only apply to 'business liability'.³⁶ That is liability for breach of obligations or duties arising from things done or to be done in the course of a business or from the occupation of premises used for business purposes.³⁷ In terms of section 14 'business' includes 'a profession and the activities of any government department or local or public authority'. The use of this wide and imprecise word has been criticized for making it difficult to determine whether a certain activity constitutes 'business'.³⁸ However, the law commissions in their reports indicated that the aim was not to exclude the application of the Act in connection with all purely private relationships, but only to exclude services supplied in a purely personal capacity.³⁹ In *Customs & Excise Commissioners v Fisher*⁴⁰ a taxpayer was assessed on value added tax in respect of contributions on the basis that they constituted consideration for the supply of services 'in the course of a business' carried on by the taxpayer within section 2(2)(b) of the Finance Act 1972. The court in that case

³³ Section 1(2) and item 1(4) of Sch 1 of the Act read with s 2(1) and (2).

³⁴ Section 26.

³⁵ Section 27.

³⁶ Section 1(3). However, it does not only apply to business liability if s 6 on sale of goods or hire purchase applies.

³⁷ Section 1(3)(a)-(b). Also see E Macdonald *Exemption Clauses and Unfair Terms* (1999) 79.

³⁸ See *Lloyd v Brassey* [1969] 2 QB 98 at 106; [1969] All ER 382 at 386, a case which deals with dismissal as a result of redundancy, where the court of appeal per Salmon LJ held that "business" is an imprecise word and may have a very wide meaning'. Also see E Macdonald *Exemption Clauses and Unfair Terms* (1999) 79-81 for a discussion of the concept 'business'.

³⁹ Law Commission No 69 and Scottish Law Commission No 39 *Exemption Clauses in Contract, Second Report* (1975) at 3.

⁴⁰ [1981] BVC 392; [1981] 2 All ER 147.

accepted certain principles from which guidance may be obtained in order to determine whether a certain activity constitutes 'business':⁴¹

'Firstly, ... it will never be possible or desirable to define exhaustively the word 'business' By providing in s 45(1) [of the Finance Act 1972] that 'business' includes any trade, profession or vocation it is clear that a wide meaning of 'business' is intended ... Secondly, in determining whether any particular activity constitutes a business it is necessary to consider the whole of that activity as it is carried on in all its aspects ... Thirdly, the aspects of that activity which are to be considered, as being indicia or criteria for determining whether the activity is a business, are six in number and ... listed by counsel for the Crown as follows: (a) whether the activity is a 'serious undertaking earnestly pursued'... or 'a serious occupation, not necessarily confined to commercial or profit-making undertakings' ... (b) whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity ... (c) whether the activity has a certain measure of substance as measured by the quarterly or annual value of taxable supplies made ... (d) whether the activity was conducted in a regular manner and on sound and recognised business principles ... (e) whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration ... (f) lastly, whether the taxable supplies are of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them ... Fourthly, ... certain aspects of the activity are not to be considered as relevant for determining whether the activity is a 'business', or are not decisive of that question, namely whether the activity is pursued for profit or whether pursued for some other private purpose or motive. Fifthly and finally, if ... all, or, alternatively a sufficient number, of those indicia or criteria were satisfied in sufficient measure to override any contra-indications which might be seen in the facts, then as a matter of law the activity must be held to be a business.'

The Act does not only apply to business liability, but is further limited in section 1(3)(a) of the Act to duties or obligations arising from things done or to be done in the 'course of a business'.⁴² Section 12 of the Act also refers to the 'course of a business' in another context and this term has been interpreted by the court of appeal in *R & B Custom Brokers v United Dominions Trust Ltd & another*.⁴³ The court held that a degree of regularity is required before a transaction could be said to be an integral part of the

⁴¹ [1981] BVC 392 at 398; [1981] 2 All ER 147 at 154.

⁴² The South African Consumer Protection Act applies to every 'transaction' occurring within the Republic of South Africa (see s 5). A 'transaction' means '... in respect of person acting in the ordinary course of business ... an agreement ...'. The Consumer Protection Act therefore applies to transactions entered into in the 'ordinary course of business'. In the interpretation of this phrase, the English law may be considered. However, ss 2-7 of Unfair Contract Terms Act 1977 apply to duties or obligations arising from things done or to be done in the 'course of a business'. See the discussion in par 1.2 in Ch 5.

⁴³ [1988] 1 WLR 321; [1988] 1 All ER 847.

business carried on and so entered into in the course of that business.⁴⁴ The reference to 'in the course of a business' rather than 'in the course of business' is indicative of a wide meaning.⁴⁵ The phrase 'things done or to be done by a person. in the course of a business' also indicates that activities merely incidental to a specific business should be construed as having been made in the 'course of a business'.⁴⁶ Therefore, once-off transactions are also regulated by the Act without the need to establish any regularity in their occurrence.⁴⁷ From the above it is clear that the Act does not touch every exemption clause in every contract, but it imposes some control over exemption clauses. The effect of the Act is that it renders certain clauses or notices ineffective in all circumstances and others effective, if they are reasonable, depending on which active section of the Act applies. I will now continue to discuss the most important sections of the Act for purposes of this chapter, which form the standard for unfairness in contracts.

2.3 General Standard for Unfairness Imposed by the Unfair Contract Terms Act 1977

In essence, the key benchmarks of fairness in the Act are default rules relating to responsibilities of traders and expectations consumers may have regarding the way in which traders will perform their obligations.⁴⁸

⁴⁴ [1988] 1 WLR 321 at 330; [1988] 1 All ER 847 at 854-855. See E Macdonald *Exemption Clauses and Unfair Terms* (1999) 81-83 where the author indicates that this meaning of 'in the course of a business' is far too restrictive to be adopted in the context of section 1(3) and where the meaning of 'in the course of a business' is discussed.

⁴⁵ See also E Macdonald *Exemption Clauses and Unfair Terms* (1999) 82.

⁴⁶ *Ibid.* For support for a wider approach see *Stevenson & another v Rogers* [1999] QB 1028; [1999] 2 WLR 1064; [1999] 1 All ER 613 where the court of appeal interpreted the phrase 'in the course of a business'.

⁴⁷ See E Macdonald *Exemption Clauses and Unfair Terms* (1999) 82.

⁴⁸ See C Willet *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 119.

The aim of the Act is to impose limits on the extent to which liability for breach of contract, for negligence or other breach of duty can be avoided by means of contract terms and other methods.⁴⁹ The Act therefore focuses on fairness, rather than freedom.⁵⁰

The general standard for fairness imposed by the Unfair Contract Terms Act 1977 is reasonableness and is contained in section 11 of the Act.⁵¹ Substantive fairness and procedural fairness matters are taken into account in terms of the reasonableness test. The terms deviating from the default rules may not be fair depending on the interests affected by them, the substantive picture and whether there was procedural fairness.⁵²

Section 11 in effect contains three tests for reasonableness. Section 11(1), (3) and (5) contains the general test for reasonableness for contracts and notices. Section 11(4) contains the second test and section 11(2) read with Schedule 2 contains the third test. Each test has its own field of application.

As indicated above, the Act renders certain clauses ineffective in all circumstances⁵³ and others effective, if they are reasonable, depending on which active section of the Act applies.⁵⁴ So-called absolute fairness is applied when terms are automatically regarded ineffective. This is the most radical form of fairness. Absolute fairness is usually applied in order to protect irreducible rights or certain substantive interests by

⁴⁹ Preamble to the Unfair Contract Terms Act 1977.

⁵⁰ See the discussion in C Willet *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 156-157 on a fairness-oriented approach versus a freedom-oriented approach. See also the discussion in Ch 2 paras 3 and 4.

⁵¹ See AG Guest 'The Terms of The Contract' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 (2004) at par 14-092 – par 14-099 for a discussion on examples of terms which were held by the courts to be unfair.

⁵² Section 11; also see C Willet *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 148.

⁵³ For example, in terms of section 2, liability for death or personal injury resulting from negligence cannot be excluded or limited.

⁵⁴ See the discussion on absolute fairness in Ch 3 para 2.1.

giving absolute protection to consumers.⁵⁵ Where terms are rendered ineffective in all circumstances, the default rules in the Act serve as fairness norms (reasonableness norms) and where the context must be considered the default rules in the Act serve as triggers for a broader assessment of fairness (reasonableness).⁵⁶

Before I continue with a discussion of the three tests for reasonableness in the Unfair Contract Terms Act, 1977 it is important to note that the proposed Unfair Contract Terms Bill⁵⁷ also contains a basic reasonableness test for contract terms in section 14(1) and for notices in section 14(2). In these tests, transparency is the core element of reasonableness.

2.3.1 The First Test for Unreasonableness: Contract Terms and Notices

The first test applies to most consumer contracts. In terms of section 11(1) a contract term shall have been fair and reasonable to include in a contract, having regard to all the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties⁵⁸ when the contract was made.⁵⁹ The fact that

⁵⁵ An example is the prohibition of the exclusion of liability for death caused by negligence. Also see C Willet *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 129-131 where different rationales for making certain terms wholly ineffective are discussed.

⁵⁶ See C Willet *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 128-129 where the two approaches of the Unfair Contract Terms Act to fairness are discussed.

⁵⁷ See para 1.

⁵⁸ Only factors which were or ought reasonably to have been in the contemplation of *all the parties* when the contract was made are relevant.

⁵⁹ In terms of section 52(2) of the South African Consumer Protection Act, the court must consider specific factors when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged. One of these factors, as set out in section 52(2)(c) is 'those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made ...'. Section 52(2)(c) of the Consumer Protection Act is therefore similar to s 11(1) of the Unfair Contract Terms Act 1977. Section

reasonableness is to be judged at the time the contract was made can be, on the one hand, criticized.⁶⁰ What if a term that seemed to be reasonable when the contract was made turn out to operate harshly? If a court has to judge reasonableness at the time the contract was made, the court will have then to ignore what has actually happened. On the other hand, assessing the reasonableness of a clause in relation to circumstances at the time of contracting should assist with contract planning.⁶¹ It will cause uncertainty and make contract planning a difficult task if a clause is rendered unreasonable because it appears unreasonable in the light of unforeseeable events occurring after the contract was made.⁶²

Section 11(3) requires that, in relation to a notice having a non-contractual effect, it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or would have arisen. So, again the basic standard to be met in order to satisfy the reasonableness-test is that it should be fair and reasonable in all the relevant circumstances. The difference between the two tests in sections 11(1) and 11(3) is the time frame of assessment. Furthermore, the question is not whether there are not circumstances in which a clause may be fair and reasonable but whether, in the circumstances, it would be fair and reasonable to allow reliance on the clause.⁶³ So, when a court has to assess whether a clause is fair and

11(1) may therefore be considered when interpreting and applying s 52(2)(c) of the Consumer Protection Act. See the discussion of section 52(2)(c) of the Consumer Protection Act in Ch 5 para 2.3.2.2.

⁶⁰ See HG Beale, WD Bishop & MP Furmston *Contract Cases and Materials* 5 ed (2008) 1011 where the authors raise the point that it seems doubtful whether a court will ever ignore what has actually happened even if the Act clearly requires that reasonableness must be judged having regard to circumstances which existed or which ought to be reasonably to have been known or in the parties' contemplations when the contract was made.

⁶¹ See E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 169.

⁶² See also E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 169 and AG Guest 'The Terms of The Contract' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 14-084.

⁶³ See the court of appeal judgment in *George Mitchell (Chesterhall) v Finney Lock Seedy Ltd* [1983] QB 284 at 307; [1983] 1 All ER 108 at 121. The court at [1983] QB 284 at 301; [1983] 1 All ER 108 at 117 referred to *R W Green Ltd v Cade Bros Farm* [1978] 1 Lloyd's Rep 602 at 607-608 regarding the question

reasonable, different relevant factors, including procedural and substantive matters, must be gathered and weighed to decide on which side the balance comes down.⁶⁴ The question is always whether a clause satisfies the requirement of reasonableness in relation to each particular case.⁶⁵ This approach may lead to uncertainty because a clause may be fair and reasonable against P, but not against S. Section 11(1) makes it clear that the time frame, against which an assessment is made, is that of the conclusion of the contract. So, this approach at least creates an opportunity for contract planning.⁶⁶

The party claiming that a contract term or notice satisfies the requirement of reasonableness has to prove that it does.⁶⁷ The burden of proof falling on the person

whether a clause was fair and reasonable. In that case Griffiths J held that the specific terms had been evolved over twenty years, that they were therefore not conditions imposed by the strong upon the weak; but were rather a set of trading terms upon which both sides were apparently content to do business. The judge in that case added that in the circumstances no moral blame attached to either party; neither of them knew, nor could be expected to know, that the potatoes were infected. In that case the judge held that the exemption clause was fair and reasonable and that the seed merchants were entitled to rely on it.⁶⁴ See *George Mitchell (Chesterhall) v Finney Lock Seedy Ltd* [1983] 2 AC 803 at 815-816; [1983] 2 All ER 737 at 743 where the then House of Lords (now the Supreme Court of the United Kingdom), per Lord Bridge of Harwich, held that: 'It would not be accurate to describe such a decision as an exercise of discretion. But a decision under any of the provisions referred to will have this in common with the exercise of a discretion, that, in having regard to the various matters to which the modified section 55(5) of the 1979 Act, or section 11 of the 1977 Act [Unfair Contract Terms Act] direct attention, the court must entertain a whole range of considerations, put them in the scales on one side or the other and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded on some erroneous principle or was plainly and obviously wrong'.

