Chapter 8

General Law of Contract: Selective Principles influencing the Law of Contract and impacting on Medical Contracts

8.1 Introduction

Freedom of contract is a concept which, ever since it was first recognized in Greek philosophy and Roman law, has shaped the law of contract. Freedom of contract, has contributed in different ways in forming the law of contract.

The writings of the Greek philosophers and Roman jurists concentrated, especially, on the value of promise-keeping [1] and consent. [2] The influence of their thinking is today seen universally when regard is had to the relationship of contract and the law of obligations. [3] During the sixteenth and seventeenth centuries naturalists of the likes of Hobbes and

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1 This is evident from a number of different sources. Gordley *The Philosophers Origins of Modern Contract Doctrine* (1991) 10-11 highlights in particular, the writings of the Greek philosopher, Aristotle, who first wrote *"let us discuss the truthful ..... Who seeks faith in his agreements? For he is true both in word and in life because his character is such"* and the writings of Thomas Aquinas who wrote *"One who promises something does not lie if he has the intention to do what he promises because he does not speak contrary to what he has in mind. If, however, he does not do what he promises, then he appears to act unfaithfully because his intention changes."*

2 Gordley (1991) 10-11 highlights the emphasis placed by Gaius on promises and the role consent plays in keeping to a promise made. The writer also highlights the work of *Accursius* D. 46.1.172 who wrote of consent as giving *"..... effect or form or clothing to the natural root so that it can produce an obligation."*

3 Much has been written about the relationship but it is especially, Atiyah *An Introduction to the Law of Contract* (1995) 7-10 who emphasizes that the law of contract is part of the law of obligations ..... *"It is governed with obligations which people incur to others as a result of the relations and transactions in which they become involved."*

Locke, relying on social, economic and political philosophies, promoted their natural law ideas in promoting the concept of freedom of contract. The freedom of contract was viewed by them as a fundamental human freedom, in which man was free to regulate his own conduct. In the market place, to enter into market relations, free from any interference. [4]

In the eighteenth and nineteenth centuries in a market driven universe, economic liberalism through the concept *laissez-faire*, relied heavily on the doctrine of freedom of contract in which the freedom of the individual was valued highly. [5]

The dominance of the doctrine of freedom of contract continued its influence so much so, that in the United States of America, it found its way into the American Constitution. [6] The dominance of contractual freedom also found its way into the courts in the United States of America, England and South Africa etc. Influenced by the natural law theory, which provided, man had an inalienable right to make their own contracts for themselves, the courts started adopting the attitude that the courts should interfere with people, on the

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4 The national laws ideas by Hobbes and Locke is encapsulated in the following passages quoted by Atiyah *The Rise and Fall of Freedom of Contract* (1985) 69ff; Aronstam *Consumer Protection Freedom of Contract and The Law* (1979) namely:

"(1) Human beings are free from control by others; what men do, they do freely.

(2) Relationships with other human beings are voluntarily entered into out of motives of self-interest.

(3) The individual is essentially the proprietor of his own person and capacities; he can alienate his own labour by a contract which is perceived as a disposal of something belonging to the individual in much the same way as alienation of his land or his goods.

(4) Human society consists of a series of market relations."

and as far as rights issues are concerned:

"The right of nature, which writers commonly call the jus naturale, is the liberty each man hath, to use his own power, as he will himself, for the presentation of his own nature, that is to say, of doing anything, which in his own judgement, and reason, he shall conceive to be the aptest means thereunto."

Aronstam believes the right to contract freely, in modern day, still remains one of the basic human rights and the cornerstone of the modern theory of the law of contract.

5 Friedman *The Law of Contract in Canada* (1999) at v refers to Maine *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (Oxford University Press, London 1861) at 140. Maine writes: *"Not, is it difficult, to see what is the tie between man and man, which, replaces by degrees those forms of reciprocity in rights and duties, which, have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals ..... (We may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."* (His emphasis). It was especially the philosopher Adam Smith, relying on the value of promise-keeping quoted in Atiyah who advocated *"A man who makes a promise is trusted by the promisee and it is in his interest that he should be so trusted; the double meaning of the phrase `to be given credit' clearly shows why it is in a man's interest that he should be trusted."*

6 Article 1 of Section 10(1) of the American Constitution provides: *"No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."* See Aronstam (1979) 6ff.

economical terrain, as little as possible. During the classic law period, the courts developed a judicial doctrine of freedom of contract. [7]

The legal writers also expressed strong views in favour of the pure doctrine of freedom of contract, *inter alia; contracting parties* should be free to negotiate the terms of their contracts without legislative interference, where contracting parties have entered into an agreement, full legal effect should be given thereto etc. It has also been stated that agreements should be held sacred and should be enforced by the courts if the agreement, or terms of the agreement, are broken. [8]

But, in time, the argument of the protagonists of the pure doctrine of freedom of contract came under severe criticism by the legal writers, the courts, as well as consumer organizations. It is especially with the advent and influence of standardized contracts that the ethos of pure freedom of contract was questioned and criticized. The main arguments

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7 Atiyah (1979) 69ff sets out the approach of the courts at the time when he states: *"The law was not concerned to limit the power of contracting or to interfere between the contracting parties in the interests of justice, but merely to assist one of them when the other broke the rules of the game and defaulted in the performance of his contractual obligations."* See also Aronstam (1979) 6. The ingredients of the doctrine of freedom of contract comprising unlimited freedom to contract and sanctity of contract were highlighted by the courts quite frequently none better than, the much better abbreviated English decision of *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 Eq. 562 in which Sir George Jessel MR stated: *"If there is one thing which more than another 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. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."* The American courts were particularly alive to individualism, private rights free from restrictions and a minimum of legal interference with private rights. This was expressed in very clear and precise terms in the case of *Lochner v State of New York* (1898) 45 US 198 in which Mr Justice Peckham stated: *"There is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to match other trades or manual occupations, not that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of contract and of action."* The judicial ethos of freedom of contract also made its way into the South African courts so much so, that Kotze JP in the case of *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 531, remarked: *"The spirit of modern jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the observations of De Villiers CJ, in Henderson v Hamilton, 1903 2D SC 513 at 519."*
And further remarking: *"All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by law."*

8 Aronstam (1979) 13-14; Atiyah (1979) 9-10; The South African legal position is best illustrated by Hahlo "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SALJ* Law Journals (1981) 70: *"Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress his contractual undertakings will be enforced to the letter. If though inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market place."*

advanced included, firstly, the argument that both parties to a contract are bargaining from positions of equal strength is incorrect, especially when dealing with standardized contracts. In reality, so it is argued by the legal writers and the courts alike, equality in the relationship between two contracting parties rarely exists. Often the weaker contracting party is exploited by the stronger party. [9]

The promotion of consumerism impacted heavily in curbing the unlimited freedom of contract enjoyed during the classical period. A factor influencing a change in mindset is said to be morality. [10]

Various doctrines were founded and developed throughout the years which served to play a role in the protection of the weaker party in the law of contract. These include paternalism, [11] good faith, [12] public policy, inequality [13] and unconscionable-ness. [14]

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9 The writers Aronstam (1979) 14 and Hawthorne "The Principle of Equality in the Law of Contract" (1999) *THRHR* 157, 163 identify social and economical inequalities as factors influencing the domination and exploitation; With regards to the courts approach during the classical period Atiyah (1979) 8-9 presents the position as follows: *" ..... during the classical period the courts when considering the principle of freedom of contract took no account of social and economic pressures which in many circumstances might virtually force a person to enter into a contract."* The writer also expresses the view that *"classical law of contract paid little attention to inequalities between the contracting parties."* Insofar as case law is concerned the American courts as early as 1873 in the case of *New York Central Railway Company v Lockwood* 84 US 357 (1873) at 379 expresses reservations about equality in the bargaining position of contracting parties when Justice Bradley states: *"The carrier and his customer do not stand of a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out and seek redress in the courts. He prefers, rather, to sign any paper the carrier presents. In most cases, he has no alternative but to do this, or abandon his business."*

10 The effect of the change is described by Atiyah (1979) 28ff as *"The moral principle that one should abide by one's agreements and fulfil one's promises is being increasingly met by another moral principle, namely that one should not take advantage of an unfair contract which one has persuaded another party to make under economic or social pressure."*

11 The restraint placed in this form on contractual freedom to protect the weaker party comprises legislative control and judicial control. Throughout the years since the classic period the courts developed canons of constriction *inter alia* the *contra proferentem* rule in order to protect the weak against exploitation. Because of the inconsistency by the courts in applying the rules and so protect the weak; the legislature stepped in countries such as England and the United States of America. In the former instance the *Unfair Contract Terms Act* 1977 was passed and in the latter instance the *Uniform Commercial Code* was passed. See Atiyah (1979) 28. Other countries to have introduced legislative and judicial interventions to redress the perceived evils and injustices include the Netherlands, France and Germany. See Hawthorne (1995) 167.

12 Good faith is a doctrine which plays a significant role in the United States of America and has been absorbed in their legislative interventions. Section 1-203 of the *Uniform Commercial Code* provides *inter alia "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."* On the other hand, similarly, Sec 205 of the *Second Restatement of Contracts* provides: *"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."* For a comprehensive discussion on the role of good faith in the United States legislation see Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 113ff. In Britain, although English law decline to adopt a general principle of good faith, it nevertheless play a role as it is used as another tool for control by the courts especially, where unfairness arises.

Having given a brief introduction to the history of the doctrines of freedom of contract and the sanctity of contract, it is important to outline to what degree they have impacted on the law of contract in the countries selected for researching this thesis, namely, South Africa, England and the United States of America. For that reason, the remainder of this Chapter will comprise of a discussion on the influence of freedom of contract in South Africa, England and the United States of America. This is important, given the topic of the research

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See Beatson and Friedman *Good Faith and Fault in Contractual Law* (1995) 14. In South Africa, good faith is not used as a general principle to curb unfairness although the South African courts do recognize contracts are acts which involve good faith. The cases include *Meshkin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis supra* 852; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) 433. There are legal writers in South Africa who have promoted the idea of including good faith as a fully fledged defence in the South African Law of Contract. See Fletcher "The Role of Good Faith in the South African Law of Contract" *Responsa Meridiana* (1997) 1-14 See also Hawthorne (1995) 172.

13 Public policy is universally accepted as a fully fledged defence in the law of contract and provides a counter to the doctrine of unlimited freedom of contract. It is a term which provides a somewhat dichotomy in the sense that on the one hand public policy dictates the freedom of contract, on the other hand, where contracts or provisions of contracts are incompatible with general social customs, the principles of freedom to contract and contracts ought to be enforced, should succumb to policy considerations which promotes fairness and justice. See Hawthorne (1995) 173. See also Atiyah (1979) 25-26; Pollock *Principles of Contract* (1902) 313; See further Christie *The Law of Contract in South Africa* (1991) 419ff; Wessels *The Law of Contract in South Africa* 2ed by Roberts (1951) par 463 480ff; Joubert *General Principles of the Law of Contract* (1987) 132-151; Van der Merwe et al (2003) 440ff; Kerr (1998) 171-189.

14 Unconscionable-ness, is a doctrine widely recognised in countries such as England and the United States of America. In England, legal writers such as Cheshire et al *Law of Contract* (1986) 20-21, Nyuk-Yin *Excluding liability in Contracts* (1985) 132, Atiyah (1995) 300 recognizes the justification for pronouncing on the invalidity of agreements, where one of the contracting parties , who is viewed as the stronger party, takes unfair advantage of his position in exploiting the weaker contracting party . The English courts have also since as early as 1751 in the case of *Chesterfield v Jansen* (1751) 2 Ves. Sen. 125, 28 E.R. 82 remarked: *"..... an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided but as pernicious in principle, and therefore repressed."* More recently in the cases of *Lloyds Bank v Bundy* (1975) QB 326 and *Schroeder Music Publishing Co Ltd v McCall* (1974) 3 ALL E.R. 616 the English courts also recognize the principle of affording protection of *"those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable".* The American position is described by Peden *The Law of Unjust Contracts* (1982) 300 and Deutsch *Unfair Contracts* (1977) 11 in very similar terms as that of England. The dominance of standardized contracts also necessitated the American legislature to step in and promulgate legislation to counter substantive unfairness. The *Uniform Commercial Code* - Sec 2-302 recognize the need for relief from unconscionable contracts. It provides *"if the court as a matter of law finds the contract or any clause ..... to have been unconscionable ..... the court may refuse to enforce the contract"* UC.C. Sec 2-302(1) (1990). See the discussion Dematteo (2001) 100. The American courts have also on a number of occasions stepped in and assisted the weaker party against exploitation by the stronger contracting party, especially, in standard form contracts. One of the cases in which this doctrine featured very prominently is that of *Williams v Walker-Thomas Furniture Co* 121 U.S. App D.C. 315, 350 F.2d 445, 18 A.L.R. 3d 1297. This doctrine has not made its mark in South Africa as is the case in the United States of America and England. Although the concept unconscionable-ness is known to the legal writers and the courts in South Africa, it has never been accepted as a free floating defence. It has however been used mainly to assess unfair terms and unfairness in attempting to enforce a contract. See Van der Merwe et al Contract*: General Principles* (2003) 117, Lubbe and Murray (1988) 340. The South African Law Commission (1998) 17 has however, suggested that perhaps the time is ripe to revisit this defence.

undertaken, and will very clearly contribute to the final assessment on whether a hospital or doctor or other health care provider may validly exclude their liability.

Consequently, the influence of freedom of contract in the aforementioned countries will be discussed individually, where-after, a brief summary and the conclusions reached will be drafted.

Given the influence of western democracy and capitalism in South Africa, there can be no denial that the contract doctrine in South Africa is based on the paradigm of a free market, where voluntarily participation, by individuals, is perceived to be one of equal footing in a bargaining process.

The aforementioned ideology has caused legal writers and the courts to accept that an individual is free to decide whether, with whom, and on what terms, to contract and once a contract has been concluded, the wishes of the contracting parties must be adhered to by the exact enforcement of the contractual obligations. [15]
But, especially, some of the legal writers share the view that unlike the classic period, the notion of autonomy and the principles derived from it are not applied absolutely. Factors identified which are said to inhibit private autonomy include the changing values of society, [16] the recognition of the inequality of bargaining power, [17] public policy, [18] as well as,

15 It is especially, the writer Kahn *Contract and Mercantile Law* (1988) 70 who fully embraces the sanctity of contract with reference to the famous dictum of Jessel in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ 462 at 445 in which he stated: *" ..... if there is one thing which more than another 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 Hahlo "Unfair contract terms in civil law systems" *SALJ* 70 following the English law advocates: *"Provided a man is not a minor or a lunatic and his consent are not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place."* Christie (2001) 17 also defend the so-called hands-off approach in stating: *"the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts appears to be unreasonable; a form of paternalism inconsistent with the parties' freedom of contract."* The South African courts have also over a century supported the idea of contractual freedom and the sanctity of the enforcement of contracts. This commenced as far back as 1902 in the case of *Eastwood v Shepstone* 1902 TS 294 at 302, continuing with the case of *Wells v South African Alumenite Company* 1927 AD 69 who adopted the principle enunciated in *Printing and Numerical Registering Company v Sampson* (1875) LR 19 EQ 462; and more recently *Olsen v Standaloft* 1982 (2) SA 668 ZS; *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (AD); *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (AD); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) and most recently in the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA.

16 Van der Merwe et al (2003) 11 emphasize the changing values of society as a cardinal factor affecting individual autonomy.

constitutional protection. [19]

Influenced by its historical background, the principle of freedom of contract and the binding force of contract still remains one of the pillars of the English law of contract today, despite the influence of positive law and legislative intervention. [20]

The effect of the English ethos of contractual freedom, similarly to the position in South Africa, is this, a contracting party is free to contract with whom and on what terms (save for legislative prohibition or any other common law prohibitions such as fraud, public policy, misrepresentation etc) and courts are obliged under these circumstances to enforce such contracts and contractual provisions. [21]

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17 Hawthorne (1994) 167-169 expresses the view that the inequality between the contracting parties has caused a gradual erosion of the freedom of contract which does need legislative and judicial intervention. He is particularly keen on legislative intervention as the judiciary in the past has ignored the socio-economic reality between contracting parties and has `hidden their moral vision behind technical rules and legal doctrines'.

18 Public policy is perhaps the most used factor in invalidating contracts or contractual provisions. It is Christie *The Law of Contract and the Bill of Rights Compendium* (1997) 3H-9 who opines: *"Although public policy generally favours the utmost freedom of contract, a contract or a term in a contract may be declared contrary to public policy which is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to lack of economic experience, or is plainly improper and unconscionable, or unduly harsh or oppressive."* Support for this view can be found in Beauchamp and Childress (2001) 65 in which the writer remark: *Respect for autonomy has only prima facie standing and can sometimes be overridden by competing moral considerations."*

19 Carstens and Pearmain (2007)322. The new constitutional era in South Africa has had an influence on the application of the pure doctrine of freedom of contract. See in this regard the discussion of Carstens and Pearmain (2007) 322ff who exclaim that since constitutional values and principles now infuse and inform public policy, the principle of freedom of contract must similarly acknowledge and be shaped in accordance with constitutional values and principles. The Constitutional Court in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 15 sums up the position as follows:
"All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servande is, therefore, subject to constitutional control."

20 It is the writings of Chitty *Chitty on Contracts* Volume 1 General Principles (1999) Par 1-011; Tillotson *Contract Law in Perspective* (1995) 6-7; Stone *The Modern Law of Contract* (2003) 2-3; McKendrick *Contract Law Text, Cases and Materials* (2003) 4, 7-8; Atiyah (1995) 27-36; Furmston, Cheshire and Fitfoot *Furmston's Law of Contract* (1986) 17-18 which have continuously emphasized the importance of the doctrines of freedom of contract and the sacred enforcements of contracts. The legislature intervention referred to it as the *Unfair Contract Terms Act* 1977 and the *Unfair Terms in Consumer Contracts Regulations* 1994.

21 The position is most forcefully described by Sir George Jessel MR in the case of *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 EQ 562 in which he stated: *"There is one thing which more than another 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, that you are not lightly to interfere with this freedom of contracts."* This dictum has been favoured in many judgements in the English courts, since.

With the empowerment of consumer organisations in England, who showed great concern at the exploitation of the weaker contracting parties by the stronger, especially, in standardized contracts, protective measures were put in place, albeit legislative interventions which impacted severely on the notions of freedom of contract and the sanctity of contracts. [22]

It was especially the case in exemption clauses, where consumer organisations focused their attention a great deal. This then, eventually lead to legislative interference by the State, with freedom of contract in circumstances which Atiyah [23] described as, "often justified on moral and economic grounds." The writer however, suggests that with the increase in the educational and sophistication levels of British people over the last century and a half, the pendulum is swinging more in favour of freedom of contract again, in which paternalism is less favoured.

American contract law has as its basis the philosophical grounding that every force in society should be permitted to act freely and exert itself without constraint, limited only by the constraint that it should not cause friction in society. [24]
America being a capitalist state, in the business world, values the pious spirit of individualism and of *laisezz-faire*. Moreover, this is reflected in their ethos of freedom of contract and the sanctity of the exchange between the contracting parties, so much so, that, contractants are expected to keep to their promises in an exchange. [25]

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22 The legislative interventions included statutory changes in the law of contract by adopting legislation for the protection of the consumers *inter alia* the Rent Act, the Purchase Act, the Money Lenders Act and the Unfair Contract Terms Act 1977, just to mention a few.

23 Atiyah (1995) 3. The rationale for the change in emphasis is explained by Atiyah (1985) at 731-732 as follows: *"The problem is all the greater because ..... in the high noon of classical theory the Courts gave a new meaning to the requirements of the Statute of Frauds. The written note or memorandum required by the Stature, they insisted, was merely evidence of an agreement: the actual binding contract rested not in the writing itself, but in the will of the parties. But when, later in the nineteenth century, the Courts were faced with the new problems of printed clauses, or tickets containing references to terms contained elsewhere, there was an increasing tendency to treat the written terms, subject to certain conditions, as themselves the actual words of the contract."*

24 This philosophy was expounded by the philosopher Pound. See Peden *The Law of Unjust Contracts* (1982) at 457.

25 This has been firmly endorsed by the American legal writers. In this regard Kessler *Contracts of adhesion - some thoughts about freedom of contracts* (1943) Columbia LR 629-631 quotes with authority the English dictum of Jessel N, Printing and Numerical Registering Co v Sampson 19 EQ CAS 462: *" ..... courts are extremely hesitant to declare contracts void as against public policy because there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty and voluntarily shall be held sacred and shall be enforced by the Courts of Justice."* This principle has been vigorously defended by the American courts in the past. In the case of *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1887) the court in following Jessel's much quoted dictum held: *"It is clear that public policy and the interests of society favour the utmost freedom of contract, within the law, and require that business transactions should*

The only exception recognized by legal writers and the courts alike, is when there could be a justifiable interference with the freedom of contract and the sanctity of contract, where contracts contaminated by fraud, undue influence, where the contract or provisions of the contract threatens health, the moral welfare or the safety of the public, as well as contracts that are illegal or against public policy. [26]

Some of the American courts have, in the past, shown their reluctance to police the content of a contract or the process of the formation, so much so, that they invoked the constitutional guarantees to freedom of contract. [27]
The effect thereof was that the courts ignored those contracting parties who stood in an unequal bargaining position with the stronger party and, consequently, the weaker was exploited by the stronger.

In time however, as was the case in English law, pressure groups and legal writers re-aligned the issues with the changes in community values, which included striving for fairness and justice in contracts. This eventually led to the American contract law being codified, thus putting a stop to unlimited freedom of contract.

The Restatement of Contracts made a tremendous impact on the general jurisprudential

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not be trammelled by unnecessary restrictions."