⁶⁴ See the decision of the court of appeal in *Phillips Products Ltd v Hyland & another* [1987] 1 WLR 659 CA at 668; [1987] 2 All ER 620 at 628-629.

⁶⁵ See also E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 162.

⁶⁷ Section 11(5).

who wants to rely on an exemption clause has been welcomed previously by the court as being of great significance in cases in light of the obscurity of evidence or the absence of evidence on issues which are, or might be, relevant on the issue of reasonableness.⁶⁸

2.3.2 *The Second Test for Unreasonableness: Clauses Limiting Liability to a Specified Sum (Limitation Clauses)*

The second test for unreasonableness which applies to consumer contracts, deals with the limitation of the amount of compensation recoverable. In terms of section 11(4) if a contract term or notice restricts liability to a certain sum of money, the requirement of reasonableness should be judged by having regard in particular to the resources that could be expected to be available to a person for the purpose of meeting the liability should it arise.⁶⁹ Regard must also in particular be had to how far it was open to a person to cover himself by insurance.⁷⁰ Section 11(4) does not only cover cases where a specified sum is stated in a contract, but also where a contract states a formula for determining a sum.⁷¹

Although section 11(4) points out the factors that must in particular be taken into account, all relevant factors must still be taken into account.⁷² The cost of insurance is,

⁶⁸ As per the court of appeal in *Phillips Products Ltd v Hyland & another* [1987] 1 WLR 659 CA at; [1987] 2 All ER 620 at 628.

⁶⁹ Section 11(4)(a).

⁷⁰ Section 11(4)(b).

⁷¹ See E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 172.

⁷² *Singer Co (UK) Ltd v Tees and Hartlepool Authority* [1988] 2 Lloyd's Rep 164. The then House of Lords (now the Supreme Court of the United Kingdom) in *Smith v Eric S Bush (a firm)* [1990] 1 AC 831 at 858; [1989] 2 All ER 514 at 531 (the only real consumer case) indicated that it is impossible to draw up an exhaustive list of the factors that must be taken into account when a judge is faced with the question of reasonableness. However, the court listed matters that should always be considered.

for example, in general, an important factor to be considered when considering reasonableness. The House of Lords in *Smith v Eric S Bush (a firm)*⁷³ held that

‘Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss. ... I would not, however, wish it to be thought that I would consider it unreasonable for professional men in all circumstances to seek to exclude or limit their liability for negligence. Sometimes breathtaking sums of money may turn on professional advice against which it would be impossible for the adviser to obtain adequate insurance cover and which would ruin him if he were to be held personally liable. In these circumstances it may indeed be reasonable to give the advice on a basis of no liability or possibly of liability limited to the extent of the adviser’s insurance cover.’

This decision clearly illustrates that what must be considered is not only whether a party relying upon an exemption clause could have insured himself, but also the cost of the insurance. When liability is limited to a specific sum, that sum also has to be justified in order to comply with the requirements of reasonableness.⁷⁴

2.3.3 *The Third Test for Unreasonableness: Clauses for the Sale of Goods or Hire-purchase or Terms under which Possession or Ownership of Goods Passes*

The third test for reasonableness applies only to terms caught by sections 6 and 7 of the Unfair Contract Terms Act, 1977. These sections deal with terms in contracts for the sale of goods or hire-purchase or terms in other contracts under which possession or ownership of goods passes. In order to determine whether terms for the purposes of section 6 and 7 satisfy the requirement of reasonableness, regard must be had to specific matters set out in Schedule 2 to the Act.⁷⁵ However, this does not prevent a court or arbitrator from holding that a term which purports to exclude or restrict liability is not a term of the contract.⁷⁶ Schedule 2 lists certain factors to which regard is to be had

⁷³ [1990] 1 AC 831 at 858-859; [1989] 2 All ER 514 at 531-532.

⁷⁴ *St Albans City and District Council v International Computers Ltd* [1995] FSR 686; (11/11/1994) TLR 1. For a discussion on the reasonableness of a limitation of liability to a specified sum see E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 172-175.

⁷⁵ Section 11(2).

⁷⁶ Section 11(2).

in particular for the purposes of sections 6(3), 7(3) and (4), 20 and 21. These are sections that are relevant in commercial contracts in relation to exclusion or restriction of implied terms as to description, quality and fitness in contracts for the sale and supply of goods.⁷⁷ Exclusions or restrictions are allowed as against persons dealing otherwise than as consumers, only insofar as a term satisfies the requirement of reasonableness. Regard is to be had to any of the following factors listed in Schedule 2 that are relevant (the list is therefore not exhaustive): (a) the strength of the parties' bargaining position relative to each other;⁷⁸ (b) whether the customer received any inducement to agree to the term or whether he had an opportunity to enter into a similar contract with other persons without having to accept a similar term;⁷⁹ (c) whether the customer knew or ought reasonably to have known of the existence and extent of a term;⁸⁰ (d) where a term excludes or restricts any liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with it would be practicable;⁸¹ (e) whether the goods were manufactured, adapted or processed to the special order of a customer.⁸² Although Schedule 2 only applies to commercial contracts, the court has drawn upon it in several consumer cases, because these factors are usually relevant to reasonableness of exemption clauses.⁸³

⁷⁷ Commercial contracts in these circumstances refer to exclusion or restriction of liability as against a person dealing otherwise than as a consumer. See section 6(3).

⁷⁸ Schedule 2, item (a). Among other things, alternative means by which the customer's requirements could have been met should also be taken into account.

⁷⁹ Schedule 2, item (b). Among other things, regard must be had to any custom of the trade and any previous course of dealings between the parties.

⁸⁰ Schedule 2, item (c).

⁸¹ Schedule 2, item (d). See commentary on the time frame for assessment in par 2.3.1 .

⁸² Schedule 2, item (e).

⁸³ See the decisions of the court of appeal in *Phillips Products Ltd v Hyland & another* [1987] 1 WLR 659 CA at 668; [1987] 2 All ER 620 at 628 and *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 608; [1992] All ER 257 at 262 where the court confirmed that although Schedule 2 does not always apply in cases, the considerations set out in Schedule 2 are usually regarded as being of general application to the question of reasonableness. See also E Peel 'Making More Use of the Unfair Contract Terms Act 1977: *Stewart Gill Ltd v Horatio Myer & Co Ltd*' 56 (1993) *Modern Law Review* 98 at 102 where it is that

The guidelines set out in Schedule 2 are not exhaustive. In *Overseas Medical Supplies Ltd v Orient Transport Services Ltd*⁸⁴ the court identified further factors that may be relevant in the question of reasonableness, and which had been regarded as relevant by previous courts: (a) the way in which the relevant conditions came into being and are used generally; (b) in relation to the equality of bargaining position, the question of whether the customer was obliged to use the services of the supplier and how far it would have been practical or convenient to go elsewhere; (c) the clause must be viewed as a whole, rather than taking any particular part of it in isolation; (d) the reality of the consent of the customer to the supplier's clause; (e) in cases of limitation rather than exclusion of liability, the size of the limit in comparison with other limits in widely used standard terms; (f) the availability of insurance, although it is not a decisive factor; (g) the presence of a term allowing for an option to contract without the limitation clause but with an increase in price.⁸⁵

The proposed Unfair Contract Terms Bill⁸⁶ contains a non-exhaustive list of relevant factors that can be taken into account when reasonableness of an exemption clause is assessed. The list includes the following factors: (a) the other terms of the contract; (b) the terms of any other contract on which the contract depends; (c) the balance of the parties' interests; (d) the risks to the party adversely affected by the term; (e) the possibility and probability of insurance; (f) other ways in which the interests of the party adversely affected by the term might have been protected; (g) the extent to which the term (whether alone or with others) differs from what would have been the case in its absence; (h) the knowledge and understanding of the party adversely affected by the

although it is only necessary to apply the guidelines laid down in Schedule 2 of the Unfair Contract Terms Act 1977 to the test of reasonableness required under sections 6 and 7, they must be regarded as being of general application.

⁸⁴ [1999] CLC 1243 at 1248; [1999] EWCA Civ 1449 at par 10.

⁸⁵ See also AG Guest 'The Terms of The Contract' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 14-086.

⁸⁶ Section 14(4). See also para 1.

term, the strength of the parties' bargaining positions, and the nature of the goods or services to which the contract relates.

2.3.3.1 Inequality of Bargaining Power⁸⁷

Although inequality of bargaining power is not determinative of unreasonableness, bargaining power is probably the most basic factor in relation to the requirement of reasonableness. The House of Lords in *Smith v Eric S Bush (a firm)*⁸⁸ held that bargaining power is a factor that should always be considered when deciding whether an exemption clause is reasonable. Bargaining power must be judged by broad considerations.⁸⁹ One such broad consideration is also listed in Schedule 2. That is whether the injured party had an opportunity to enter into a similar contract with other persons without having to accept a similar term.⁹⁰ When deciding whether a customer had an opportunity of entering into a similar contract with some other persons, the court should evaluate that opportunity. The court should for example, ask how practical and convenient it is to contract with some other person. The court of appeal in *Overseas Medical Supplies Ltd v Orient Transport Services Ltd*⁹¹ held that in relation to the question of equality of bargaining position, it will have regard not only to the question of whether the customer was obliged to use the services of the supplier but also to the

⁸⁷ In terms of section 52(2) of the South African Consumer Protection Act, the court must consider specific factors when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged. One of these factors, as set out in section 52(2)(b) is 'the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position'. Section 52(2)(b) of the Consumer Protection Act is therefore similar to Schedule 2, item (a) of the Unfair Contract Terms Act 1977. Schedule 2, item (a) may therefore be considered when interpreting and applying section 52(2)(b) of the Consumer Protection Act. See the discussion of schedule 52(2)(b) of the Consumer Protection Act in Ch 5 par 2.3.2.1 .

⁸⁸ [1990] 1 AC 831 at 858.

⁸⁹ See the findings of the Queen's Bench Division in *Stag Line Ltd v Tyne Ship Repair Group (The Zinnia)* [1984] Lloyd's Rep 211 at 222.

⁹⁰ Schedule 2, item (b).

⁹¹ [1999] CLC 1243 at 1248; [1999] EWCA Civ 1449 at par 10.

question of how far it would have been practicable and convenient to go elsewhere. Another factor that plays a role is the relationship between the parties. In *Rolls Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd*⁹² the court, for example, held that a continuing close working relationship and earlier successful collaboration indicate that the bargaining power of the parties are equal even if one of the parties is in a much stronger position. In general, it can be reasoned that the use of standard terms in an industry indicates inequality of bargaining power.⁹³

In the Law Commissions' Report,⁹⁴ guidance is given on factors that may be considered in assessing the strength of parties' bargaining positions. It involves questions such as whether the transaction was unusual for either or both of them, whether the complaining party was offered a choice over a particular term, whether that party had a reasonable opportunity to seek a more favourable term, whether that party had a realistic opportunity to enter into a similar contract with other persons, but without that term, whether that party's requirements could have been met in other ways, whether it was reasonable, given that party's abilities, for him or her to have taken advantage of any choice offered over a particular term or choice to meet his or her requirements in other ways.⁹⁵

⁹² [2003] EWHC 2871 (TCC) at par [77]; [2003] WL 23145261 at par [77].

⁹³ Just before the Unfair Contract Terms Act, 1977 came into force, the court of appeal in *Levison & another v Patent Steam Carpet Cleaning Co Ltd* [1997] 3 WLR 90 at 96 (the court took cognisance of the then Unfair Contract Terms Bill) with reference to *Suisse Atlantique Society d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 406, held that exemption clauses differ from other clauses because in the ordinary course a consumer has no time to read them, and if he did read them he would probably not understand them. And, if the customer understands and objects to an exemption clause, he would in general be told to take it or leave it. If he then went to another supplier the result would be the same. That is in contrast with the idea of freedom of contract that implies choice or room for bargaining.

⁹⁴ See para 1.

⁹⁵ Note 45 of the Explanatory Notes.

2.3.3.2 Availability of Alternatives⁹⁶

Availability of alternatives is the second factor listed under Schedule 2, but it, as already indicated, plays a role in the strength of the bargaining power of the parties. The House of Lords in *Smith v Eris S Bush (a firm)*⁹⁷ held that when assessing the availability of alternatives, it must be considered whether it would have been reasonably practicable to obtain the advice (or goods) from an alternative source taking into account considerations of costs and time. So, the reality of an alternative is as important a factor as the alternative itself.

2.3.3.3 Knowledge⁹⁸

⁹⁶ In terms of section 52(2) of the South African Consumer Protection Act, the court must consider specific factors when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged. One of these factors, as set out in s 52(2)(i) is 'the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier'. Section 52(2)(i) of the Consumer Protection Act is therefore similar to Schedule 2, item (b) of the Unfair Contract Terms Act 1977. Schedule 2, item (b) may therefore be considered when interpreting and applying section 52(2)(i) of the Consumer Protection Act. See the discussion of section 52(2)(i) of the Consumer Protection Act in Ch 5 paras 2.2.1.3.2 and 2.3.2.1.