26 Although the courts retained the power to declare a contract void for being in contravention of sound public policy, the American courts have expressed caution before doing so. This was a clear message rendered by the court in *Equitable Loans and Security CC v Waring* 117 Ga. 599 (1) 2 44 S.E.: *"The power of the courts to declare a contract void for being in contravention of a sound public policy is very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. The authority of the law making power to interfere with the private right of contract has its limits and the courts should be extremely cautious in exercising the power to supervise private contracts which the law making power has not declared unlawful."* A similar view was expressed by the Appeal Court of Florida in the case of *Banfield v Louis Cats Sports Inc* et al 589 So, 2d 441, 16 Flo (1991) in stating: *"It is a matter of great public concern that freedom of contract be not lightly interfered with. Bituminous Casualty Corp Williams. When a particular contract, transaction, or course of dealing is not prohibited under any constitutional provision, statutory provision, or prior judicial decision, it should not be struck down on public policy grounds unless it is `clearly injurious to the public good' or `contravene(s)' some established interest of society."*

27 The constitutional guarantee was vigorously invoked by the court in the case of *Josie E Smith v Edward Simson JR and FL Cappaert* 224 So. 2d 565 (1969) wherein it was stated: *"The right to contract and have contracts enforced is a basic one guaranteed by the Constitutions. The function of the courts is to enforce contracts rather than enable parties to escape their obligation upon the pretext of public policy. The court has adjudged contracts void only when the illegality is clearly shown."* The court continues: *"Contracts voluntarily made between competent persons are not to be set aside lightly. As the right of private contract is no small part of the liberty of the citizen. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy or illegality."*

premise of freedom of contract. [28] Besides the Restatement of Contracts, the American legislature also introduced the Uniform Commercial Code in 1990, which grants American judges discretion to impose equitable corrections in the interest of justice, where contracts, or provisions of contracts, would lead to unfair results. [29]

8.2 Freedom of Contract

8.2.1 Historical Background

The concept of freedom of contract in more modern times first gained recognition, by the courts and some jurists alike, during the eighteenth and nineteenth centuries. It does appear, however, that its first traces date back to the sixteenth century. In this regard, both Greek Philosophy and Roman law contributed in different ways, in establishing general principles which advocated largely the keeping to agreements.

In this regard, both Aristotle and Thomas Aquinas made major contributions. It is Aristotle who, with the introduction of his promise-keeping theory, first wrote:

"Let us discuss the truthful man. ..... Who seeks faith in his, agreements? For he is true both in word and in life because his character is such." [30]

Similarly, Thomas Aquinas expounded the theory that promises are binding as a matter of fidelity and honesty. Relying on the principles of `natural law', Aquinas, advocated that promise-keeping is in like lying, although, with a distinction:

"One who promises something does not lie if he has the intention to do what he promises because he does not speak contrary to what he has in mind. If, however, he does not do what he promises, then he appears to act unfaithfully because his intention changes." [31]

It was especially the Roman jurist, Gaius, who wrote about the effects of consent when

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28 In this regard S179 (b) (1981) of the *Restatement (Second) of Contracts* directs that courts void a contract or contractual provisions which are against "some aspect of public welfare". S195 (1) of the *Restatement (Second) of Contracts* directs that "a term exempting a contracting party from tort liability is unenforceable on grounds of public policy."

29 Section 2-702 of the *Uniform Commercial Code* (1990) provides that: *"If the court as a matter of law finds the contract or any clause to have been unconscionable, the court may refuse to enforce the contract."* The statutory limitations according to the legal writers have curbed the individual's freedom to contract and have lead to just and reasonable results. Aronstam (1979) 13ff. See also Dimatteo (2001) 99ff; Burton *Contract Law Selected Source Materials* (1995) 4ff.

30 Gordley (1991) 10-11 quoting from the writings of Aristotle.

31 Gordley (1991) 10-11 quoting from the writings of Aquinas.

concluding contracts. According to Gaius, obligations arise by contract (ex contractu), especially, sale, lease, partnership and mandatum, which contracts, Gaius, called contracts *consensu* or consensual contracts.

Although Gaius did not rely on the theories of `promise-keeping' or `fidelity and honesty', nevertheless, he regarded promises as binding and thought that consent was essential to a promise.

It was the jurist Accursius who wrote of consent as giving *".....efficacy or form or clothing to the natural root so that it can produce an obligation."* [32]

But it was during the sixteenth and seventeenth centuries that the concept freedom of contract was theoretically developed. It was especially the writings of Hobbes and Locke, who relied on social, economic and political philosophies, which made major contributions in promoting the concept freedom of contract. Their natural law ideas included:

"(1) Human beings are free from control by others; what men do, they do freely.

(2) Relationships with other human beings are voluntarily entered into out of motives of self-interest.

(3) The individual is essentially the proprietor of his own person and capacities; he can alienate his own labour by a contract which is perceived as a disposal of something belonging to the individual in much the same way as alienation of his land or his goods.

(4) Human society consists of a series of market relations." [33]

Thomas Hobbes, espousing the natural law approach to freedom of contract as a fundamental human freedom, explained this right in the following general terms:

"The right of nature, which writers commonly call the jus naturale, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature, that is to say, of doing anything, which in his own judgement, and reason, he shall conceive to be the aptest means thereunto." [34]

The doctrine of freedom of contract continued to be adopted during the eighteenth and nineteenth century. It was, especially, the proponents of the *laissez-faire* economy who

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32 Gordley (1991) 10-11 quoting from the writings of Accursius D.46.1.172.

33 See Atiyah (1979) 69ff. See also Aronstam (1979) 1-4. The writer states that during this period a strong feeling existed that man, because of his unique ability to reason, could by means of rational argument, create and develop a universal body of rules to regulate relations within the prevailing economic, political and social conditions. It is the ability of man to argue rationally which propagated the idea that man possessed certain fundamental rights including the right to contract. The right to contract was seen as a voluntary act of a man whereby he promised something to another. See Grotius Inleidinge 3.1.10-12. According to Aronstam (1978) 1-6 it was the recognition of the basic right to contract which lead to the formulation of the concept of freedom of contract which in modern day, still remains one of the basic human rights and the cornerstone of the theory of the law of contract. See further Hawthorne (1999) 157 *THRHR* 596ff.

34 See Aronstam (1979) 3.

attached a lot of value to the doctrine of freedom of contract. [35] Most notably amongst them, was the philosopher Adam Smith, who paved the way for economic liberalism with his popularised version of *laissez-faire*. Smith advocated a free political economy, free of state interference and the enhancement of freedom of contract, which he perceived to be necessary for the successful expansion of trade and industry. He also attached great value to the freedom of the individual. [36]

Other writers included *Henry Maine* and *Henry Sidgewick* who viewed contractual freedom as a means to social development. In his famous phrase `*from status to contract*', *Maine* , argued that society grew from a situation in which obligations and functions were determined by a person's status (the static society) into one in which all obligations were created by the contract (The progressive society). [37]

The doctrine of freedom of contract was also advocated by the writer, *Henry Sidgewick,* who illustrated societal progression, when he wrote:

"Suppose contracts freely made and effectively sanctioned, and the most elaborate social organisation becomes possible, at least in a society of such human beings as the individualistic theory contemplates, gifted with mature reason and governed by enlightened self-interest." [38]

So strong was this movement to promote the doctrine of the freedom of contract in a social, political and economic climate, that countries such as the United States of America incorporated this into their Constitution. [39]

The purpose, aims and objectives of the doctrine of freedom of contract have been articulated in more modern times by *Hawthorne* [40] as follows:

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35 See Aronstam (1979) 4; See also Hawthorne (1999) 162-163; See further Atiyah (1995) 3.

36 See Hawthorne (1999) 163; Aronstam (1979) 4-5; See further Atiyah (1979) 81. The author holds the view that it was especially Smith who had a deep seated belief in `man's moral obligation to observe promises'. It was Smith who then advocated: *"A man who makes a promise is trusted by the promisee and it is in his interest that he should be so trusted; the double meaning of the phrase `to be given credit' clearly shows why it is in a man's interest that he should be so trusted."*

37 See Sir Henry Maine *Ancient Law* 180-2 discussed by Aronstam (1979) 6.

38 Henry Sidgewick *Elements of Politics* (1879) 82ff.

39 Article 1 of Section 10(1) of the *American Constitution* provides: *"No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."* See Aronstam (1979) 6.

40 "The Principle of Equality in the Law of Contract" (1999) *THRHR* 157, 163.

"First of all, it is used to mean that persons should be free to negotiate the terms of their contracts without legislative interference. Secondly, the meaning attached is that where parties have concluded a contract, the terms of the contract should not be interfered with and should be given full effect. Thirdly, it has been interpreted to mean that a person should be free to select the parties he contracts with, and fourthly, that a person should be free to decide not to contract." [41]

It was during the eighteenth and nineteenth centuries and during the heyday of the theories of natural law and the philosophy of *laissez-faire*, that the judges (who were largely responsible for the creation of the law) were faced with the creation of the law of contract.

Influenced by natural law, wherein, it was believed that men had an inalienable right to make their own contracts for themselves and the philosophy of *laissez-faire*, wherein, it was believed that the law should interfere with people on economical terrain as little as possible, judges attempted to formulate a judicial doctrine of freedom of contract. [42]

The pure doctrine of freedom of contract according to *Aronstam* [43] embodied four distinct characteristics namely: Firstly, it was used to mean that persons should be free to negotiate the terms of their contracts without legislative interference. Secondly, it was used to mean that where persons have entered into a contract, the provisions of that contract should not be interfered with and should be given full legal effect. Thirdly, the doctrine was used to mean that a person should be free to select the person with whom he contracts, and fourthly, it was used to mean that a person should be free not to contract.

The effect of the classical law of contract embodied the following: Besides the freedom of contract that you could choose with whom you wanted to contract and arrive at the terms you wanted by mutual agreement, once a contract was freely and voluntarily entered into, it should be held sacred, and should be enforced by the courts if the agreement or terms of the agreement were broken. [44]
In so far as judicial thinking is concerned, what did emerge during this period was an ethos

41 See Hawthorne (1999) 163; Von Hippel "The Control of Exemption Clauses" *International and Comparative Law Quarterly* (1967) 592; See also Atiyah (1979) 83.

42 Atiyah (1995) 3. The author states that the judicial doctrine at the time embraced the following approach namely: *"The law was not concerned to limit the power of contracting or to interfere between the contracting parties in the interests of justice, but merely to assist one of them when the other broke the rules of the game and defaulted in the performance of his contractual obligations."* See also Aronstam (1979) 6.

43 *Consumer Protection, Freedom of Contract and the Law* (1979) 13-14.