⁹⁷ [1990] 1 AC 831 at 858; [1989] 2 All ER 514 at 531. See, in general, *R W Green Ltd v Cade Bros Farm* [1978] 1 Lloyd's Rep 602 regarding a choice of level of risk. See also E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 177-178.

⁹⁸ In terms of section 52(2) of the South African Consumer Protection Act, the court must consider specific factors when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged. One of these factors, as set out in section 52(2)(h) is 'whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any (i) custom of trade; and (ii) any previous dealings between the parties'. Section 52(2)(h) of the Consumer Protection Act is therefore similar to Schedule 2, item (c) of the Unfair Contract Terms Act 1977. Schedule 2, item (c) may therefore be considered when interpreting and applying section 52(2)(h) of the Consumer Protection Act. See the discussion on schedule 52(2)(h) of the Consumer Protection Act in Ch 5 para 2.2.2.4.

Whether the customer knew or ought reasonably to have known of the existence and extent of an exemption clause is the third factor listed under Schedule 2. So, although difficult to prove, knowledge of the existence and extent of an exemption clause indicates that such clause is reasonable. There are two types of knowledge:⁹⁹ (a) actual knowledge;¹⁰⁰ and (b) knowledge the customer ought to have had.¹⁰¹ However, the court of appeal in *Britvic Soft Drinks Ltd & others v Messer UK Ltd & another* held that it is legitimate to consider and take into account the actual extent and quality of the knowledge of a party. However, the court of appeal in *Schenkers Ltd v Overland Shoes Ltd*¹⁰² looked at knowledge the customer ought to have had. It found that the specific clause was in common use in the trade concerned. The court also held that the clause was sufficiently well known that any failure by the defendants to put their minds to the clause could not be relied on to establish that it was unfair or unreasonable to include it in a contract. This also implies that a trade practice may indicate the reasonableness of an exemption clause.¹⁰³ Since knowledge is about the existence and extent of a term, a consumer may for example be aware of the existence of a term but could not have been expected to know the content of the term.¹⁰⁴ It is difficult to assess reasonableness against knowledge if there is no specific measure to inform a customer of the presence of a specific term, such as an obligation to notify a customer of any term that purports to

⁹⁹ Schedule 2, item (c).

¹⁰⁰ The requirement of actual knowledge is a subjective requirement. See R Bradgate 'Unreasonable Standard Terms' (1997) 60 *Modern Law Review* 582 at 591.

¹⁰¹ The requirement of knowledge the customer ought to have had is an objective requirement. So, the law asks whether the proffesor could reasonably believe that the profferee was assenting to his terms. This part of the test is not wholly objective: The proffesor must actually (subjectively) believe that the profferee assents. See R Bradgate 'Unreasonable Standard Terms' (1997) 60 *Modern Law Review* 582 at 591.

¹⁰² (26/02/1998) TLR 1 at 2; [1998] 1 *Lloyd's Rep* 498 at 507.

¹⁰³ In this regard, see s 52(2)(h) of the South African Consumer Protection Act in terms of which the following must be taken into account: 'whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement ... having regard to any (i) custom of trade...'. This also implies that a trade practice may indicate fairness.

¹⁰⁴ See *Charlotte Thirty and Bison Ltd v Croker Ltd* (1990) 24 *Con LR* 46 and E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 181.

limit or waive risk. An obligation to notify a customer of a specific term can contribute towards increased transparency.¹⁰⁵ It would also be easier for a proffesor to say that he reasonably believes that the profferee assented if he has taken reasonable steps to bring the terms to the profferee's notice.¹⁰⁶

The Law Commissions, in the notes to the Unfair Contract Terms Bill¹⁰⁷ listed factors that might be relevant in considering a party's knowledge and understanding. These factors, although placing a huge burden on the other party, will help to assess knowledge more effectively. They are: (a) any previous course of dealing between the parties;¹⁰⁸ (b) whether the party knew of a particular term; (c) whether the party understood its meaning and implications; (d) what a person other than the party, but in a similar position, would usually expect in the case of a similar transaction; (e) the complexity of the transaction; (f) the information given to the party about the transaction before or when the contract was made; (g) whether the contract was transparent; (h) how the contract was explained to the party; (i) whether the party had a reasonable opportunity to absorb any information given; (j) whether the party took professional advice or it was reasonable to expect the party to have done so; and (k) whether the party had a realistic opportunity to cancel the contract without charge.

¹⁰⁵ In this regard see section 49 of the South African Consumer Protection Act which places an obligation on a supplier to notify consumers of the presence of certain notices or provisions in consumer agreements which makes it easier to assess reasonableness against knowledge. See the discussion on s 49 of the Consumer Protection Act in Ch 5 para 2.3.1.2.

¹⁰⁶ R Bradgate 'Unreasonable Standard Terms' (1997) 60 *Modern Law Review* 582 at 591-592.

¹⁰⁷ Note 44 in the Bill. See para 1.

¹⁰⁸ In this regard, see section 52(2)(h) of the South African Consumer Protection Act in terms of which the following must be taken into account: 'whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement ... having regard to ... any previous dealings between the parties'. This implies that previous dealings between parties may be an indication of fairness.

2.3.3.4 Practicability of Compliance

Where a term excludes or restricts any liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with the term would be practicable is the fourth factor listed under Schedule 2. A time limitation clause is an example of such clause, for example a clause stating that a buyer may only institute a claim against a seller if the buyer gave notice of the claim to the seller within six months of entering into the agreement. If compliance with the condition will, within the contemplation of the parties lead to unexpected results, it indicates that the clause is unreasonable and *vice versa*. Since what the parties could reasonably have contemplated is taken into account, actual breach of the condition is only relevant to the extent that it was within the parties' contemplation at the time of contracting.¹⁰⁹

2.3.3.5 Special Order-goods¹¹⁰

Whether goods were manufactured, adapted or processed to the special order of a customer is a factor that is relevant in assessing the reasonableness of exemption clauses.¹¹¹ So, if a seller manufactures goods for buyers and the buyers indicate standards that the goods have to comply with or how the goods will be used, it will be unreasonable for the sellers to limit their liability in its entirety and to leave the buyers

¹⁰⁹ See E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 183.

¹¹⁰ In terms of section 52(2) of the South African Consumer Protection Act, the court must consider specific factors when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged. One of these factors, as set out in section 52(2)(j) is '... whether the goods were manufactured, processed or adapted to the special order of the consumer'. Section 52(2)(j) of the Consumer Protection Act is therefore similar to Schedule 2, item (e) of the Unfair Contract Terms Act 1977. Schedule 2, item (e) may therefore be considered when interpreting and applying s 52(2)(j) of the Consumer Protection Act. See the discussion of section 52(2)(j) of the Consumer Protection Act in Ch 5 para 2.2.2.5 .

¹¹¹ Schedule 2, item (e).

without any remedy.¹¹² However, if an exemption clause gives a buyer the right to test and reject the special order-goods and the buyer does not exercise the right to reject the goods, the exemption clause will be reasonable.¹¹³

2.4 Final Remarks Regarding Reasonableness in terms of the Unfair Contract Terms Act, 1977

To summarize, the Unfair Contract Terms Act, 1977 applies to exemption clauses. Section 11 requires that such clause must be reasonable. Reasonableness is a matter that must be decided on the circumstances as they were when the contract was made. This allows for contract planning. Section 11 in effect contains three tests for reasonableness. Section 11(1), (3) and (5) contains the general test for reasonableness for contracts and notices. Section 11(4) contains the second test and section 11(2) read with Schedule 2 contains the third test. Except for providing factors to be taken into account when assessing the reasonableness of a term or contract, the court cases do not provide real guidance to contract drafters and planners in respect of what is required to pass the reasonableness test.¹¹⁴ The House of Lords, however, in *Smith v Eric S Bush (a firm)*¹¹⁵ indicated that it is impossible to draw up an exhaustive list of the factors that must be taken into account when a judge is faced with the question of reasonableness of an exemption, exclusion or limitation clause. However, the court listed, in a list similar to Schedule 2, substantive and procedural matters that should always be considered. The factors are: (1) Were the parties of equal bargaining power? (2) In the case of advice, would it have been reasonably practicable to obtain advice from alternative sources taking into account considerations of costs and time?

¹¹² See the Court of Appeal's decision in *Edmund Murray Ltd v BSP International Foundation Ltd* [1992] 33 Con LR 1 (CA). See also and E Macdonald *Exemption Clauses and Unfair Terms* 2nd ed (2006) at 184.

¹¹³ See the decision of the Queen's Bench Division in *British Fermentation Products Ltd v Compair Reveal Ltd* [1999] WL 487199; [1999] 2 All ER (Comm) 389 (QBD); 66 Con LR 1 (QBD).

¹¹⁴ See also E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 167-168.

¹¹⁵ [1990] 1 AC 831 at 858-859; [1989] 2 All ER 514 at 530-531.

(3) How difficult is the task being undertaken for which liability is being excluded? If a dangerous or difficult undertaking is involved, there may risks of failure which would be a pointer towards reasonableness of the exclusion. (4) What are the practical consequences of the decision on the question of reasonableness, such as the money potentially at stake and the ability of the parties to bear the loss involved (insurance)? The first and second factors relate to procedural fairness.¹¹⁶

The third and fourth factors mentioned by the court, relate to the substance of a term, because aspects such as the availability and cost of insurance and the difficulty of a task being carried out are aspects that can be determined from the terms.¹¹⁷ The last factor also focuses on the consequences and therefore opens the door to predict the outcomes of finding a clause to be reasonable or unreasonable.

In his criticism, Willet¹¹⁸ opined that the court, in *Smith v Eric S Bush (a firm)*, didn't focus on general substantive fairness, ie, whether there were favourable terms balancing out the detriment caused by the exclusion of limitation of liability. He suggests that the court could have held that the contract price would have been higher if the contract was without the exclusion. The court also didn't find that the factors it listed applied to other exclusions than the exclusion of liability for negligence. Further, the relationship between procedural and substantive fairness was not analysed, for example how transparency affects the substance of a term. The court also did not address choice or the possibility of getting a second opinion. So, to conclude, the court cases do not provide real guidance to contract drafters and planners in respect of what is required to pass the reasonableness test.

From a South African perspective, the interpretation of the Unfair Contract Terms Act 1977 may be of guidance when interpreting the South African Consumer Protection Act. Although these pieces of legislation have very different fields of application, the factors

¹¹⁶ See C Willet *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 155.

¹¹⁷ See C Willet *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 154-155.

¹¹⁸ *Fairness in Consumer Contracts – The Case of Unfair Terms* (2007) 155-158.

that may be taken into account when assessing unreasonableness in terms of section 11(1) and Schedule 2 to the Unfair Contract Terms Act 1977 are similar to the factors that must be considered when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms are alleged in terms of sections 52(1) and (2) of the Consumer Protection Act.

3 The Unfair Terms in Consumer Contracts Regulations

3.1 Introduction and Background

Article 100A of the Treaty establishing the European Economic Community¹¹⁹ empowers the Council of the European Communities to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishing and functioning of the internal market. On 5 April 1993, as a result, the Council of the European Communities adopted the Unfair Contract Terms Directive.¹²⁰ In terms of this Directive member states have to provide a minimum level of consumer protection in respect of unfair contract terms.¹²¹ Article 10(1) of the Directive obliges member states to bring laws, regulations and administrative provisions into force to comply with the Directive not later than 31 December 1994. The provisions of the Directive can be divided in three sections:¹²² (1) an attempt to formulate a European concept of unfairness;¹²³ (2) interpretation and plain language;¹²⁴ and (3) the legal consequences of unfairness.¹²⁵

¹¹⁹ The Treaty of Rome of 25 Mar 1957.

¹²⁰ EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC).

¹²¹ Art 8.

¹²² G Howells & T Wilhelmsson *EC Consumer Law* (1997) at 88-89.

¹²³ Articles 3 and 4.

¹²⁴ Article 5.

¹²⁵ Articles 6 and 7.

Article 3 sets a general standard for unfairness. It states that a term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumers. This implies that the Directive aims at addressing issues associated with standard form contracts.¹²⁶ In the Annex to the Directive an indicative and non-exhaustive list of terms which may be regarded as unfair is set out. Article 4(1) makes provision for guidelines on assessing unfairness. It provides that unfairness shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependant. Article 4(2) limits the scope of the Directive since it provides that in so far as contract terms are in plain, intelligible language, assessment of the unfair nature of the terms shall not relate to the definition of the subject matter of the contract, nor to the adequacy of price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other. The focus on plain language in article 4(2) is significant. It implies that the Directive does not require consumer contracts to be substantively fair, but it does require them to be clear, because clarity is essential for effective market competition between terms.¹²⁷

Article 5 states that all written contract terms must always be drafted in plain, intelligible language.¹²⁸ It also provides that where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.¹²⁹

¹²⁶ See the discussion on the exclusion of individually negotiated contracts in G Howells & T Wilhelmsson *EC Consumer Law* (1997) 91-93.

¹²⁷ H Collins 'Good Faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229 at 234-238.

¹²⁸ See the discussion on section 22 of the Consumer Protection Act, which contains the right of information in plain and understandable language, in Ch 5 para 2.3.1.3.