44 Atiyah (1995) 9-10. The writer puts the ratio behind the sanctity of contracts down to the fact that *the parties entered into them of their own choice and volition, and settled the terms by mutual agreement."*

of unlimited freedom of contracting. The ingredients of `freedom of contract' and `sanctity of contract', became the foundation on which the whole of the law of contract, in the different jurisdictions, was built. This was echoed by Sir George Jessel MR, in one of the most celebrated English dictum at the time, namely, in the case of *Printing and Numerical Registering Company v Sampson* [45] he stated:

"If there is one thing which more than another 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. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." [46]

In a succeeding judgement of the *Manchester, Sheffield and Lincolnshire Railway Company v H.W. Brown* [47] Lord Bramwell in similar terms stressed the importance of freedom of contract when he stated:

"I am prepared to hold that unless some evidence is given to show that a contract voluntarily entered into by two parties is unjust and unreasonable, it ought to be taken that that contract is a just and reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable." [48]

The pronouncements on the ethos of the doctrine of freedom were not restricted to the English Courts. There is also a long line of *dicta* handed down by the American Courts in which the doctrine has been formulated and applied. The American Courts were particularly alive to individualism, private rights free from undue restrictions and a minimum of legal interference with private rights. During this period, the American Courts exaggerated private rights at the expense of public interests. Their decisions were based on the belief that the public good is best served by the protection of the rights of every individual. The only limitation placed on the right to contract freely, was that it yield before the health, moral welfare or the safety of the public. [49]

One of the first cases in which the American Courts refused to interfere with the freedom of contract and found that a statute constituted an unwarranted interference with freedom

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45 (1875) L.R. 19 EQ 562.

46 *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 EQ 462.

47 (1883) 8 AC 703 (HL).

48 *The Manchester, Sheffield and Lincolnshire Railway Company v H.W. Brown* (1883) AC 703 (HL).

49 Aronstam (1979) 7; See also Atiyah (1979) 6. The writer also recognizes that in instances, concerning public policy, the courts retained the power to declare contracts to be ineffective.

of contract, was that of *Godcharles v Wigeman*. [50] In this case the court found that a statute, requiring labourers to be paid their wages in money and not in goods, was degrading and insulting to the labourers in that it prevented them, as persons, having full legal capacity, from making their own contracts for the payment of wages.

In a subsequent case of *State v Hauen*, [51] the Supreme Court of Kansas, when dealing with a similar statute which prescribed payment of wages in money, went so far as to accuse the State legislature of placing the labourer under guardianship, thereby classifying him, in right of freedom of contract, alongside the idiot, the lunatic or the felon in the penitentiary.

The doctrine of freedom of contract was also emphasized in the well known case of *Lochner v State of New York*. [52] In this case, the American Supreme Court, decided that Art 8 Sec 110 of New York Laws 1897, which limited employment in bakeries to 60 hours a week and to 10 hours a day, constituted an arbitrary interference with the freedom to contract guaranteed by the 14th amendment to the Constitution of the United States of America. In this regard Mr Justice Peckham stated the following:

"There is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to match other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgement and of action. They are in no sense wards of the State. Viewed in the light of a purely labour law, with no reference whatever to the question of health, we think that a law like [this] one involves neither the safety, the morals not the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." [53]

Although the courts retained the power to declare a contract void for being in contravention of sound public policy, the American Courts have expressed caution before doing so. The court adopted the following approach in *Equitable Loan and Security Co v Waring*: [54]

"The power of the courts to declare a contract void for being in contravention of a sound public policy is very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. The authority of the law making power to interfere with the private right of contract has its limits and the courts should be extremely cautious in exercising the power to supervise private contracts which the

50 (1886) 113 PA at 427.

51 (1892) 61 KANS 146.

52 (1898) 45 US 198.

53 *Lochner v State of New York* (1898) 45 US 198.

54 117 GA. 599(1) (2; 44 S.E. 320 (1903).

law making power has not declared unlawful." [55]

A flaw, however, existed in the argument of the protagonists of the pure doctrine of freedom of contract, in that, the doctrine is based upon the premise that both parties to a contract are bargaining from positions of equal strength and that each is quite free to adopt, or reject, any term that the other might wish to impose on the contract. [56]

But it fails, however, to take into consideration the fact that, in reality, equality rarely exits, nor does it consider that many contracts entered into arise from necessity, for example, the standardized agreements. [57]

It was especially the standardized contracts which came in for criticism by the legal writers, [58] the courts, [59] and the consumer organizations.
Since the beginning of the nineteenth century, with the advent of the consumer organisations, pressure was brought to bear on businesses to respect the rights of consumers and to curb all forms of exploitation. This led to changes in political thought, as well as, social and economic conditions. [60]

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55 *Equitable Loan and Security Co v Warring* 17 GA 599(1) (2); 44 SE 320 (1903).

56 See Aronstam (1979) 14; Hawthorne (1999) 163; See also Atiyah (1995) 6.

57 Aronstam (1979) 14; See also Hawthorne (1999) 163. The writer identifies social inequalities as a factor which contributed towards the domination and exploitation of one contracting party by another. See further Atiyah (1979) 8-9 who states that *"..... During the classical period the court of freedom of contract took no account of social and economic pressures which in many circumstances might virtually force a person to enter into a contract."* The writer also states that *"classical law of contract paid little attention to inequalities between the contracting parties."*

58 Kessler (1943) 43 *Col LR* 629 opines: *"The customer is usually not able to shop around for better terms, either because the author of the standard of contracts has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but subjection more or less voluntary to terms dictated by the stronger party."* See also Aronstam (1979) 15; See further the comments by Jacobson "The Standard Contracts Law of Israel" (1968) 12 *Journal of Business Law* 325 when the writer states: *"On the other side there stands the person who requires services or purchases the goods that he can either accept the contract as it is without any changes, or refuse to become a party thereto. In fact very often, or almost always, the supplier as the only one, or one of few, who is in a position to supply the required services or the necessary goods, and the suggested option of the customer is merely theoretical for in fact it does not exist."* See further Aronstam (1979) 15; Hawthorne (1999) 166.

59 The American Courts as early as 1873 in the case of *New York Central Railway Company v Lockwood* 84 US 357 (1873) at 379 recognised that the pure doctrine of freedom of contract rarely, if ever, exists. Justice Bradley in this regard stated: *"The carrier and his customer do not stand of a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out and seek redress in the courts. He prefers, rather, to sign any paper the carrier presents. In most cases, he has no alternative but to do this, or abandon his business."*

60 Atiyah (1995) 11. The author states that the emergence of the consumer as a contracting party brought about

It was especially the promotion of consumerism which brought about the virtual eclipse of the doctrine of *laissez-faire* as a political force which impacted on the law of contract. [61]

But, notwithstanding the pressure brought by the consumer movements, standard-form contracts continued to develop and to be introduced in different spheres of industry, insurance, transport and commerce. [62]

During this period, ardent critics of freedom of contract began to home in on the societal ills of unlimited freedom of contract. [63] It was, especially, countries such as the Netherlands, [64] the United States, [65] France [66] and England, [67] who introduced legislative and judicial interventions to redress the perceived evils and injustices resulting from a free market. [68]

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significant changes in that the law of contract was seen as a positive instrument. This replaces the negative position the law of contract held sway before the influence of consumerism.

61 Atiyah (1995) 11. The author opines that law viewed as a positive instrument for the achievement of justice. This according to the author resulted in the change of mindset in that: *"The moral principle that one should abide by one's agreements and fulfil one's promises is being increasingly met by another moral principle, namely that one should not take advantage of an unfair contract which one has persuaded another party to make under economic or social pressure."* See also Atiyah The Rise and Fall of Freedom of Contract (1979) 544-545.

62 Atiyah (1995) 12. The writer is of the view that right from the outset *"the terms in these standard-form contracts were far more favourable to the organization supplying the goods or services in question than to the individual receiving them."* The author also identifies what he terms a *"common and troublesome feature of standard-form contracts namely the presence of an `exemption clause' which often provides that the organization is not to be liable in virtually any circumstances whatsoever."*

63 Hawthorne (1995) 166.

64 Hawthorne (1995) 167. The author states that the publication of the Niew Burgerlijk Wetboek heralded in an era in which the consequences of contracts as well as the application of any legal risks had to be both reasonable and equitable. See also Niew Burgerlijk Wetboek Arts 6.5.3.1.2 and 6.5.3.1.2.

65 Hawthorne (1995) 167. The author expresses the view that similarly with the promulgation of the Uniforms Commercial Code unconscionable contracts were also marginalized. See also the Uniform Commercial Code Par 2. 302.

66 Hawthorne (1995) 167. In France the justification for state intervention lay in the concept of protecting the weaker parties and restoring the inequality of bargaining power.

67 Hawthorne (1995) 167. In England the doctrine of equity influenced the modification of the English common law on contract which also provided relief for unconscionable bargains. England, also introduced the Unfair Contract Terms Act 1977 which is seen as the most important consumer protection Act dealing with contractual rights. See also Atiyah (1995) 25.

68 Hawthorne (1995) 167.

In this regard, it was especially the development of various doctrines; inter *alia,* paternalism, [69] good faith, [70] public policy, [71] inequality and unconscionable ness [72] which played a major

69 Hawthorne (1999) 168. The author defines paternalism as *"the principle or system of controlling or governing in a parental manner an action which is contrary to the actor's welfare"*. Restraints placed on contractual freedom to protect the weaker party, be it in the form of legislative control, and be it judicial control, serves as a form of paternalism. See also Atiyah (1995) 28.

70 Hawthorne (1999) 171. According to the writer the duty to contract in good faith is a principle introduced which governs the creation, consequences and performance of contracts and addresses the inequality between contracting parties as means to redress the situation. See also further Fletcher *Responsa Meridiana* (1997) 1-17 who sees the role of good faith as *"if good faith is entrenched legislation, powerful bargaining will be less able to rely on their access to legal resources as an advantage over consumers."* Hitherto, the South African legal system has not adopted a general principle of good faith, although, the South African courts accepts that contracts are acts which involve good faith. See Van der Merwe et al (1994) 232; See also Hawthorne (1999) 172; See further the South African cases of *Meshkin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis supra* 652; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433.

For the English Law position see Bratson and Daniel Friedman Good Faith and Fault in Contractual Law (1995) 14. The authors state that although hitherto, English law, declines to adopt a general principle of good faith, nevertheless, the doctrine of good faith provides another tool for control of contractual terms and their applications, especially, with regard to unfairness. In the United States of America, it is especially in the *Uniform Commercial Code* that the doctrine of good faith plays a significant role. See 1-203 of the *Uniform Commercial Code* which provides: *"Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."* See also Sec 205 of the *Restatement (2d) of Contracts* which states: *"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."*

71 Hawthorne (1995) 173. This principle entails that in the case of contracts perceived as incompatible with general social customs, the values of the principle of freedom of contract and the rule that contracts freely concluded, should be enforced (*pacta sunt servanda*) succumb to other policy considerations. See also Atiyah (1995) 25-26; Atiyah (1979) 386; Pollock (1902) 313; See further Christie (1991) 419 ff; Wessels (1951) par 463 480 ff; Joubert (1987) 132-151; Van der Merwe et al (1994) 440 ff; Kerr (1998) 171-189.