Article 6 provides that unfair terms are not binding on a consumer. Article 7 places a duty on all member states to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts.

The Unfair Contract Terms Act 1977 was not amended in order to give effect to the Directive, but as a result, the Unfair Terms in Consumer Contracts Regulations 1994¹³⁰ were implemented. The Unfair Terms in Consumer Contract Regulations 1999¹³¹ replaced these regulations and came into force on 1 October 1999.¹³² In 2005 the law commissions proposed a single piece of legislation to replace the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 in the form of the Unfair Contract Terms Bill and a report on unfair contract terms.¹³³ To date, the Bill has not been accepted. Before I discuss the concept of unfairness in contract law with reference to the Unfair Terms in Consumer Contracts Regulations 1999, it is necessary to give a cursory analysis of the Regulations' field of application and scope.

3.2 Field of Application of the Unfair Terms in Consumer Contracts Regulations 1999

The Unfair Terms in Consumer Contracts Regulations 1999 is largely based on the EC Directive. The Regulations, with certain exceptions, apply in relation to unfair terms in contracts between a seller or supplier and a consumer.¹³⁴ The Regulations provide for a fairness test in respect of non-negotiated consumer contracts or so-called standard

¹²⁹ See also s 4(4) of the Consumer Protection Act in Ch 5 para 2.3.1.3.3. Section 4(4) also provides that the interpretation most favourable to the consumer must prevail.

¹³⁰ Statutory Instrument 1994 no 3159.

¹³¹ Statutory Instrument 1999 no 2083.

¹³² Regulation 1.

¹³³ Law Commission No 298 and Scottish Law Commission No 199 *Unfair Terms in Contracts* (2005).

¹³⁴ Regulation 4(1). A 'consumer' is defined in reg 3 as any natural person who, in contracts covered by the Regulations, is acting for purposes which are outside his trade, business or profession. A 'seller or supplier' is defined in reg 3 as any natural or legal person who, in contracts covered by the Regulations, is acting for purposes relating to his trade, business or profession, whether publicly or privately owned.

term contracts which have not been individually negotiated.¹³⁵ A term 'not having been individually negotiated' is a term which has been drafted in advance and the consumer therefore has not been able to influence the substance of the term.¹³⁶ Certain terms are excluded from the application of the Regulations. Regulation 6(2) provides that in so far as contract terms are in plain, intelligible language, assessment of the unfair nature of the terms shall not relate to the definition of the subject matter of the contract, nor to the adequacy of price and remuneration, as against the services or goods supplied in exchange. So, so-called core terms will not be subjected to the fairness test if they are in plain and intelligible language.¹³⁷ Furthermore, the Regulations do not apply in relation to contractual terms which reflect mandatory statutory or regulatory provisions or the provisions of principles of international conventions to which the Member States or the European Community are party.¹³⁸

¹³⁵ Regulation 5. See also E Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contract Regulations: *Director General of Fair Trading v First National Bank*' (2002) 65 *Modern Law Review* 763.

¹³⁶ Regulation 5(2). See also the case of *Bryen & Langley v Boston* [2005] EWCA Civ 973 and the discussion in E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 207-210.

¹³⁷ See also E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) at 188 and 213-215. See the discussion by SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 15-043 where it is stated that the Regulations make two requirements of contract terms. That is, that: (1) they should be fair, and (2) they should be expressed in plain and intelligible language.

¹³⁸ Regulation 4(2). See SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) at par 15-013 – par 15-020 and par 15-030 – 15-042 for a discussion contracts to which the Regulations apply.

3.3 General Standard for Unfairness Imposed by the Unfair Terms in Consumer Contracts Regulations

Regulation 5(1) provide that an unfair term is a contractual term¹³⁹ which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. If a supplier or seller claims that a contractual term was individually negotiated, they have to show that it was.¹⁴⁰ Furthermore, Schedule 2 contains an indicative and non-exhaustive list or grey list of terms which may be regarded as unfair.¹⁴¹

The court of appeal in *Director General of Fair Trading v First National Bank Plc*¹⁴² analysed the elements of the test of unfairness of a contractual term as set out in the Regulations. The elements are: (1) an absence of good faith; (2) a significant imbalance in the parties' rights and obligations under the contract; and (3) detriment to the consumer.¹⁴³

¹³⁹ The reference to 'contractual term' implies that the Regulations apply to contractual terms and not to non-contractual clauses and notices. However, the Unfair Contract Terms Act 1977 may apply to them.

¹⁴⁰ Regulation 5(4). The Regulations do not contain any provision addressing the burden of proof in relation to fairness of a term, so the normal burden applies, that is the consumer has to prove that a term is unfair.

¹⁴¹ Regulation 5(5). The list is identical to the list in the Directive. The list is similar to the list of terms presumed to be unfair published in the Regulations under the South African Consumer Protection Act. See Ch 5 par 2.2.1.1.2. For a comprehensive discussion on the list of terms see SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) at par 15-069 – par 15-088.

¹⁴² [2000] EWCA Civ 27 at par 26.

¹⁴³ See also E Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contract Regulations: *Director General of Fair Trading v First National Bank*' (2002) 65 *Modern Law Review* 763 at 768 and R Stone *The Modern Law of Contract* 8 ed (2009) 333-337.

3.3.1 Good Faith

One concern is that the Directive and Regulations give very little guidance on the meaning and scope of 'good faith'.¹⁴⁴

The preamble of the Directive merely states that '... in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'. Some of these aspects are familiar to the English law. In the context of determining reasonableness in terms of the third test for reasonableness in the Unfair Contract Terms Act 1977, (1) the strength of the bargaining position of the parties, (2) inducement offered to the consumer, and (3) whether the goods were made to the special order of the consumer are some of the five factors listed in Schedule 2.¹⁴⁵ It is therefore clear that the concepts of 'reasonableness' and 'good faith' overlap significantly. Another aspect that should be taken into account in terms of the Directive is the legitimate interests of the other party.¹⁴⁶

¹⁴⁴ See SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) at par 15-047 and R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 690. See also R Brownsword, G Howells & Thomas Wilhelmsson 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willet (ed) *Aspects of Fairness in Contract* (1996) 25 at 39 and G Teubner 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11 at 11-12.

¹⁴⁵ See para 2.3.3. See also SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 15-046. In South Africa, these factors are also factors that the court must in terms of section 52(2) when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged.

¹⁴⁶ In terms of section 52(2) of the South African Consumer Protection Act, the court must consider specific factors when unconscionable conduct, false, misleading or deceptive representations or unfair,

The most important feature of the test for unfairness is the concept of 'good faith'. Its implementation gave rise to some concern in England, because it is not an established or well-defined concept in the English law.¹⁴⁷ England, like South Africa, always addressed the issue of unconscionability of unfair contracts by means of a collection of different doctrines such as duress, undue influence and restraint of trade. Modern consumer protection legislation in general moves the emphasis away from the maxim *caveat emptor* to regulating procedural aspects such as behaviour during the bargaining process or pre-contractual behaviour with the aim of preventing abuse of bargaining position and consumer exploitation. The focus on behaviour during the bargaining process or pre-contractual behaviour leads one to the conclusion that a duty to bargain in good faith exists.¹⁴⁸ The appeal court in *Bryen & Langley Ltd v Boston*¹⁴⁹ came to a similar conclusion in its application of regulation 5(1). It found that in assessing whether a term that has not been individually negotiated is unfair, it is necessary to consider not merely the commercial effects of the term on the relative rights of the parties but, in particular, whether the term has been imposed on the consumer in circumstances which

unreasonable or unjust contract terms is alleged. One of these factors, as set out in section 52(2)(f) is 'whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not necessary for the legitimate interest of the supplier'. Section 52(2)(f) of the Consumer Protection Act in a sense overlaps with the preamble of the Directive: the Consumer Protection Act places the focus on the legitimate interests of the supplier by taking into account whether he did anything that was not necessary for his legitimate interest, while the Directive places the focus on the legitimate interest of the consumer by stating that the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account. See the discussion of section 52(2)(f) of the Consumer Protection Act in Ch 5 para 2.2.2.3.

¹⁴⁷ M Dean 'Unfair Contract Terms: The European Approach' (1993) 56 *Modern Law Review* 581 at 584; H Collins 'Good Faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229 at 229 and 245. In South Africa majority in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) para [22] held that good faith could not be accepted as an independent basis for not enforcing or setting aside a contract. See the discussion in Ch 4 para 2.4.

¹⁴⁸ See also M Dean 'Unfair Contract Terms: The European Approach' (1993) 56 *Modern Law Review* 581 at 585-586.

¹⁴⁹ [2004] EWCA Civ 973 para 45.

justify a conclusion that the supplier has fallen short of the general requirement of fair dealing. Collins is also of the opinion that 'good faith' refers to the necessity of pursuing the so called 'fair dealing', that is re-establishing consumer consent through complete knowledge and correct mechanisms of choice (procedural fairness) and good faith promotes the fair deal, that is making an overall evaluation of the different interests involved (substantive fairness).¹⁵⁰ On the one hand, it may seem that the interpretation of this concept of good faith which is limited to the procedural aspects of unfairness is preferred by the court.¹⁵¹ On the other hand, the court of appeal and the House of Lords in *Director General of Fair Trading v First National Bank Plc*¹⁵² found that 'good faith' has a double operation and that any purely procedural or even predominantly procedural interpretation of the requirement of 'good faith' must be rejected. The court found that it has a procedural aspect, which requires the supplier to consider the consumer's interest.¹⁵³ A court may, however, uphold a clause that might be unfair if it came as a surprise if the supplier took steps to bring it to the consumer's attention and to explain it. The court also found that good faith has a substantive aspect. Some clauses may cause such an imbalance that they will always be treated as unfair.¹⁵⁴

The Court of Appeal further found that

¹⁵⁰ H Collins (ed) *Standard Contract Terms in Europe – A Basis for and a Challenge to European Contract Law* (2008) 191.

¹⁵¹ See *Munkenbeck & Marshall v Harold* [2005] EWHC 356 (TCC) at par 15 where the court found that certain points are relevant to the question whether the requirement of good faith mentioned in regulation 5(1) has been satisfied. These points are: whether the terms are unusual and onerous and whether they were drawn to the consumer's attention.

¹⁵² [2000] EWCA Civ 27 at para 28 and [2002] 1 Lloyd's Rep 489 at para 36; [2001] 3 WLR 1297 at para 36.

¹⁵³ This leads to an overlap with one other of the three factors that should be taken into account, namely a significant imbalance in the parties' rights and obligations under the contract. See par 3.3.2.

¹⁵⁴ See also H Collins (ed) *Standard Contract Terms in Europe – A Basis for and a Challenge to European Contract Law* (2008) 191-192.

'... the 'good faith' element seeks to promote fair and open dealing, and to prevent unfair surprise and the absence of real choice. A term to which the consumer's attention is not specifically drawn but which may operate in a way which the consumer might reasonably not expect and to his disadvantage may offend the requirement of good faith. Terms must be reasonably transparent and should not operate to defeat the reasonable expectations of the consumer. The consumer in choosing whether to enter into a contract should be put in a position where he can make an informed choice.'¹⁵⁵

It must, however, be kept in mind that the Regulations apply to non-negotiated terms, so the Regulations address the issue of fairness in standard form contracts. The major problem with standard form contracts is usually the lack of transparency.¹⁵⁶ This problem can be addressed by focusing on procedural fairness at a preventative level. The Office of Fair Trading¹⁵⁷ also takes the stance that the test of unfairness takes note of how a term could be used and what a consumer is likely to understand by the wording of a clause.¹⁵⁸ The Office of Fair Trading is likely to conclude that a term has potential for unfairness if it is likely to mislead consumers, or be unintelligible to them.

The House of Lords in *Director General of Fair Trading v First National Bank*¹⁵⁹ found that:

'The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of

¹⁵⁵ At para 29.

¹⁵⁶ The Law Commissions' *Joint Consultation Paper, Unfair Terms in Contracts* (2002) (Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119) at par 4.108-4.109. See also E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 229-230.

¹⁵⁷ See regulations 10, 11 and 12. The Office of Fair Trading consider any complaints about the unfairness of a contract term and it believes that a term is unfair, it has powers to ask a court for an injunction to prevent it being used or recommended for use. However, only the courts can finally decide whether a term is or is not unfair.

¹⁵⁸ See Office of Fair Trading 3 (1997) *Unfair Contract Terms Bulletin* at 7. See also E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 230.

¹⁵⁹ [2002] 1 Lloyd's Rep 489 at para 17; [2001] 3 WLR 1297 at para 17.

experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations'.¹⁶⁰

So, according to the court openness requires that terms should be expressed fully, clearly and legibly, with no pitfalls and that prominence should be given to certain terms which might operate to a consumer's disadvantage.¹⁶¹ In deciding whether a clause complies with the requirement of good faith, mainly procedural matters or matters related to procedural fairness are taken into account, such as:¹⁶² (1) the strength of the bargaining position of the parties, (2) inducement offered to the consumer, (3) whether the goods were made to the special order of the consumer, (4) whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the general requirement of open and fair dealing, (5) whether a clause came as a surprise to a consumer, (6) whether the supplier took steps to bring a clause to the consumer's attention and to explain it, (7) whether the consumer had a real choice or was in a position to make a real choice, (8) whether the terms were reasonably transparent and whether it operated to defeat the reasonable expectations of the consumer, and (9) whether the terms were expressed fully, clearly and legibly.¹⁶³ All of these factors pertain to transparency, openness and fair dealing.

¹⁶⁰ At para 17.

¹⁶¹ See also sections 22 and 49 of the South African Consumer Protection Act which require contract, terms and notices to be in plain and understandable language and that a supplier must notify a consumer of the presence of certain notices and terms. See the discussion in Ch 5 paras 2.3.1.2 and 2.3.1.3.

¹⁶² See R Brownsword, G Howells & Thomas Wilhelmsson 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willet (ed) *Aspects of Fairness in Contract* (1996) 25 at 40-45 where it is stated that good faith looks is a procedural test, which requires (1) disclosure and (2) choice.

¹⁶³ Many of these factors are also required by the South African Consumer Protection Act. In terms of section 52(2) of the Consumer Protection Act, the court must consider specific factors when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged. These factors are similar to the factors listed in section 52(2) of the Consumer Protection Act. Furthermore, section 49 of the Consumer Protection Act requires that a supplier must notify a consumer of the presence of certain notices and terms. This may lead to the conclusion that good faith is in effect required by the Consumer Protection Act. See the discussion in Ch 5 para 2.3.1.2.

Finally, it is also clear that good faith means different things both within a particular legal system and between legal systems.¹⁶⁴

3.3.2 Significant Imbalance in the Parties' Rights and Obligations under the Contract

'Significant imbalance' is not defined in the Regulations. It, however, first directs attention to the substantive unfairness of the contract and it overlaps substantially with that of the absence of good faith. A term which gives a significant advantage to the seller or supplier without a countervailing benefit to the consumer, such as a price reduction, might fail to satisfy this part of the test of an unfair term.¹⁶⁵

It is clear that a significant imbalance is required and not merely any imbalance. The House of Lords in *Director General of Fair Trading v First National Bank*¹⁶⁶ set out the approach to be taken in deciding whether a 'significant imbalance' exists. It found that:

'The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the

¹⁶⁴ The House of Lords in *Director General of Fair Trading v First National Bank Plc* [2002] 1 Lloyd's Rep 489 at para 17; [2001] 3 WLR 1297 at para 17 confirmed that the member states do not have a common concept of fairness or good faith and that the Directive does not aim to state the law of any member state. See also SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 15-047 and R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 690, G Teubner 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11 at 11-12, and R Brownsword, G Howells & Thomas Wilhelmsson 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willet (ed) *Aspects of Fairness in Contract* (1996) 25 at 39 where it is stated that the European interpretation of the concept of good faith can be taken to connote simply a particular state of mind, namely one free from suspicion or notice – good faith in the sense of pure heart and empty head, but that the implications of such an interpretation would be dire.

¹⁶⁵ See the decisions of the court of appeal and House of Lords in *Director General of Fair Trading v First National Bank Plc* [2000] EWCA Civ 27 at par 30 and [2002] 1 Lloyd's Rep 489 at par 37; [2001] 3 WLR 1297 at par 37.

¹⁶⁶ [2002] 1 Lloyd's Rep 489 at para 17; [2001] 3 WLR 1297 at para 17.

imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the regulations seek to address.'

Accordingly, what is required is that terms and obligations must be weighed and compared, which means that matters related to substantive fairness are taken into consideration.¹⁶⁷

3.3.3 *Detriment to the Consumer*

'Detriment to the consumer' is one of the three elements of the unfairness test. It merely indicates that the Regulations are aimed at 'significant imbalance' against the consumer rather than the seller or supplier.¹⁶⁸ It may also indicate that there can sometimes be a significant imbalance, but no detriment to the consumer.¹⁶⁹

3.4 ***Circumstances to be Taken into Account in the Application of the Unfairness Test***

Regulation 6(1) sets out the circumstances to be considered in the application of the unfairness test in regulation 5(1). It states that

¹⁶⁷ See also section 48(2) of the South African Consumer Protection Act which also requires that the terms of a contract must be weighed and compared. It provides that, a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied or the terms of the transaction or agreement are so adverse to the consumer as to be inequitable. See the discussion in Ch 5.

¹⁶⁸ E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 231.

¹⁶⁹ R Lawson *Exclusion Clauses and Unfair Contract Terms* 8 ed (2005) 221.

'Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent'.

3.4.1 Terms of the Contract

All the terms of the contract are relevant, although not all of them are subject to the fairness test. Core terms are not, if they are in plain and intelligible language, subject to the fairness test.¹⁷⁰ The terms of other dependant contracts are also relevant.¹⁷¹

3.4.2 Nature of the Goods or Service

The nature of the goods or services for which the contract was concluded must be taken into account. This include aspects such as what was to be supplied, risks, the complexity of what is being supplied, what the consumer knew, or might be expected to know about it and the nature of the transaction.¹⁷² If a consumer, for example, hires industrial drilling tools for use at home, the fact the tools are usually used in a commercial context by an experienced person may argue for the fairness of an exemption clause.¹⁷³

3.4.3 Circumstances Attending the Conclusion of the Contract

In terms of the Unfair Contract Terms Act 1977, fairness is a matter that must be decided on the circumstances as they were when the contract was made, because this

¹⁷⁰ Regulation 6(2). See also para 3.2.

¹⁷¹ Regulation 6(2).

¹⁷² *Bryen & Langley v Boston* [2004] EWHC 2450 (TCC) para 45.

¹⁷³ See SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 15-054 for more examples.

approach allows for contract planning.¹⁷⁴ Although the fairness test is applied at the level of a particular contract, ie, at the time when the contract was made, it must also be applied as preventative measure.¹⁷⁵ However, one may ask how fairness can be applied in a preventative action, since the contract is, at that time, not yet in existence. In this regard, the House of Lords in *Director General of Fair Trading v First National Bank Plc*¹⁷⁶ found that ‘... [t]he system of pre-emptive challenges is a more effective way of preventing the continuing use of unfair terms and changing contracting practice than *ex casu* actions ... The directive and the regulations must be made to work sensibly and effectively and this can only be done by taking into account the effects of contemplated or typical relationships between the contracting parties.’

‘Circumstances attending the conclusion of the contract’ should also encompass factors such as whether the terms were expressed in plain language, whether the terms were presented clearly, bargaining power and the availability of alternatives.¹⁷⁷ Furthermore, the fact that a seller has put pressure on a consumer to conclude the contract or to do so in haste, without time to think about it, point against fairness of any term which

¹⁷⁴ See para 2.3.1. In terms of section 11(1) of the Unfair Contract Terms Act 1977 a contract term shall have been fair and reasonable to include in a contract, having regard to all the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. In terms of section 52(2) of the South African Consumer Protection Act, the court must consider specific factors when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged. One of these factors, as set out in section 52(2)(c), is ‘those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made ...’. See the discussion on section 52(2)(c) of the Consumer Protection Act in Ch 5 para 2.3.2.2.

¹⁷⁵ E Macdonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 229.

¹⁷⁶ [2002] 1 Lloyd's Rep 489 at par 33; [2001] 3 WLR 1297 at par 33.

¹⁷⁷ These factors are also taken into consideration in the application of the third reasonableness test. See the discussion on Schedule 2 to the Unfair Contract Terms Act 1977 in para 2.3.3. The Unfair Contract Terms Bill also contains a basic reasonableness test for contract terms in section 14(1) and for notices in section 14(2). In these tests, transparency is the core element of reasonableness. The same factors are taken into account in the evaluation of transparency.

prejudices the consumer. The degree of genuine opportunity for the consumer to read and consider the terms of a contract is also an important factor.¹⁷⁸

3.5 The Requirement of Plain Language

Openness is one of the core elements of good faith. As indicated in paragraph 3.4.3, openness requires that terms should be expressed fully, clearly and legibly, with or pitfalls and that prominence should be given to certain terms which might operate to a consumer's disadvantage.¹⁷⁹ Furthermore, regulation 6(1) sets out the circumstances to be considered in the application of the unfairness test in regulation 5(1). One of the factors that must be taken into account is all the circumstances attending the conclusion of the contract.¹⁸⁰ 'Circumstances attending the conclusion of the contract' encompass factors such as whether the terms were expressed in plain language, whether the terms were presented clearly, bargaining power and the availability of alternatives. So, when deciding whether a term is fair, whether a term was expressed in plain and intelligible language is one of the factors which is considered. Above that, regulation 7(1) requires that a seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language. This requirement of plain language is a procedural one, because it focuses on the drafting of the term, rather than its effect. 'Plain' language is language that cannot be misunderstood or that does not give rise to doubts and 'intelligibility' encompasses the style used and how a contract is printed on paper.¹⁸¹

The Office of Fair Trading issued some guidelines in relation to plain language: (1) the contract should be comprehensible by the consumer without recourse to legal advice;

¹⁷⁸ SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 15-055. See also Schedule 2, item (2)(1)(i) which provides that terms with the object of irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract may be regarded as unfair.

¹⁷⁹ See para 3.3.1.

¹⁸⁰ See para 3.4.3.

¹⁸¹ P Nebbia *Unfair Contract Terms in European Law* (2007) 136.

(2) legal jargon should be avoided; (3) the contract should be in direct and ordinary language; (4) the first and second person should be used rather than naming and defining the parties; (5) cross-references should be minimised; (6) headings should be used; and (7) the size of the print should be large enough to be legible without difficulty.¹⁸²

Regulation 7(2) deals with the effect of failure to comply with the requirement of plain and intelligible language. It provides that if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail. Furthermore, if a 'core term' is not written in plain and intelligible language, it will be subjected to the fairness test of reg 5.¹⁸³ Non-compliance may also constitute an important factor in the assessment of the fairness of a term.¹⁸⁴

3.6 Final Remarks Regarding Unfairness in terms of the Unfair Terms in Consumer Contracts Regulations 1999

Many of the considerations to be taken into account in assessing the fairness of a term for the purposes of the Regulations, especially in relation to the requirement of good faith, are the same or similar to the considerations to be taken into account in assessing the reasonableness of a term under the Unfair Contract Terms Act 1977. The 'definitions' of both good faith and reasonableness in effect allow a court to take into account whatever factors it thinks right in deciding whether a term should be enforced. So these tests are quite similar in that they both inquire whether a term should be

¹⁸² Office of Fair Trading 2 (1996) *Unfair Contract Terms Bulletin* at 8. See also SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 15-090.

¹⁸³ See para 3.2.

¹⁸⁴ See also SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 15-091 – para 15-092.

enforceable by considering the contract itself, the relative positions of the parties to the contract or to the circumstances in which the contract was made.¹⁸⁵

As already indicated, the courts held that good faith is a concept comprising elements of both procedural and substantive fairness. However, in general, good faith, deals mostly with procedural safeguards for the consumer, to enable the consumer to protect himself. In deciding whether a clause complies with the requirement of good faith, mainly procedural matters or matters related to procedural fairness are taken into account, such as (1) the strength of the bargaining position of the parties, (2) inducement offered to the consumer, (3) whether the goods were made to the special order of the consumer, (4) whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the general requirement of open and fair dealing, (5) whether a clause came as a surprise to a consumer, (6) whether the supplier took steps to bring a clause to the consumer's attention and to explain it, (7) whether the consumer had a real choice or was in a position to make a real choice, (8) whether the terms were reasonably transparent and whether it operated to defeat the reasonable expectations of the consumer, and (9) whether the terms were expressed fully, clearly and legibly. Finally, the legitimate interests of the other party should be taken into consideration in deciding whether a term complies with the requirements of good faith.

The 'significant imbalance' aspect of fairness test directs attention to the substantive unfairness of the contract. It requires that terms and obligations must be weighed and compared in order to determine whether a significant imbalance exists. Furthermore, schedule 2 to the Regulations sets out an indicative and non-exhaustive list of terms which may be regarded as unfair.

¹⁸⁵ SJ Whittaker 'Unfair Terms in Consumer Contracts' in HG Beale (ed) *Chitty on Contracts* vol 1, 29 ed (2004) para 15-068.

From a South African perspective, the Unfair Terms in Consumer Contracts Regulations 1999 may be of guidance when interpreting the South African Consumer Protection Act. Although these pieces of legislation have very different fields of application, the factors that may be taken into account when assessing fairness in terms of reg 5(1) are similar to the factors that must be considered when unconscionable conduct, false, misleading or deceptive representations or unfair, unreasonable or unjust contract terms is alleged in terms of sections 48 and 52(1) and (2) of the Consumer Protection Act. When applying the fairness test as set out in the Regulations, one can, clearly distinguish between the requirements of procedural and substantive fairness. Whereas procedural fairness focuses on preventing unfairness, substantive fairness deal with the fairness of the contract terms.

Finally, what matters for the European and English contract law is consumer choice and not consumer rights, while what matters primarily for South African contract law is consumer rights and not consumer choice.¹⁸⁶

¹⁸⁶ See H Collins 'Good Faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229 at 234-238.