72 For the English position see Cheshire et al (1986) 20-21. The authors recognize the principle namely that the English Courts, are justified in pronouncing on the invalidity of agreements, where one of the contracting parties , who is viewed as the stronger party, takes unfair advantage of his position in exploiting the weaker party to the contract . See also Nyuk-Yin (1985) 132. The author supports the doctrine of unconscionability when he states: *"Unconscionability enables courts to review unfair contracts not otherwise open to review on the ground that they are procured by the abuse of unequal bargaining power."* But cautions the author that unlike in American Law in which the American *Uniform Commercial Code* holds that unconscionability lies at the heart of the code, the English notion of unconscionability is still skeletal, although, it can be said that unconscionability is now very much a part of English Law. The author continues to state that, it is especially with the introduction of the *Unfair Contract Terms Act* 1977, which superseded the common law notion that now empowered the courts to *inter alia* police the reasonableness of contractual terms. See also Wheeler and Shaw *Contract Law cases, materials and commentary* (1994) 474-475. The authors find justification for the interference in contracts entered into between two parties in the fact that *"by nature it is equitable that no-one should be made richer by another's loss or injury especially when use is made of exclusionary clauses in which liability for negligently inflicted personal injury is excluded."* See further Atiyah (1995) 300. According to the author *"it is unconscionable that one party has extracted an extortionate and grossly unfair bargain, by taking advantage of the other in some unfair or tricky way."* It is especially the principle of equity which has moved the English Courts to set aside express contractual provisions on the grounds of unconscionability. See Atiyah (1995) 300. For the earlier decisions see *Chesterfield v Janssen* (1751) 2 Ves. Sen. 125; 28 ER. 82 in which it was held:*"…. an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided but as pernicious in principle, and therefore repressed."* See further *Wynne v Heaton* (1778) 1 Bro CC 1 at 9, 28 ER 949. See also

role in the protection of the weaker party in the law of contract.

But, notwithstanding the introduction and development of the various doctrines as means

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Evans v Llewellyn (1787) 29 ER 1191 in which the court held: *"..... If the party is in a situation in which he is not a free agent and is not equal to protecting himself, this Court will protect him."*
A century later in *Frey v Lane* (1888) 40 Chancery Div 312 the court came to the protection of a contracting over which advantage was taken when it stated: *" .... a Court of Equity will inquire whether the parties really did meet on equal terms, and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress it will void the contract."* More recently, the court was also prepared to protect the weaker party against exploitation by the stronger party. In *Lloyds Bank v Bundy* (1975) QB 326 at 339 when the court held: *"Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on `inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being `dominated' or `overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases."*
In 1974 the House of Lords was also impaired to recognize the principle of: *" ... protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable"* when in the case of *Schroeder Music Publishing Co Ltd v McCall* (1974 3 All ER 616 the principle was accepted. For the American position see Peden (1982) 300. The author states that although attempts were made in the American Common Law to adopt the doctrine of unconscionability as exposed in the English decision of *Chesterfield v Janssen* (1751) 2 Ves. Sen. 125, 28 ER 82, most of the cases were however, decided on the more traditional grounds of mistake, misrepresentation, duress or fraud as the common law courts generally refused to recognize a doctrine of unconscionability as such. See also Deutsch (1977) 11. But, with the enactment of the *Uniform Commercials Code* in 1957, litigants were encouraged to seek relief, and courts were more susceptible, to recognize the need for relief from unconscionable contracts. Most of these cases according to Peden involved standard forms of contract. See also Deutsch (1977) 3. The author is of the view that it was especially adhesion contracts as a type of standard contract in which one party has ultimate superiority of bargaining power and the other party has virtually no choice but to adhere to the terms of the stipulator (on the basis of a take-it-or-leave-it translation) which eventually lead to the enactment of the American *Uniform Commercial Code*. The defence against unfair standardized contracts is embodied in Section 2-302 of the *Uniform Commercial Code*. Although the text of the code does not reveal the rational behind the doctrine, Deutsch (1977) 16 express the opinion that it was founded on the principle namely: *"the prevention of oppression and unfair surprises."* In this regard the American Courts especially in a leading case of *Williams v Walker-Thomas Furniture Co* 121 U.S. App D.C. 315; 350 F2d 445, 18 A.L.R. 3d 1297 (Dis Coll 1965) defined the test for deciding on unconscionability as: *" .... an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party."* The court further detailed the elements of absence of meaningful choice namely: *"Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? [W]Then a party of little bargaining power, and hence little real choice, signs a commercial unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."*
The effect of superiority of bargaining power according to Deutsch (1977) 128-129, therefore, plays an important role in deciding unconscionability. In this regard the economic disparity, together with other relevant factors, induces the courts to invalidate the harsh and unfair contract terms in certain cases. See also Nyuk-Yin (1989) 146-149.

to protect the weaker party and the modifications in social and economic conditions, the freedom of contract and the sanctity law of contract, itself, remains an integral part of the modern law of contract. [73]

In so far as the South African Law of Contract is concerned, the doctrine of the freedom of contract has long since also been recognised by several of the South African writers as one of the foundations of the law of contract in South Africa. It is especially *Kahn* [74] quoting from *Grotius* [75] who once stated: *"In civil law the very essence of a contract is the full meeting of the minds of the parties wishing to make a contract."* [76]

Hahlo [77] best illustrated our common law approach with regard to contractual freedom when he writes:

"Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress his contractual undertakings will be enforced to the letter. If through inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place." [78]

The South African courts have also long since adopted the ethos of contractual freedom. In this regard, the South African judges, in a number of cases, spanning over a period of time, also contributed towards bolstering the doctrine of freedom of contract.

In one of the earliest cases concerning the doctrine of contractual freedom, Kotze JP in *Osry v Hirsch, Loubser and Co Ltd* [79] commented as follows:

"The spirit of modern Jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the

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73 Atiyah (1995) 9-10, 21-22; See also Deutsch (1977) 19; See further The South African Law Commission *Report on Unreasonable stipulations in contracts and the rectification of contracts* (1998) 17 who suggest: *"In modern contract law, a balance has to be struck between the principle of freedom of contract, on the one hand, and the counter-principle of social control over private volition in the interest of public policy, on the other."*

74 *Contract and Mercantile Law* (1988) 31.

75 *Inleidinge* 3.1.10.4.

76 Kahn *Contract and Mercantile Law* (1988) 31 quoting from Inleidinge 3.1.10.4.

77 "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SA Law Journal* (1981) 70.

78 Hahlo "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SA Law Journal* (1981) 70.

79 1922 CPD 531.

observations of De Villiers CJ, in Henderson v Hamilton. 1903 20 SC 513 at 519

Kotze JP proceeds:

"All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by Law." [80]

In a succeeding Appellate division case of *Wells v South African Alumenite Co,* [81] Innes CJ, dealing with the sanctity of contractual bargains and the court's obligation to uphold and enforce such bargains stated:

"No doubt the conditions 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." [82]

In a later dictum, in the case of *Shifren and Others v SA Sentrale Ko-op Graan Maatskappy Beperk,* [83] Potgieter J stated the position as follows:

"It is a general principle of our law that parties shall not be fettered in their contractual freedom unless their agreement is against public policy or prohibited by law." See Wells v SA Alumenite Co *supra* at p 73.

Commenting on an agreement that parties should never again contract with each other, Potgieter J held that *".... it is certainly contrary to public policy since it amounts to a substantial limitation of contractual freedom and on that ground it would not be binding."* [84] The Supreme Court of Appeals in a more recent judgement echoed the sentiments expressed by the South African Courts throughout the years when the court per Cameron

80 *Osry v Hirsch, Loubser and Co Ltd* 1922 (CPD) 531 at 546.

81 1927 (AD) 69.

82 *Wells v South African Alumenite Co* 1927 (AD) 69.

83 1964 (2) SA 343 (0).

84 *Shifren and Others v SA Sentrale Ko-op Graan Maatskappy Beperk* 1964 (2) SA 343 (0) at 346; the abovementioned dictum was followed in the Appellate Division (as it then was) case of *SA Sentrale Ko-op Graan Maatskappy Beperk v Shifren en Andere* 1964 (4) SA 760 (AD). See also the number of dicta in which the South African Court judges have commended the freedom and sanctity of contract and refused to interfere with contractual terms, however harsh they are. In 1973 in the case of *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785 the Appellate Division stated that `*the court will not enquire into the conscionability or unconscionability* of the exercise of a right to involve a forfeiture clause in a lease. In 1982 in the case of *Tamrillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 436 the Appellate Division stated that the courts have no power to modify contractual terms as to afford some `equitable relief'. There are also innumerable decisions upholding the maxim `*caveat subscriptor*' in which the judges have been reluctant to interfere with the provisions of the market place and in so doing to protect the improvident, foolish or ill informed. See *George v Fairmead* 1958 (2) SA 465 (A).

AJ expressed himself as follows in the case of *Napier v Barkhuizen* [85] with regard to the principles and autonomy which *"find expression in the liberty to requlate one's life by freely engaging (in) contractual arrangements."* [86]

8.2.2 The Influence of Freedom of Contract in South Africa

8.2.2.1 Legal Writings

The concept of freedom of contract and the maxim *pacta sunt servanda* have withstood the test of time and still very much form the cornerstone of the South African Law of Contract. [87]

Both freedom of contract and *pacta sunt servanda* have been received via the South African common law, namely Roman law, as well as, the English Law. [88]

Although *pacta sunt servanda* and freedom of contract are different concepts, nevertheless, the latter is regarded as a corollary of the former and they are seldom distinguished from each other. [89]

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85 2006 (4) SA 1 Para 12 (SCA), 2006 (9) BCLR 1011 (SCA).

86 *Napier v Barkhuizen* 2006 (4) SA 1 Para12 (SCA), 2006 (9) BCLR 1011 (SCA).

87 Hefer "Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie 2000 *TSAR* No 1 142 at 153; Pretorius "The Basis of Contractual Liability in South African Law" (1) 2004 (67) *THRHR*. 179; Van der Walt "Kontrakte en Beheer oor Kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367 at 368; Van Aswegen "The Future of South African Contract Law" 1994 (57) *THRHR* 448 at 456; Grove "Die Kontraktereg, Altruïsme, Keusevryheid en Die Grondwet" 2003 *De Jure* 134; Lubbe and Murray (1988) 20-21; Van der Merwe et al (1994) 10; Christie *Bill of Rights Compendium* 2002 311-6; Wessels *The Law of Contract in South Africa* 1951 Volume 1 572; Hutchinson van Heerden Visser Van der Merwe *Wille's Principles of South African Law* (1991) 431; Joubert *The Law of South Africa* Volume 5 Part 1 (1994) 215; Hahlo *SALJ* (1981) 70 at 71.

88 Hawthorne "Closing of the Open Norms in the Law of Contract" 2004 67 (2) *THRHR* 294 295; Hopkins "Standard-form Contracts and the Evolving Idea of Private Law Justice: A case of Democratic Capitalist Justice versus Natural Justice" 2003 (1) *TSAR* 150 155; Van der Walt *THRHR* (1991) 367 375; Pretorius (2004) *THRHR* 179 at 181, 183; See also Kahn (1981) 70 who with regard to the English law influence to the subject of freedom and sanctity of contract cites the time-worn dictum of Sir George Jesse in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ 462 at 445 in which he states: *" ..... if there is one thing which more than another 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."*
The author Hahlo (1981) 70 following the English Law advocates: *"Provided a man is not a minor or a lunatic and his consent are not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place."* See also Hefer (2000) *TSAR* 142 regarding the English Law influence on South African Law with reference to the Jessel dictum.