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1. Conclusion

For many years, fairness-oriented approaches (or collectivism) were suppressed by the over-emphasis on traditional contract ideologies. However, in recent years, the freedom-oriented approach was increasingly criticised for being abstract, formalistic, and non-contextual. It was also realised that the classical law of contract with its freedom-oriented approach was designed for parties negotiating at arm's length. The need to implement a fairness-oriented approach through the implementation of legislation was accordingly recognised. A fairness-oriented approach takes proper account of social reality, and places obligations on parties not to exploit each other and effectively to contract in good faith.⁸⁶⁸

The two main elements or dimensions of fairness are substantive and procedural fairness. To achieve substantive and procedural fairness, certain specific factors need to be considered and certain measures need to be adopted.⁸⁶⁹

Although the courts in South Africa have had several opportunities to create or enforce fairness mechanisms or requirements in the law of contract, they never did so, despite the fact that the need for the regulation of unfair contract terms was noted several times. The courts further paid little or no attention to the significance of fairness in the process of negotiating and concluding contracts.

⁸⁶⁸ See Ch 2 for a discussion of the philosophical context of the focus on unfairness in contracting procedures, unfair terms and unfair outcomes of contracts.

⁸⁶⁹ See Ch 3 for a discussion of the dimensions of fairness.

At common law, the courts have formally recognised only three instances in which contracts may be rescinded for procedural unfairness – misrepresentation, duress, and undue influence. Freedom of contract, with its emphasis on negotiation and real party autonomy, is actually only a theoretical freedom, as a result of the increased use of standard-term contracts, and the concomitant lack of true negotiation. Legislative control in the form of fairness legislation was accordingly the only option. This led to the enactment of the Consumer Protection Act, that regulates fairness in consumer contracts under the right to fair, just, and reasonable terms and conditions.⁸⁷⁰

Under the right to fair, just, and reasonable terms and conditions, the following sections are of importance:(a)section 48 describes when terms and conditions will be unfair; (b)section 49 sets out when a notice is required for certain terms and conditions;(c)section 50 gives details as to when consumer contracts must be in writing;(d)section 51 sets out which transactions, agreements, terms, or conditions are prohibited; and (e)section 52 describes the powers of the court to ensure fair conduct, terms, and conditions.⁸⁷¹

Over and above the fairness provisions contained under the right to fair contracts, the Act contains other provisions related to fairness. To ensure sufficient disclosure of information, the Act requires that certain minimum information be disclosed to consumers. This ensures transparency and puts consumers in a better position to protect their own interests. Under the right to disclosure and information, the Act, among others, deals with the right to information in plain and understandable language, which right significantly and pro-actively contributes towards procedural fairness.

Section 48 sets out the general fairness criterion. In the first instance, a supplier must not supply, offer to supply, or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable, or unjust.

⁸⁷⁰ See Ch 4 for a discussion of the history of fairness in the South African law of contract.

⁸⁷¹ See Ch 5 for a discussion of the concept 'fairness' in consumer contracts regulated by the Consumer Protection Act.

Secondly, a supplier is not allowed to market any goods or services, or negotiate, or enter into, or administer a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust, or unreasonable. Thirdly, a supplier must not require a consumer or a person to whom goods or services are supplied at the consumer's direction to waive any rights, assume any obligation, or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction. To decide whether a term or contract was indeed unfair, several substantive and procedural factors play a role and must be taken into account, of which some are applied proactively and as preventative measures.

Section 48(2) contains a few guidelines as to fairness. If one of these factors exists or is present, it renders a contract or term unfair. This includes that a term or contract is unfair (a) where it is excessively one-sided in favour of any person other than a consumer; (b) where the terms of the agreement or transaction are so adverse to the consumer that they are inequitable; (c) where a consumer has relied to his/her detriment on a false, misleading, or deceptive representation, or a statement of opinion provided by or on behalf of a supplier; or (d) where the transaction or agreement has been subject to a term, condition, or notice for which a notice in terms of section 49(1) is required, and the term, condition, or notice is unfair, unreasonable, unjust, or unconscionable, or the fact, nature, and effect of the term, condition, or notice was not drawn to the consumer's attention as required by section 49(1).

Section 52(2) also lists specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where it is alleged that the supplier conducted unconscionably, used false, misleading, or deceptive representations, or that a contract or contract term is unfair.

All these guidelines or factors are related to either substantive or procedural fairness. To convert the right to fair contracts or terms from an abstract right to a

reality, it is necessary to distinguish between substantive and procedural fairness.

Substantive fairness is a distinct virtue that can be measured against the 'price' of a contract, by a balancing of interests, default rules, and reasonable expectations, or pro-actively, by disallowing terms with certain substantive features. Conceptions of substantive fairness may either be generalised or individualised. If fairness is determined with reference to factors external to the contracting parties it is generalised, for example, where fairness is determined with reference to the market price of goods or services, or the availability of alternatives from competitors. If fairness is determined with reference to factors related to consumers' welfare, it is individualised, such as where fairness is determined with reference to the effect of terms on the consumer. Procedural fairness connotes fairness in the formation of a contract, which can be measured against the requirement of transparency. Transparency involves two elements – transparency in relation to the terms of a contract, and transparency in the sense of not being positively misled, pre-contractually or during the performance of a contract, about aspects of the goods, service, price, and terms. Transparency in relation to the terms of a contract refers to whether the contract terms are accessible, in clear language, well structured, and cross-referenced, with prominence being given to terms that are detrimental to the consumer or because they grant important rights to the consumer. Procedural fairness measures usually enable consumers to protect themselves against substantive unfairness.

Irrespective of the noble aims of procedural fairness, more emphasis should have been placed on substantive fairness, for example, by compiling a grey and a black list as pre-contractual fairness measures.⁸⁷² even if a contract or term is procedurally fair, it is uncertain whether a consumer will avail him/herself of procedural fairness or of measures aimed at procedural fairness; put differently, it is uncertain whether a consumer will utilise the measures in the Act aimed at procedural fairness. Although procedural fairness may lead to transparency

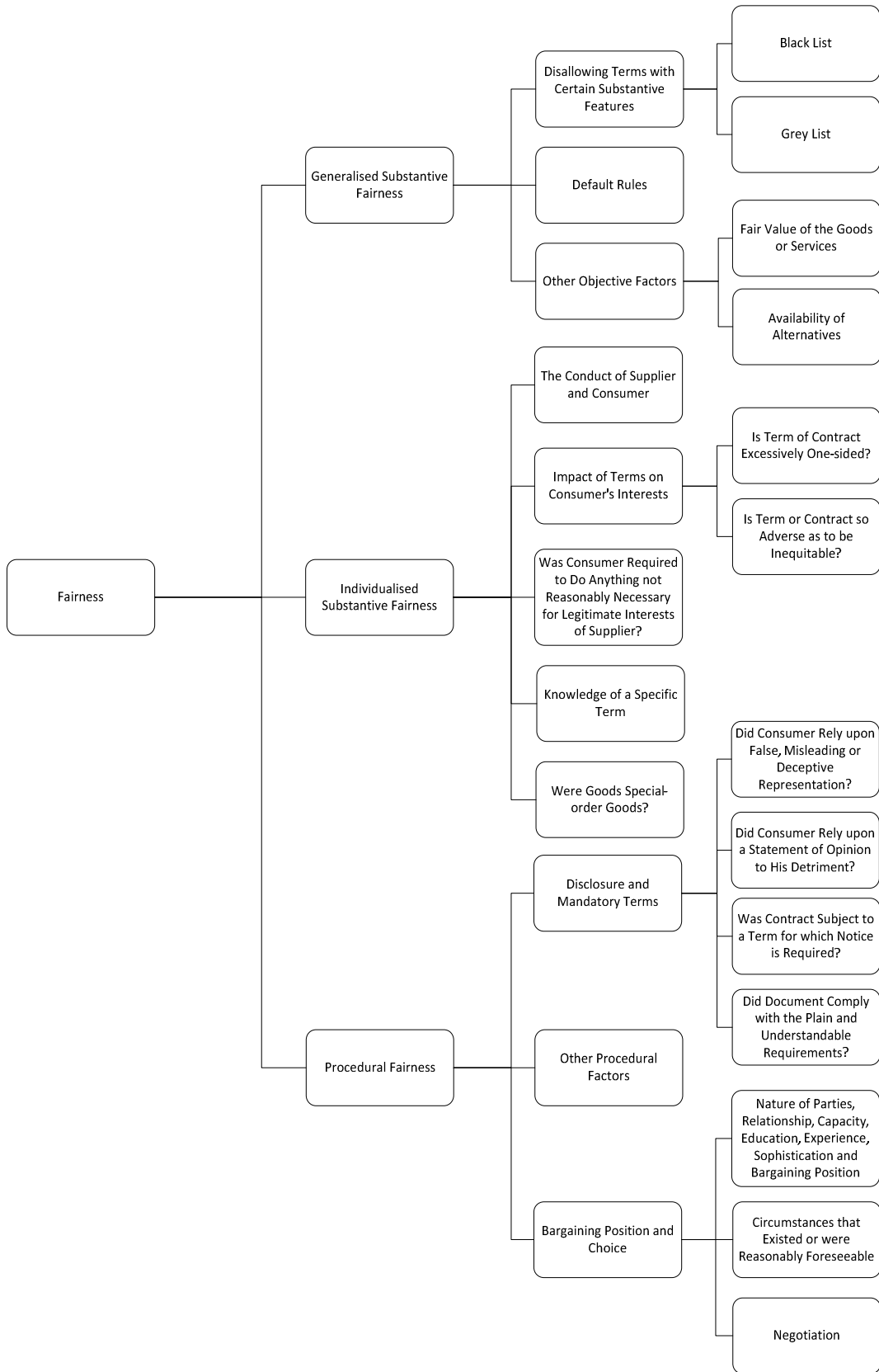
⁸⁷²See para 3.2.1.4 and para 3.2.2.6 in Ch 6.

and so may increase the levels of consensus, the success of procedural fairness depends on many external factors, such as whether the consumer will study the contract. However, in South Africa, many consumers are illiterate and accordingly procedural fairness is important. Substantive fairness on its own can never function as the only fairness requirement, especially when consumers are illiterate.

Procedural fairness requires that consumers be aware of terms that are to their detriment, so that they can protect themselves against them. Disclosure of the presence of detrimental terms also increases transparency.⁸⁷³ Informing a consumer of the presence of detrimental terms is accordingly a measure aimed at preventing procedural unfairness. However, sometimes a supplier's compliance with notice and disclosure requirements may not increase overall fairness, as consumers are disinclined to read detailed contract terms. To address the problems related to measures aimed at procedural fairness, a strong emphasis should be placed on standardisation of the way in which terms should be presented. However, this is still not a complete solution: it does not make it more likely that a consumer will actually read the terms.

Figure 1 below sets out a framework that indicates the aspects that should be taken into account, or measures that should be adopted in terms of the Act in order to achieve fairness (or to determine fairness).

⁸⁷³See para 3.3.1.2 in Ch 5.



Section 2(2) of the Consumer Protection Act provides that ‘when interpreting or applying this Act, a person, court or Tribunal or the Commission may consider appropriate foreign and international law...’. In chapter 6, the two basic contractual fairness regimes of the United Kingdom, which are in many ways similar to the Consumer Protection Act, were discussed. The first regime is contained in the Unfair Contract Terms Act of 1977, and the second regime, which is based on the Unfair Contract Terms Directive adopted by the Council of the European Communities, is contained in the Unfair Terms in Consumer Contracts Regulations 1999. These instruments were used to interpret the concept ‘fairness’ in consumer contracts regulated by the Consumer Protection Act.

2. Recommendations

The concept ‘fairness’ in the regulation of consumer contracts under the Act was analysed in this thesis and many points of criticism were raised. The main points of criticism and uncertainties are summarised below. Further, specific amendments⁸⁷⁴ to the Act and specific interpretations of certain provisions of the Act are recommended:

- (a) To understand what ‘fairness’ entails, fairness should be understood within a framework of substantive and procedural fairness, which makes it easier to apply and to measure.⁸⁷⁵
- (b) Too many individualised factors have to be taken into account when substantive fairness is assessed. It is accordingly difficult to comply with the requirements of fairness in a pro-active manner. Generalised substantive factors are easier to apply and to consider, because they increase predictability. To make it easier to apply, it is advisable to

⁸⁷⁴ Omissions are marked in bold and []; insertions are underlined.

⁸⁷⁵ See figure 1 above.

distinguish between generalised and individualised substantive fairness factors.⁸⁷⁶

- (c) Disallowing terms with certain substantive features is the most radical form of fairness and the least acceptable from a freedom-oriented perspective. This is usually done by way of a black list. A black list contains a list of absolutely prohibited terms. The benefit is that black lists enhance the effectiveness of the control of unfair contract terms and that they lead to greater predictability. At the same time, black lists are also applied pro-actively, since suppliers apply these lists as a measure of self-imposed control. Proactive control is not fully dependent on judicial control, so the costs and risks of litigation are also reduced by black lists. The same applies to grey lists. Terms presumed to be unfair are usually listed in a grey list.

In practice, a black list functions better than a general criterion of fairness on its own: the latter may take a long time to be given content in practice, and the outcome of its application to any given instance may well be difficult to predict. In order for black lists (and grey lists) to be manageable, they should focus on terms that are not desirable across different types of contracts. Terms unique to specific types of contract should be dealt with in sector-specific legislation. It is therefore recommended that legislation should accordingly state that a black or grey list is additional to any other statutory or common-law measures of control, and not intended to replace such measures. As South Africa has practically no experience with the general control of fairness in contract, it is prudent to be careful when one compiles an extensive black list.