89 Christie *Bill of Rights Compendium* (2002) 3H-5.

Freedom of contract means that an individual is free to decide whether, with whom, and on what terms, to contract. [90]

The principle of *pacta sunt servanda,* on the other hand, requires exact enforcement of contractual obligations created in circumstances which are consistent with freedom of contract and consensuality. [91]

The concept freedom of contract, in South Africa today, is founded on the principle of liberty, a natural law right, [92] blended with the principles of human rights and dignity. [93] Although the notion of autonomy entails that the contracting parties have, as previously stated, the liberty to contract, the notion of autonomy and the principles derived from it,

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90 Van der Merwe et al (1994) 10; Kahn (1988) 36-33; See also De Wet and van Wyk Kontraktereg en Handelsreg (1992) 6 130; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 37 (1) De Jure 58 at 59; Grove *De Jure* (2003) 134; Hopkins *TSAR* 2003 (1) 150 at 152; Hawthorne 1995 (58) *THRHR* 163.

91 Van der Merwe et al (1994) 10; See also Christie (2001) 17. The author defends the so-called hands off approach in that: *"the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts appears to be unreasonable; a form of paternalism inconsistent with the parties' freedom of contract."*

92 Kahn (1988) 31, views the very essence of a contract as *"the free meeting of the minds of the parties wishing to make a contract."* See also Van der Walt 1991 *THRHR* 367 at 376. The author opines that one of the fundamental principles of natural law is that the individual is autonomous and as such clothed with certain fundamental rights *inter alia* a competency to freely engage in trade and to conclude contracts as they see fit; Jordaan 2004 *De Jure* 58 at 59 describes the contractual autonomy as *"the freedom to determine whether, with whom and on which terms to contract, and create, if at all, legally enforceable relationships in terms of which performance must take place."* The author quotes from Kant's basic writings (Kant 2001) who believed that *"every person is therefore perceived as a moral agent with moral autonomy which relate to contracting."* Kötz "Controlled Unfair Contract Terms: Options for legislative reform" 1986 *SALJ* 405 describes the autonomous competency of individuals as: *"Contract involves free choice of the individuals concerns and is therefore based on the idea of private autonomy."* Hopkins *TSAR* 2003.1.150 at 152 acknowledges contractual autonomy when emphasizing our court's approach namely: *"..... The parties to a contract must be free to choose the terms and the manner of their agreement for themselves."*

93 Van der Merwe et al (2003) 1-14. The author states that since the introduction of the Constitution of the Republic of South Africa, Act 108 of 1996, it has had implications for the notion of autonomy, in that, Chapter 2 of the Constitution dealing with basic rights, recognizes and protects some particular rights on a `horizontal' level, including, the principles of the common law governing the law of contract. See also Grove (2003) *De Jure* 134 138. See further Christie *Bill of Rights Compendium* (2002) 3H-20. The writer, with reference to Section 9 of the Constitution Act 108 of 1996, argues that in instances where on the facts of the case, the adoption of the pure principles of freedom of contract and the sanctity of contract, would lead to an infringement of a right resultant from the inequality of bargaining power in those instances, when the necessity of the prevention outweighs the necessity of enforcing the contract, the *caveat subscriptor* rule will be relaxed. The author suggests that this technique can be applied to limitations on the enforcement of exemption clauses and to the constriction of contracts *contra proferentem*. *Contra* Grove (2003) *De Jure* 134 at 138-139. The author expresses the view that notwithstanding the introduction of Schedule 2 of the Constitution Act 108 of 1996, there is nothing in the provisions dealing with basic human rights which provides that the freedom of contract is *per se* in conflict with the provisions of the constitution.

unlike during the classical period, are not applied absolutely. [94]

One of the most recognised characteristics of the law of contract in South Africa which has shown great prominence in recent years is the principle that, despite the acceptance of the principle of the freedom of contract, a contract will not be enforced if its application would be against public policy. [95]

8.2.2.2 Case Law

Given the fact that South Africa as a state is moulded in the Western democratic capitalist style, in which the current contract doctrine is based on the paradigm of a free market, where voluntary participation by individuals is perceived to be one of equal footing in a

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94 Grove 2003 *De Jure* 134. The author is of the view that limitations are placed on the freedom to contract by numerous *ad hoc* common law and statutory rules and norms, which externally, influence the relationship between contracting parties. The author cites good faith and public interests as the prime example of the common law rules and norms as well as statutory rules and norms limiting the freedom of contract. See the *Credit Agreement Act* 75 of 1980 and the *Usury Act* 73 of 1968. Useful guidelines thereon are provided by Strydom "The Private domain and the Bill of Rights" 1995 *SAPL/SAPR* 52 63 wherein he holds: *"Let's take the example of freedom of contract. No matter how highly we value such freedom, it cannot serve as a justification for enforcing private agreements the purpose of which is the exclusion of persons of a certain race of sexual orientation. If such agreements affect a person's human dignity, undoubtedly a situation which calls for redress arises."* See further Gordley (1991); Jordan 2004 41ff *De Jure* 58 at 60; See also Kerr (1998) 8-9; See also Van der Merwe et al (2003) 11 who cites the changing values of society as a factor which inhibits private autonomy. Hawthorne 1999 (58) *THRHR* 157 at 167-169 claims that freedom of contract and the principle of *pacta servanda sunt* are not absolute values in that, despite its recognition in especially, the classical period, the inequality between the contracting parties has caused a gradual erosion of freedom of contract as the legislative and judiciary, have sought intervention to redress an imbalance of power, engendered, by freedom of contract. In this regard Hawthorne opines that: *"..... The present principle of pacta sunt servanda should be interpreted to conflict as little as possible with fundamental rights such as equality or freedom from servitude or forced labour. These implications do not, however, in my opinion mean that where the effect of an application of a rule or principle amounts to a limitation of fundamental rights as between private individuals, the protection of fundamental right will necessarily take precedence over subjective rights of performance validly acquired."* The writer also cites the *Credit Agreement Act* 75 of 1980, the *Usury Act* 73 of 1968 and the *Rent Control Act* 80 of 1976 as forms of legal paternalism employed by the legislature, to govern the contracts of consumers, borrowers and tenants for social interests in which the weaker parties are protected against exploitation. Hawthorne in promoting legislating influence is critical of the judiciary in its efforts to control immoral and unconscionable agreements. He argues that most judges despite appearing to be neutral in their strict adherence to the principle of equality before the law `ignore the discrepancy between the formal requirements of freedom and equality and socio-economic reality' as they prefer to hide their moral vision behind technical rules and legal doctrines'. *Contra* Van Aswegen 1994 (57) *THRHR* 448-451. The author appears to be a protagonist for judicial reform in the law of contract provided it is met with judicial activism in which factors such as *bona fides*, equity and substantive justice, play a vital role. Support for the foretasted view is found in Van Aswegen's 1994 (5) *THRHR* 455 argument that *"legislative reform can never be the only means of reform."*

95 Christie *Bill of Rights Compendium* (2002) 3H-9. The author sets out the legal position as follows namely: *"Although public policy generally favours the utmost freedom of contract, a contract or a term in a contract may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to social or economic experience, or is plainly improper and unconscionable, or unduly harsh or oppressive."* Support for this view can be found in Beauchamp and Childress (2001) 65 in which the writers remark: *"Respect for autonomy has only prima facie standing and can sometimes be overridden by competing moral considerations."*

bargaining process, without State intervention, it is not a surprise that this influence is mirrored in the judicial *dicta*, ranging from the more recent judgements of *Afrox Health Care Bpk v Strydom* 2002 6 SA 21 (SCA), and *Brisley v Drotskey* 2002 (4) SA 1 (SCA) to the earlier decisions of *Eastwood v Shepstone* 1902 TS 294, and more especially in *Osry v Hirsch Loubser and Co Ltd* 1922 CPD 531.

In order to have a greater understanding of the judicial thinking, it is advisable to commence with an investigation into the older cases first. This will create a platform for establishing to what degree their reasoning still influences judicial thinking today.

In the case of *Eastwood v Shepstone supra* the court refused to recognise a contract of forced labour. The court based its decision on the liberty of contract but subsequently concluded:

" ..... Because the people of the tribe in regard to all such transactions would not be free agents, and would have no liberty of contract." [96]

The principle of freedom to contract and, in particular, the terms upon which a contract may be founded, formed the basis of the decision of *Morrison v Anglo Deep Gold Mines Ltd*. [97] This case concerned a so-called `contracting out' clause in which an employer limited his liability for injury caused to a servant by the negligence of fellow-workman. Recognising the principle of freedom to contract, the court held:

"Now it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule, and certainly, the law will not recognise any arrangement which is contrary to public policy." [98]

The Appellate Division in 1919 also recognised the sanctity of contract when in the case of *Conradie v Rossouw*, [99] Solomon ACJ stated:

"That rule may be simply stated as follows: An agreement between two or more persons entered into seriously and deliberately is enforceable by action."

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96 *Eastwood v Shepstone* 1902 (TS) 294 at 302.

97 1905 (TS) 775.

98 *Morrison v Anglo Deep Gold Mines Ltd* 1905 (TS) 775 at 779. See also *South African Railways and Harbours v Conradie* 1921 (AD) 132 at 147-148.

99 1919 (AD) 279.

In the same case De Villiers A.J.A. also stated the legal position to be the following:

"According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action." [100]

Thereafter followed a number of cases, in South Africa, in which the consensuality basis of contract and the autonomy of the wills of the contracting parties, as well as, the doctrine of the sanctity of contract, were upheld.

In a Cape decision of *Osry v Hirsch* [101] Kotze JA strongly pronounced his preference for the doctrine of freedom of contract when he stated: *"The spirit of modern jurisprudence is in favour of the liberty of contract."* [102]

In another Appellate division dictum of *Paiges v Van Ryn Gold Mines Estates Ltd* [103] the court recognised the principle of freedom to contract when De Villiers JA held that, for a stipulation in a contract to be invalid, a reason must first be found, in a principle, restricting the freedom of contract.

But it was Innes CJ who, in the *Wells v South African Alumenite Company,* [104] took the strongest stance until then, in recognising the sanctity of contract. Adopting the principle enunciated in the English decision of *Printing and Numerical Registering Company v Sampson* (1875) LR 19 EQ 462 at 465 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. "[I]f there is one thing which more than another 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." (Per Jessel MR in Printing and Numerical Registering Company v Sampson (1875) LR Eq. 462 at 465)" [105]

The sanctity of contract was further entrenched by the Appellate Division in the case of

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100 *Conradie v Rossouw* 1919 (AD) 279 at 288 and 320 respectively.

101 1922 (CPD) 531.

102 *Osry v Hirsch* 1922 (CPD) 531 at 546.

103 1920 (AD) 600.

104 1927 (AD) 69.

105 *Wells v South African Alumenite Company* 1927 (AD) 69 at 73.