Where a term which may seem substantively unfair may sometimes be justified, it is better to put such term on a grey list; later, based on experience, it may be moved to the black list. Section 51 contains a

⁸⁷⁶See para 2.2 in Ch 5.

black list of prohibited terms.⁸⁷⁷ It does not contain an extensive list of terms, but rather a list of factors or guidelines. The first part of the list is, however, vague and long. It is not as specific as it should be, as it is linked to the purpose and policy of the Act. In turn, the purpose of the Act is set out in wide and general terms. The list further prohibits a term with the effect or object of deceiving and misleading the consumer. However, it is difficult to determine whether the effect or purpose of a term is to mislead or deceive a consumer. These parts of the black list accordingly do not enhance predictability, as the black list is dependent on judicial control. Another problem with the black list is that it does not provide for regular updates, which is key to the effectiveness of the Act and the black list. The Act should at least make provision for the Consumer Commission to review the black list regularly and to make recommendations to the Department of Trade and Industry. The following amendments to section 51 of the Act are recommended:

- '51 Black list of [P]prohibited transactions, agreements, terms or conditions**
- (1) A supplier must not make a transaction or agreement subject to any term,~~[or] condition~~ or notice if –
- [(a) its general purpose or effect is to –**
- (i) defeat the purposes and policy of this Act;**
- (ii) mislead or deceive the consumer; or**
- (iii) subject the consumer to fraudulent conduct;**
- (b) it directly or indirectly purports to –**
- (i) waive or deprive a consumer of a right in terms of this Act;**
- (ii) avoid a supplier's obligation or duty in terms of this Act;**
- (iii) set aside or override the effect of any provision of this Act; or**
- (iv) authorise the supplier to –**
- (aa) do anything that is unlawful in terms of this Act;**
- or**
- (bb) fail to do anything that is required in terms of this Act;]**
- (a) it directly or indirectly waives or restricts the consumer's rights under this Act or in any other way contravenes this Act;**
- (b) ...**
- (c) it purports to –**
- (i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;**
- (ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or**

⁸⁷⁷ See para 3.2.1.1.1 in Ch 5.

- (iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 18(1);
 - (d) it results from an offer prohibited in terms of section 31;
 - (e) it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by subsection (2)(a);
 - (f) it purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund;
 - (g) it falsely expresses an acknowledgement by the consumer that –
 - (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or
 - (ii) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer;
 - (h) it requires the consumer to forfeit any money to the supplier –
 - (i) if the consumer exercises any right in terms of this Act; or
 - (ii) to which the supplier is not entitled in terms of this Act or any other law;
 - (i) it expresses, on behalf of the consumer –
 - (i) an authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the agreement relates;
 - (ii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; or
 - (iii) a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with this Act; or
 - (j) it expresses an agreement by the consumer to –
 - (i) deposit with the supplier, or with any other person at the direction of the supplier, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device; or
 - (ii) provide a personal identification code or number to be used to access an account.
- (2) A supplier may not –
- (a) directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision contemplated in subsection (1);
 - (b) request or demand a consumer to –
 - (i) give the supplier temporary or permanent possession of an instrument referred to in subsection (1)(j)(i) other than for the purpose of identification, or to make a copy of such instrument; or
 - (ii) reveal any personal identification code or number contemplated in subsection (1)(j)(ii); or
 - (c) direct, or knowingly permit, any other person to do anything referred to in this section on behalf of or for the benefit of the supplier.'
- (3) A purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes this section.
- (4) This section does not preclude a supplier to require a personal identification code or number in order to facilitate a transaction that in the normal course of business necessitates the provision of such code or number.

- (5) The National Consumer Commission must review this section at least once every three years and the must thereafter make recommendations to the Minister who may by public notice amend section 51 so as to add, modify or omit an entry on the recommendation of the National Consumer Commission.'

(d) A grey list contains a list of terms that may be unfair. The final decision on whether a term is unfair depends on the circumstances of a particular case. One of the benefits of greylisting problematic terms is that it places the burden of proving to a court that a term is fair on the supplier. Furthermore, as with black lists, a grey list has the benefit of proactive control, as suppliers usually avoid greylisted terms. A grey list is set out in the regulations to the Act.⁸⁷⁸ Ideally, the grey list in regulation 44 should have been included in the text of the Act, in the same part as the black list (in a section 51A). It would then have had greater prominence and would have been more accessible to consumers. It may be argued that it is easier to amend regulations, because regulations don't have to go through the full legislative process. However, in practice it is not necessarily easier to amend regulations. The benefit of an Act is that it has greater prominence and is more accessible to consumers than regulations. Again, the problem is that the grey list does not provide for regular updates. The following amendments to the Act are recommended (subsection 5 was added to the current regulation 44 which were incorporated with the necessary changes):

51A Grey list of contract terms which may be regarded as not fair

- (1) For purposes of section 120(d) of the Act, a term of a consumer agreement between a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession is presumed to be unfair if it -
- (a) has the purpose or effect of a term listed in subsection (3), and
 (b) does not fall within the ambit of subsection (4).
- (2)(a) The list in subsection (3) is indicative only, so that a term listed therein may be fair in view of the particular circumstances of the case.
- (b) The list in subsection (3) is non-exhaustive, so that other terms may also be unfair for purposes of section 48 of the Act.
- (c) A term which falls within the ambit of subsection (4) remain subject to sections 48 to 52 of the Act.

⁸⁷⁸See para 3.2.1.1.2 in Ch 5.

- (d) This section does not derogate from provisions in the Act or other law in terms of or in respect of which a term of an agreement is prohibited.
- (3) A term of a consumer agreement subject to the provisions of subsection (1) is presumed to be unfair if it has the purpose or effect of –
- (a) excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61(1) of the Act;
- (b) excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a debt owed to the supplier against any claim which the consumer may have against the supplier;
- (c) limiting the supplier's obligation to respect commitments undertaken by his or her agents or making his or her commitments subject to compliance with a particular condition which depends exclusively on the supplier;
- (d) limiting, or having the effect of limiting, the supplier's vicarious liability for its agents;
- (e) forcing the consumer to indemnify the supplier against liability incurred by it to third parties;
- (f) excluding or restricting the consumer's right to rely on the statutory defence of prescription;
- (g) modifying the normal rules regarding the distribution of risk to the detriment of the consumer;
- (h) allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement;
- (i) enabling the supplier to unilaterally alter the terms of the agreement including the characteristics of the product or service;
- (j) giving the supplier the right to determine whether the goods or services supplied are in conformity with the agreement or giving the supplier the exclusive right to interpret any term of the agreement;
- (k) allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer;
- (l) enabling the supplier to terminate an open-ended agreement without reasonable notice except where the consumer has committed a material breach of contract;
- (m) obliging the consumer to fulfil all his or her obligations where the supplier has failed to fulfil all his or her obligations;
- (n) permitting the supplier, but not the consumer, to avoid or limit performance of the agreement;
- (o) permitting the supplier, but not the consumer, to renew or not renew the agreement;
- (p) allowing the supplier an unreasonably long time to perform;
- (q) allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the agreement, without giving the consumer the right to be compensated in the same amount if the supplier fails to conclude or perform the agreement (without depriving the consumer of the right to claim damages as an alternative);
- (r) requiring any consumer who fails to fulfil his or her obligation to pay damages which significantly exceed the harm suffered by the supplier;
- (s) permitting the supplier, upon termination of the agreement by either party, to demand unreasonably high remuneration for the

- use of a thing or right, or for performance made, or to demand unreasonably high reimbursement of expenditure;
- (t) giving the supplier the possibility of transferring his or her obligations under the agreement to the detriment of the consumer, without the consumer's agreement;
- (u) restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the supplier;
- (v) providing that the consumer must be deemed to have made or not made a statement or acknowledgment to his or her detriment, unless –
- (i) a suitable period of time is granted to him or her for the making of an express declaration in respect thereof; and
- (ii) at the commencement of the period the supplier draws the attention of the consumer to the meaning that will be attached to his or her conduct;
- (w) providing that a statement made by the supplier which is of particular interest to the consumer is deemed to have reached the consumer, unless such statement has been sent by prepaid registered post to the chosen address of the consumer;
- (x) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, including by requiring the consumer to take disputes exclusively to arbitration not covered by the Act or other legislation;
- (y) restricting the evidence available to the consumer or imposing on him or her a burden of proof which, according to the applicable law, should lie with the supplier;
- (z) imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer (including for the making of a written demand and the institution of legal proceedings);
- (aa) entitling the supplier to claim legal or other costs on a higher scale than usual, where there is not also a term entitling the consumer to claim such costs on the same scale;
- (bb) providing that a law other than that of the Republic applies to a consumer agreement concluded and implemented in the Republic, where the consumer was residing in the Republic at the time when the agreement was concluded.
- (4)(a) Paragraph (k) of subsection (3) does not apply to a term in terms of which a supplier of financial services reserves the right to unilaterally terminate an open-ended agreement without notice, but the supplier is required to immediately inform the consumer thereof.
- (b) Paragraph (h) of subsection (3) does not apply to –
- (i) a transaction in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;
- (ii) an agreement for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
- (iii) a price-indexation clause, where lawful, but the method by which prices vary must be explicitly described.
- (c) Paragraph (i) of subsection (3) does not apply to –
- (i) a term under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, but –

- (aa) the supplier must immediately inform the consumer thereof; and
- (bb) the consumer is free to dissolve the agreement at the earliest opportunity;
- (ii) a transaction in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;
- (iii) an agreement for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
- (iv) a term under which the supplier reserves the right to unilaterally alter the conditions of an open-ended agreement, but –
 - (aa) the supplier must forthwith inform the consumer thereof; and
 - (bb) the consumer is free to dissolve the agreement immediately;
- (d) Paragraphs (r) and (s) of subsection (3) do not apply to any penalty, fee or compensation which the supplier is entitled to charge under the provisions of this Act or any other law.
- (5) The National Consumer Commission must review this section at least once every three years and thereafter must make recommendations to the Minister who may by public notice amend section 51A so as to add, modify or omit an entry on the recommendation of the National Consumer Commission.'

(e) The fair value of the goods or services in question is one of the generalised substantive factors that the court must consider in order to determine whether a contract is unfair.⁸⁷⁹ The incorrect application of this factor may cause chaos and uncertainty. It should not be applied in such a way as to impute to the legislature the intention that the courts should control prices or profit making. This factor should not be considered in isolation because a contract should not be declared unfair simply because the price is unfair. The market values of goods or service will always be a good standard against which to measure a particular price. As market value is a question of fact, it can be proved by expert evidence. The market price of the relevant goods or services is also influenced by others aspects such as the risks against which the supplier is seeking to protect him/herself by using the term, and the degree of detriment or risk caused to the consumer by the term. In English law, core terms (those that define the subject matter and price) are excluded from unfairness challenges, as consumers are always

⁸⁷⁹See para 3.2.1.3.1 in Ch 5.

aware of these terms. If a price is vague, the normal rules of interpretation should apply. If a price is not ascertainable or ascertained, the contract is not a valid contract of sale. It is accordingly suggested that the price or the value of goods or services should not be considered when a court has to decide whether a contract is unfair. The following amendment to section 52(2) is recommended:

(2) In any matter contemplated in subsection (1), the court must consider

-
- [(a) the fair value of the goods or services in question;]**
- (b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position...

(f) The amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier is one of the generalised factors the court must consider when deciding whether a contract is unfair.⁸⁸⁰ When assessing the alternatives, the availability of alternative should also be considered, as well as whether it would have been reasonably practicable to obtain the advice or goods from an alternative source, taking into account considerations of costs and time. The following amendment to section 52(2)(i) of the Act is recommended:

(i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier if the consumer had an opportunity of entering into a similar contract with another supplier;

(g) One of the factors which renders a contract unfair, unreasonable, or unjust and which is listed in section 48(2), is whether a term or contract is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied.⁸⁸¹ It is not clear what the precise meaning of 'excessively one-sided' is. It can be equated to 'a significant imbalance in the parties' rights and obligations

⁸⁸⁰See para 3.2.1.3.2 in Ch 5. See also para 2.3.3.2 in Ch 6 for a discussion of the availability of alternatives.

⁸⁸¹See para 3.2.2.1.1 in Ch 5.

under the contract', which may render a contract unfair under English law. In terms of English law, the requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his/her favour.⁸⁸² The terms, rights, and obligations of parties must accordingly be weighed and compared in order to decide whether a term or the contract is excessively one-sided. The court has a discretion to decide whether the term or contract is 'excessively' one-sided. A term or contract will, among others, be excessively one-sided if it places one party almost entirely within the economic power of the other party. I recommend that 'excessively one-sided' should be equated to 'a significant imbalance in the parties' rights and obligations under the contract'. The court then has to decide if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his/her favour.

- (h) One of the factors which renders a contract unfair, unreasonable or unjust listed in section 48(2), is whether the terms are so adverse to the consumer that they can be regarded as inequitable.⁸⁸³ This factor relates to the contents of a contract. It however does not provide much guidance as to the meaning of 'fairness' or 'unfairness', because 'inequitable' is merely a synonym for 'unfair'. This aspect also overlaps with the question of whether a contract or term is excessively one-sided, because an excessively one-sided term or contract is also unfair (inequitable). It is therefore suggested that the word 'inequitable' in section 48(2) be replaced by 'unfair'.

'(b) the terms of the transaction or agreement are so adverse to the consumer as to be unfair[**unequitable**];'

- (i) The conduct of the supplier and the consumer is one of the specific factors that a court must consider in any proceedings before it

⁸⁸²See para 3.3.2 in Ch 6.

⁸⁸³See para 3.2.2.1.2 in Ch 5.

concerning a transaction or contract between a supplier and consumer where unfairness is alleged.⁸⁸⁴ 'Conduct' is not defined in the Act. I therefore submit that the court may thus, especially in light of the fact that the Act does not preclude the court from considering factors other than those which the court must consider in terms of section 52(2), consider any conduct of the supplier or consumer, which resulted in or caused unfairness.

- (j) Whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier is one of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.⁸⁸⁵ Again, 'conduct' is not defined in the Act. I therefore submit that the court may accordingly consider any conduct of the supplier or consumer. It is also not certain whether 'required to do anything' would, for example, include a term requiring the consumer to indemnify the supplier against liability. However, it is clear that this factor aims at addressing the issue of imbalance between the parties. The question could as well have been whether a term is reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term. In the first instance, it must be shown that a term (or conduct) protects the legitimate interests of the supplier. Secondly, it must be determined whether the term is reasonably necessary to protect the supplier's legitimate interests. The proportionality of a term is accordingly considered. A term will be reasonably necessary to protect the legitimate interests of the supplier only where it represents a proportionate response to a risk it addresses. The following amendment to section 52(2)(f) is recommended:

'(f) whether the term or the supplier's conduct is reasonably necessary in order to protect the legitimate interests of the

⁸⁸⁴See para 3.2.2.2 in Ch 5.

⁸⁸⁵See para 3.2.2.3 in Ch 5.

supplier who would be advantaged by the term or conduct; [whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier].

(k) Whether the consumer knew, or ought reasonably to have known, of the existence and extent of any particular term of the contract is one of the specific factors that a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged. It is difficult to prove actual knowledge of a term. Actual knowledge of the existence and the extent of a term may serve as an indication that the term is fair. To decide whether the knowledge is 'actual knowledge', the actual extent and quality of the consumer's knowledge should be considered. The requirement of knowledge the consumer ought to have had is an objective requirement. The Act accordingly asks whether the supplier can reasonably believe that the consumer is assenting to his/her terms. In terms of section 52(2)(h)(i)-(ii), the court should pay regard to any custom of trade and any previous dealings between the parties to assess the consumer's knowledge. Other factors may also help to assess knowledge more effectively. If the majority of these factors are present, the court may assume that the consumer ought to have had knowledge of the specific term or terms. The following amendments are accordingly recommended:

- (h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any-
- (i) custom of trade; **[and]**
 - (ii) any previous dealings between the parties;
 - (iii) whether the consumer was informed of the presence of a specific provision;
 - (iv) whether the consumer understood the meaning and implications of the provision;
 - (v) the complexity of the transaction;
 - (vi) information given to the consumer about the transaction before or when the contract was made;
 - (vii) whether the contract was written in plain language;
 - (viii) how the contract was explained to the consumer;
 - (ix) whether the consumer had a reasonable opportunity to absorb any information given to him about the transaction by the supplier;

- (x) whether the consumer took professional advice;
- (xi) whether the consumer had an opportunity to cancel the contract without charge; and
- (xii) any other relevant factor.'

(l) In terms of the fairness guidelines listed in section 48(2), a contract or term will be unfair if the consumer relied upon a false, misleading, or deceptive representation, or a statement of opinion provided by the supplier, to the detriment of the consumer.⁸⁸⁶ In the first instance, section 41 regulates false, misleading, or deceptive representations. It states that suppliers may not use a false, misleading, or deceptive representation concerning a material fact, use innuendo, exaggeration, or ambiguity as to a material fact, or fail to disclose a material fact. Suppliers must furthermore not knowingly allow consumers to believe false, misleading, or deceptive facts by failing to correct an apparent misapprehension on the part of the consumer. Praise by a supplier of goods or service, or sales talk (or so-called 'puffing') as to a material fact can be equated to the use of exaggeration, innuendo, or ambiguity as to a material fact. At common law, 'puffing' is regarded as mere sales talk and has no binding effect. However, in terms of section 41(1)(b), exaggeration, innuendo, or ambiguity as to a material fact is prohibited; if the consumer relied upon it, it renders a contract or term unfair in terms of section 48(2)(c). Puffing as to a material fact is thus prohibited, and it may render a contract or term unfair. Secondly, section 48(2)(c) relates to a statement of opinion provided by the supplier to the detriment of the consumer. It states that if a consumer relied upon a statement of opinion provided by or on behalf of a supplier to the detriment of a consumer, the contract or term is unfair. A 'statement of opinion' includes any opinion and not only false, misleading, or deceptive opinions, as a 'statement of opinion' is not qualified by this section. A term or contract can accordingly be declared unfair should a consumer have relied on any opinion of the supplier to his/her (the consumer's) detriment. An opinion of a supplier amounts to his/her view or point of view, so it cannot be false, but it can be misleading. If it is possible for an opinion to be false,

⁸⁸⁶See para 3.3.1.1 in Ch 5.

it would be very difficult to prove. However, it is suggested that the term 'statement of opinion' should be qualified, as it is uncertain whether the legislature's intention was that any statement of opinion could lead to a contract being declared unfair. The following amendment to section 48(2)(c) is recommended:

- '(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-
- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a patently incorrect statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer;'

or

- '(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-
- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or an incorrect statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer;'

(m)The extent to which any documents relating to the transaction or agreement satisfied the plain and understandable language requirements of section 22 is one of the specific factors that a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged. Although procedural fairness and measures aimed at procedural fairness have limitations, the plain and understandable language requirements as set out in section 22 are, in the South African context where consumers are often only functionally literate, probably the most important proactive fairness measure in the Act. The plain and understandable language

requirements also address the issues relating to the use of standard-term contracts. If contracts are written in plain and understandable language, it may result in 'real' consensus being reached, as the contract is written in language that consumer comprehends. Section 22 requires notices, documents, or visual representations that are required in terms of the Act or other law to be provided in plain and understandable language as well as in the prescribed form, if any. Section 50 also makes plain language compulsory in all consumer agreements. Several elements form part of the definition of 'plain and understandable language'. In the first instance, the Act provides that the National Consumer Commission may publish guidelines on methods of assessing plain language in terms of language, style, and structure. No objective guidelines have, however, been published. In the absence of guidelines, it is difficult to determine whether suppliers meet the requirements of plain language. To give effect to requirements of plain language in a pro-active manner, to improve levels of disclosure and to increase procedural fairness, objective assessment mechanisms or guidelines must be put in place.⁸⁸⁷ The following amendment to regulations to the Regulation is recommended:

'45A Plain and understandable language guidelines

- (1) The following guidelines may be applied in order for a contract or document to meet the plain and understandable language requirements of section 22 of the Act:
- (a) the contract should use short words, paragraphs and sentences and active verbs;
 - (b) the contract or document should not use technical legal terms other than commonly understood legal terms;
 - (c) Latin and foreign words may not be used in a contract or document;
 - (d) if the contract or document defines words, the words must be defined by using commonly understood meanings;
 - (e) sentences may not contain more than one condition;
 - (f) cross-references may not be used in the contract or document, except cross-references that briefly and clearly describe the substance of the item to which reference is made;
 - (g) the contract or document should be printed or written on a white background;
 - (h) the letters in the contract or document should at least be twelve points in size;
 - (i) at least 1.5 centimeter of blank space must be allowed between each paragraph;

⁸⁸⁷ See para 3.3.1.3.3 in Ch 5 for more potential plain language guidelines.

- (j) at least 2 centimeter of blank space must be allowed at all borders of each page;
 - (k) if the contract or document is printed, each section must be captioned and the captions must be underlined or printed in boldface type; and
 - (l) the contract or document should use ink that contrasts sharply with the paper.
- (2) The guidelines in subregulation (1) are indicative only, so that the contract or document may not in particular circumstances comply with the plain and understandable requirements set out in section 22 of the Act, irrespective of compliance with all the guidelines in subregulation (1).'
- (3) The National Consumer Commission must review this regulation at least once every three years and thereafter must make recommendations to the Minister who may by public notice amend regulation 45A so as to add, modify or omit an entry on the recommendation of the National Consumer Commission.

Secondly, a further issue is whether a contract must be in an official language or a consumer's language in order to be in plain and understandable language. In terms of the Constitution of the Republic of South Africa, 1996, South Africa has eleven languages and the state has a constitutional duty to take positive and practical measures to elevate and advance the use of languages that, historically, have had diminished status. Furthermore, all official languages must enjoy parity of esteem and be treated equally. An official language requirement would have placed an enormous burden on suppliers in South Africa. However, it is uncertain what the position will be in respect of South Africans who do not speak English (sometimes regarded as the *lingua franca* of the country and also the language commonly used in agreements) and foreigners in South Africa (who only speak a foreign language). How would the requirements of plain language be complied with if consumers do not understand the language used in agreements or other communications? Such consumers presumably have to consult an advisor or dictionary. It would be considered that their understanding cost them undue effort, and such document would not be in plain language. Thirdly, section 40(2) provides that it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect his/her own interests, because of an inability to understand the language of an agreement. In light of the fact that the draft Consumer Protection Bill contained a section on the right to

information in an official language, I submit that a contract or document does not need to be written in a consumer's official language. It will, however, be to a supplier's advantage to translate documents into the official language spoken by the class of persons for whom it is intended.

(n) The nature of the parties to the contract or transaction, their relationship to each other, and relative capacity, education, experience, sophistication, and bargaining position of the consumer form part of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.⁸⁸⁸ It is recommended that a mere inequality of bargaining positions should not lead a court to conclude that a contract is unfair, and vice versa. However, if a supplier exploits a consumer's lack of education, experience, and sophistication, the inequality of the bargaining position may lead the court to conclude that the contract is unfair.

(o) The circumstances of the transaction or contract that existed or which were reasonably foreseeable at the time that the conduct or transaction occurred or when the contract was made form part of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.⁸⁸⁹ The court therefore has to consider only the circumstances of the transaction or contract that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or when the contract was made, and not the circumstances at a later stage. Generally, circumstances arising after the conclusion of the contract are irrelevant, as the Act limits the relevant circumstances to circumstances which existed or which were reasonably foreseeable at the time that the conduct or transaction occurred or the contract was made. It is doubtful whether a court will ever ignore what has actually

⁸⁸⁸See para 3.3.2.1 in Ch 5.

⁸⁸⁹See para 3.3.2.2 in Ch 5.

happened after the conduct or the contract was made, even if the Act clearly requires that fairness must be judged having regard to circumstances which existed or which were reasonably foreseeable when the contract was made. I recommend that if unfairness of a contract term or transaction is alleged, the court should as far as possible ignore circumstances that arose after the conclusion of the contract or a change in circumstances in order to protect contractual certainty.

(p) Whether there was any negotiation between the parties and the extent of it also form part of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.⁸⁹⁰ This factor directly leads one to the conclusion that the use of standard-term contracts may be an indication of unfairness due to a lack of negotiation. That is because non-negotiated (or standard) terms cannot always be regarded as the proper expression of the self-determination of both parties, and a fairness intervention is accordingly justified. 'Negotiation' is not defined in the Act. In light of the other factors the court must consider, it is assumed that negotiation has to do with choice. The question is therefore whether the consumer had a real opportunity to influence the contents of a contract or term. On the basis of the fact that the extent of negotiation should be taken into account I recommend that the mere fact that a supplier presents the supplier with more than one pre-formulated alternative to choose from does not qualify as proper 'negotiation'.

(q) Taking into account negotiation (and the other factors discussed above), it is clear that the court has to consider many factors extrinsic to a contract when determining the fairness of a contract. In terms of the parol evidence rule, a contract document is regarded as the sole evidence of the terms of a contract. It prevents one from adding, contradicting, or modifying a contract on the basis of extrinsic evidence.

⁸⁹⁰See para 3.3.2.3 in Ch 5.

In terms of section 52(3)(b)(iii), a court may make an order requiring the supplier to alter a form or document if the court determined that a term or contract was unfair. The fairness provisions of the Act have an impact on the parol evidence rule. If the Act applies to a contract and the court determined that the contract or term is unfair, based on the extrinsic evidence it had to consider, the parol evidence rule should therefore not prevent the court from ordering the supplier to alter the contract or term.

- (r) There are other factors relevant to substantive and procedural fairness that are worthy of inclusion in the list of factors that must be considered. The following amendment to section 52(2) of the Act is recommended:

- ‘...
(i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; **[and]**
(j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer[.];
(k) all the other provisions of the contract;
(l) the terms of any other contract on which the contract depends;
(m) the balance of the parties’ interests;
(n) the risks to the party adversely affected by the provision;
(o) other ways in which the interests of the party adversely affected by the provision might have been protected;
(p) the extent to which the provision, whether alone or with others, differs from what would have been the case in its absence; and
(q) the nature of the goods or services to which the contract relates.’

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