George v Fairhead (Pty) Ltd. [106] When the court was asked, in this case, to decide whether a hotel guest was bound by a clause in a hotel register he had signed, exempting the proprietor from liability for loss caused by theft or from the wrongful conduct of employees. Fagan CJ, in deciding in favour of the hotel, held:

"When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature."

Fagan CJ continues:

"If he chose not to read what that additional something was, with his open eyes, taking the risk of being bound by it, he cannot then be heard to say that his ignorance of what was in it was a justus error ..... " [107]

The principles of freedom of contract and the sanctity of contract was also recognised in the case of *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren* [108] in upholding a `no variation exception writing' clause in a contract. Steyn CJ relying on the *Wells v South African Alumenite Company* 1927 AD 69 case spoke of *"Die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is [word] in die openbare belang afgedwing."* [109]

Emphasis is also placed on the principle of freedom of contract and sanctity of contract in the case of *Filmer and Another v Van Straaten*,[110] in which Claassen J remarked:

"As to `A' the general rule is that:
(a) Any contract interfering with individual liberty of action in trading and all restraints of trade are contrary to public policy and therefore void, but..... "

And further:

"As to "B" it is the general tendency of the Court not to interfere between parties contracting on equal terms, provided the public interests are not affected detrimentally. The parties are considered the best judges of what is a reasonable contract between them. The doctrine pacta sunt servanda is applicable, and the Courts look with disfavour on a party attempting to escape from a contract into which he has entered with his eyes open, and then alleging afterwards that it was unreasonable. See New United Yeast Distributors (Pty) Limited v Brooks 1935

106 1958 (2) SA 465 (A).

107 *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472 and 473 respectively.

108 1964 (4) SA 760 (A).

109 *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren* 1964 (2) SA 343 (0) at 346.

110 1965 (2) SA 575 (W).

W.L.D. 75 at p83." [111]

In the *Magna Alloys and Research (SA) Pty Ltd v Ellis* [112] Rabie CJ, whilst recognising the general doctrine of freedom of contract, acknowledges that there are circumstances that may arise when courts are entitled to deviate from the general rule. He sets out the position as follows:

"Dit sou dus volgens die beginsels van ons reg moontlik wees om te sê dat 'n ooreenkoms wat omstandighede van die betrokke geval sodanig is dat die hof daarvan oortuig is dat die afdwing van die betrokke ooreenkoms die openbare belang sou skaad."

But cautions the court: *"Die tweede hoof oorweging is dat daar al oor 'n baie lang tyd in beslissings van ons howe aanvaar is dat dit in die belang van die gemeenskap is dat iedereen vir sover moontlik toegelaat moet word om hom vryelik in die handelswêreld of in sy beroep te laat geld - of, om dieselfde punt op 'n ander wyse te stel: Daar is al vir baie jare aanvaar dat dit die gemeenskap skaad as daar 'n onredelike beperking op iemand se handels of beroepsvryheid geplaas word."* [113]

The principle of sanctity of contract was reinforced in a Zimbabwean decision of *Olsen v Standaloft*. [114] Relying heavily on the Roman Dutch Law, Fieldsen CJ stated:

" ..... Roman-Dutch Law..... even more than the English Law tends as a matter of policy to attach importance to the need to uphold the sanctity of contracts made freely by competing parties." [115]

Our judges have also, in a number of cases, not only commended the freedom and sanctity of contract, but, outright refused to interfere with contractual terms, however, harsh this may be. In *Oatorian Properties (Pty) Ltd v Maroun* [116] the Appellate Division declared that *"the court will not enquire into the conscionable ness or unconscionable nesses of the*

111 *Filmer and another v Van Straaten* 1965 (2) SA 575 (W) at 578.

112 1984 (4) SA 874 (A).

113 *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A) 892-893.

114 1983 (2) SA 668 (ZS).

115 *Olsen v Standaloft* 1983 SA 668 (Z) at 673.

116 1973 (3) SA 779 A.

exercise of a right to involve a forfeiture clause in a lease." [117]

In *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* [118] Miller JA quoting the English decision of Esso Petroleum Co Ltd v Harpere Garage (Stanport) Ltd (1968) AC 269 at 294 A-B in which it was held: *"If one who seeks to take a lease of land knows that the only lease which is available to him is a lease with a restriction, then he must either take what is offered (on the appropriate legal terms), or he must seek a lease elsewhere. No feature of public policy requires that, if he freely contracted, he should be excused from honouring his contract. In no national sense could it be said that, he took a lease with restriction as to trading, he was entering into a contract that interfered with the free exercise of his trade or his business or with his "individual liberty of action in trading"*. Consequently, the Appellate Division held: *"To hold otherwise would be to enlarge wholly unjustifiably, the scope of the so-called `doctrine' relating reasonableness as a covenant in restraint of trade (assuming such doctrine to be part of our law) and would represent unwarranted interference with ordinary `liberty of contracting'."* [119]

But, our common law has, to a certain extent, encroached upon the freedom and sanctity of contract by its condemnation of contracts against public policy. [120]

In the *locus classicus Sasfin (Pty) Ltd v Beukes* [121] the Appellate Division declared that a contractual provision which is unfair and against public interest is unenforceable and void. In cautioning against the deviation of the general rule concerning freedom and sanctity of contract, Smalberger JA, stated the legal position as follows:

"The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.

One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John Mildmay 1938 AC 1 (HL) at 12: ...."The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds..... "

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117 *Oatoriam Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (AD) at 785.

118 1982 (1) SA 398 (AD).

119 *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (AD) at 439.

120 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (AD) 874 at 891.

121 1989 (1) SA 1 (AD).

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom." [122]

This dictum has in the most recent times been quoted and reinforced in a number of cases before the Supreme Court of Appeal. [123]

In the case of *Brisley v Drotsky*, [124] Cameron JA stresses the constitutional value which the freedom to contract embraces when he states:

"The constitutional values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint, contactual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity." [125]

The constitutional value of freedom of contract was also highlighted, as follows, in the matter of *Afrox Healthcare Bpk v Strydom* [126] in which Brand JA, remarked:

"[23] Die grondwetlike waarde van kontrakteersvryheid omvat, op sy beurt, weer die beginsel wat in die stelreël pacta sunt servanda uitdrukking vind. Hierdie beginsel word deur Steyn HR in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) op 767A saamgevat as synde:

> *"die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgeding word."* [127]

More recently as stated earlier, the Supreme Court of Appeals, per Cameron AJ, in the case of Napier v Barkhuizen, [128] stressed the importance of the principle of freedom of contract and the sanctity of contract when the learned judge stated:

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122 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1(AD) at 9B-f.

123 *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 (SCA) at 420 F; See also *De Beer v Keyser van Others* 2002 (1) SA 827 (SCA) at 837 C-E; *Brisley v Drotsky* 2002 (4) SA 1 SCA; *Afrox v Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 33 I-J, 34 A-B.

124 2002 (4) SA 1 SCA.

125 *Brisley v Drotsky* 2002 (4) SA 1 SCA at 36.

126 2002 (6) SA 21 SCA.

127 *Afrox v Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA at 38.

128 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

"That intruding on apparently voluntarily concluded arrangements are a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements." [129]

The court, in the *Napier* case, also attaches great value to the age old doctrine *pacta sunt servanda*. In this regard, the court held that the law of general application is the common law rule, namely, that agreements are binding and must be enforced as far as possible.
So strong is the Supreme Court of Appeal's belief in upholding the doctrine, that it cautions that, the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the Constitution. Here, the court emphasizes the principles of dignity and autonomy which *"find expression in the liberty to regulate one's life by freely engage[ing] [in] contractual armaments."* The Supreme Court of Appeal further explained that *" ..... intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."* [130]

Since then this case found itself in the Constitutional Court when, very recently, in the case of *Barkhuizen v Napier*, [131] the majority of the court (majority judgement written by Ngcobo J) again emphasized the importance of the previously mentioned principle. But, cautions the Constitutional Court, the Supreme Court of Appeal never suggested that the contract *pacta sunt servanda* was a sacred cow that should trump all other considerations. The Constitutional Court found in this regard that *"all law, including the common law of contract, is now subject to constitutional control."* The court then goes on to add *"the application of the principle pacta sunt servanda is, therefore, subject to constitutional control."* [132]
Sachs J, in a minority judgement in the same Constitutional Court case, comes out critically against what he terms *" ..... judicial and text-book repetition ..... which appear axiomatic, indeed mesmeric, to many in the legal world when regard is had to the doctrine of sanctity of contract and the maxim pacta sunt servanda."* Sachs J emphasizes the aspect that in open and democratic societies, through the influence of consumer protection struggles, scholarly critiques, legislative interventions and creative judicial reasoning, the

129 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 101 (SCA).

130 *Napier v Barkhuizen* 2006 (4) SA 1 SCA Para 13.

131 *Napier v Barkhuizen* 2006 (4) SA 1 SCA Para 13.

132 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

influence of the said principles have been dethroned from their jurisprudential pedestal, once occupied. They have now been *"singularly narrowed in the great majority of democratic societies"* according to Sachs J. Their application in South Africa has, according to Sachs J, been further influenced by the new constitutional order.

It appears therefore, that the South African judiciary heavily favours contractual freedom and the sanctity of enforcing contracts, notwithstanding attempts made by Sachs J in *Barkhuizen v Napier*.

8.2.2.3 Legal opinion

Both the Roman law and English Law influences are profoundly observed in the South African Law of Contract. Both the freedom of contract and the enforcement of contractual obligations are perhaps the most recognized characteristics of the law of contract and have their roots firmly embodied in the Roman law as well as the English Law. [133]

It is especially the time-worn dictum of Sir George Jessel, in *Printing and Numerical Registering Co v Sampson,* [134] in which it was stated:

" ..... if there is one thing which more than another 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." [135]

This influenced *Hahlo* [136] to advocate:

"Provided a man is not a minor or a lunatic and his consent are not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place." [137]

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133 Hawthorne "Closing of the Open Norms in the Law of Contract" 2004 67 (2) *THRHR* 294 295; Hopkins "Standard form Contracts and the Evolving Idea of Private Law Justice: A case of Democratic Capitalist Justice versus Natural Justice" 2003 (1) *TSAR* 150 155; Van der Walt "Kontrakte en Beheer oor Kontrakteervryheid in 'n nuwe Suid-Afrika" *THRHR* (1991) 367 375; Pretorius "The Basis of Contractual Liability in South African Law" (1) (2004) *THRHR* 179 at 181, 183; Kahn *Contract and Mercantile Law* (1981) 70. For case law see *Olsen v Standlift* 1983 (2) SA 668 (29); *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (AD).

134 (1875) LR 19 Eq. 462 at 465.

135 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ 462 at 465.

136 "Unfair Contract Terms in Civil Law Systems" *SALJ* (1981) 70 at 71.

137 Hahlo "Unfair Contract Terms in Civil Law Systems" *SALJ* (1981) 70 at 71.

And Innes CJ in *Wells v South African Alumenite Company* [138] to remark:

"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. "(I)f there is one thing which more than another 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." (Per Jessel MR in Printing and Numerical Registering Company v Sampson (1875) LR EQ 462 at 465)" [139]

The effect of the adoption of the doctrine of freedom to contract is; the individual is free to decide whether he/she wants to contract; with which he/she wishes to contract and on what terms he/she wants to contract. [140]

On the other hand, the *pacta sunt servanda* requires the enforcement of the contractual obligations, created in the circumstances consistent with freedom of contract and consensuality. [141]

But, the notion of autonomy is not applied absolutely, as there are contracts or contractual terms which will not be enforced if their application would be against public policy or one of the contracting parties contracted with duress, undue influence or fraud. [142]

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138 1927 (AD) 69.

139 *Wells v South African Alumenite Company* 1927 (AD) 69.

140 Van der Merwe et al *Contracts - General Principles* (1994) 10; Kahn *Contract and Mercantile Law* (1988) 33-36; See also De Wet and Van Wyk *Kontraktereg en Handelsreg* (1978) 6 130; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 37 (1) *De Jure* 58 at 59; Grove "Die Kontraktereg, Altruisme, Keusevryheid en die Grondwet *De Jure* (2003) 134; Hopkins "Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 (1) 150 at 152; Hawthorne "The Principle of Equality in the Law of Contract" 1999 (58) *THRHR* 163. For case law see *Morrison v Anglo American Deep Gold Mines Ltd* 1905 TS 775; *Conradie v Rossouw* 1919 (AD) 279; *Osry v Hirsch* 1927 (CP) 81; *Paiges v Van Ryn Gold Mine Estates Ltd* 1920 (AD) 600; *Wells v South African Alumenite Company* 1927 (AD) 69; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *SA Sentrale Ko-op Graan Maatskappy v Shifren* 1964 (4) SA 760 (A); *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W); *Magwa Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

141 Van der Merwe et al *Contracts - General Principles* (1994) 10; See also Christie *The Law of Contract in South Africa* (2001) 17. The author defends the so-called hands off approach in that: *"the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts appears to be unreasonable; a form of paternalism inconsistent with the parties' freedom of contract."*
For case law see *Conradie v Rossouw* 1919 (AD) 279 at 288; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *SA Sentrale Ko-op Graan Maatskappy v Shifren* 1964 (4) SA 760 (A); *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W); *Olsen v Standaloft* 1983 (2) SA 668 (S); *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

142 Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-9. For case law see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD); *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) at 420 F; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837 C-E; *Brisley v Drotsky*

Most recently the Constitutional Court, in a majority judgement per Ngcobo J, in the case of *Barkhuizen v Napier*, [143] endorsed the views of especially, the Supreme Court of Appeals in Napier v Barkhuizen, [144] in which the principles of freedom of contract and the sanctity of contract were highlighted. The Constitutional Court, per Ngcobo J, stressed the fact that it was not the court's understanding that the Supreme Court of Appeals suggested that the principle of contract *pacta sunt servanda* is a sacred one that should trump all other considerations. The court endorses the view of the Supreme Court of Appeals namely *"the application of the principle pacta sunt servanda is, therefor, subject to constitutional control."* [145]

It is respectively submitted that the views expressed by Sachs J need to be welcomed as they usher in new jurisprudential thinking in contract law in South Africa. Whereas judicial thinking appeared to be stagnant in the marshland of resistance to change, Sachs J clearly identifies the need to bring about legal reform when he states: *"..... legal tradition, if unmodified, will frequently lag well behind social and commercial reality."* [146] I respectfully associate myself with this thinking. It is submitted that when the principles of freedom of contract and the sanctity of contract were founded, it was during an era when social and commercial reality dictated that individually negotiated agreements should be honoured and enforced. But, since the founding of standard form contracts, where contracts are drafted in advance by the supplier of goods or services and presented to the consumer on a "*take it or leave it*" basis, often leading to harsh, unjust and injurious results, consumer organizations, especially, have rightfully questioned their legal status. Besides, some of the South African courts have also called into question the validity of clauses in standard form contracts that are unreasonable, oppressive or unconscionable. The Constitutional Court, in *Barkhuizen v Napier,* [147] quotes with approval the persuasive argument presented by Davis

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2002 (4) SA 1 SCA; *Afrox v Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 33 I-J, 34 A-B; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

143 2007 (5) SA 323 (CC).

144 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

145 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 15. See however, the dissenting views expressed by Sachs J in the minority judgement in which he expresses strong views against the axiomatic and mesmeric influence of the principles of freedom of contract and the sanctity of contract and the direction courts should take in the light of the new constitutional order in South Africa.

146 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 145 of the Judgement.

147 2007 (5) SA 323 (CC) Para 140.

J in the case of *Mort NO v Henry Shields-Chiat* [148] that the legal convictions of the community or as he terms it "our constitutional community" dictates that *"clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom".*(Quote from Constitutional Court). [149] It is submitted that the social and commercial reality in the modern day dictates that preventative measures ought to be taken to prevent the abuse of contracting parties, who stand in an unequal bargaining position, often the ignorant and poor, and who enter into written agreements, the terms of which wholly favour the party that had drafted the contract, or terms of the aforementioned contract that lie buried in the form of small print. The movement, internationally, is also clearly, to regard these types of clauses or contracts offensive to public policy.

Other factors influencing the principles of freedom of contract and the *pacta sunt servanda* as will be observed from the writings that follow include the principle of fairness, the doctrine of unconscionability, certain exclusionary clauses, the status and bargaining of the contracting parties.

8.2.3 The Influence of Freedom of Contract in England

8.2.3.1 Legal Writings

The principle of freedom of contract and the binding force of contract has remained one of the pillars of the English Law of Contract, despite losing some of its intellectual attraction through the influence of positive law and legislative intervention. [150]

The influence of the principles of freedom of contract and the binding force of contract is an extension, in part, of the nineteenth century position. The philosophical justification for the said principle during this period is said to be, *inter alia,* in the "will theory" of contract. The "will theory" on the other hand, entails that parties were to be the best judges of their interests. If, therefore, they freely and voluntarily entered into a contract, the only function

148 2001(1) SA 464 (C) at 474J-475F. This passage was cited by Olivier JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at Para 69.

149 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 140.

150 Chitty Chitty on Contracts Volume 1 General Principles (1999) Par 1-011; Tillotson Contract Law in Perspective (1995) 6-7; Stone The Modern Law of Contract (2002) 2-3; McKendrick Contract Law Text, Cases and Materials (2003) 4, 7-8; Atiyah An Introduction to the Law of Contract (1995) 27-36; Furmston Cheshire Fitfoot and Furmston's Law of Contract (1986) 17-18.

of the law was to enforce it. Moreover, the validity of a contract should not be challenged on the ground that its effect was unfair or socially undesirable, save for instances where the contract was illegal or immoral. It was also immaterial that one party was economically in a stronger bargaining position than the other. [151]

During the nineteenth century, the freedom of contract and the binding force of contract were best illustrated in contracts intending to regulate the damages payable on breach of contract, as well as, contracts limiting or excluding liability in damages for breach of contract and also in tort. During this period, reluctance was also shown to declare penalty clauses ineffective, however harsh or unfair their effect to one of the contracting parties may have been. [152]

The influencing factor behind this philosophy was grounded upon the moral principle that a person should fulfil his promises and abide by his agreements. Other influencing factors included the theories of natural law, which meant that men had an inalienable right to make their own contracts, for themselves. The philosophy of *laissez-faire*, similarly, meant that the law should interfere with people as little as possible. [153] It was especially, during the nineteenth century, that industrial and commercial competition was encouraged. This further promoted the ideas of freedom of choice and freedom of contract. [154] The only restriction placed on the principle of freedom of contract during this period, was the overriding public interest - `public policy', in which the courts retained the power to declare contracts to be ineffective because they were contrary to public policy. [155]

In so far as the sanctity of contract is concerned, it was generally accepted that once a contract was freely and voluntarily entered into, it should be held sacred, and should be enforced by the courts if it was broken. [156] The only limitations placed upon the courts in enforcing the sanctity of contracts were, contracts entered into under the influence of fraud, or duress or contracts designed to violate the criminal law. Such contracts could not

151 Chitty (1999) Par 1-010; McKendrick (2003) 4; Stone (2002) 2-3; Tillotson (1995) 6-7; Atiyah An Introduction to the Law of Contract (1995) 3-5; Furmston et al (1986) 13, 17-18.

152 Chitty (1999) Par 1-010; McKendrick (2003) 7-8; Tillotson (1995) 6-7; Stone (2002) 2-3.

153 Atiyah (1995) 3.

154 Atiyah (1995) 6.

155 Atiyah (1995) 6.

156 Atiyah (1995) 10.

be enforced due to public policy. [157] The general principle of freedom to contract continued to impact on the law of contract in English law during the twentieth century and continues to do so today. [158] Nevertheless, moral, political and economical forces had already commenced exerting their influence on the nature and content of contract during the nineteenth century. But, it was during the twentieth century that real development in the law of contract began to take place. [159]

The emergence of consumerism heralded in a new era, in which the consumer became a contracting party, which led to major changes.

Whereas previously, little attention was paid to inequalities between contracting parties, with the advent of consumerism, a moral principle was established, namely, that one should not take advantage of an unfair contract which one has persuaded another party to make, under economic or social pressure. Regard was had to the inequality of bargaining power between the contracting parties. [160]

The emergence and widespread use of the standard-form contracts also influenced the development of contract law in English Law. One of the key concerns about the standard-form contracts generally is this, whereas the actual creation normally requires the agreement of the parties, with standard-form contracts, the contracts ceased to consist of individually negotiated or custom-made terms. The individually negotiated contracts have been replaced by standard printed terms, offered by large organizations, often, on a `*take it or leave it'* basis. Although the consumer remained `free' in theory, his choice was often restricted to `*taking it or leaving it'*. If a consumer, for example, wanted to travel by rail, although nobody could compel the consumer to travel by train, should he decide to travel by rail, he had to do so on the terms and conditions imposed by the Railway companies. He could, therefore, not negotiate his own terms. [161]

By the mid-twentieth century, these standard-form contracts had become one of the major problems of the law of contract in England. It was felt that the fact that the terms were

157 Atiyah (1995) 10.

158 Chitty (1999) Par 1-011; McKendrik (2003) 4-5.

159 Tillotson (1995) 7; Atiyah (1995) 11.

160 Atiyah (1995) 11; Tillotson (1995) 6-7; Chitty (1999) Par 1-010; 1-011; McKendrik (2003) 4.

161 Atiyah (1995) 16.

imposed by one party and the other had no choice but to accept them or go without, they made serious inroads into contractual freedom, in that, one of the contractants had no real freedom to negotiate his own terms. The terms were also perceived to be more favourable to the bigger organizations or monopolies, leaving the weaker contracting party in a disadvantageous position. [162]

One of the most troublesome features of standard-form contracts was the presence of an `*exemption clause,* ' which often provided that the organization would be exonerated from liability `*in virtually any circumstances whatsoever.*' They were incorporated into most commercial agreements, ranging from the sale of goods, carriage of goods by sea, insurance contracts and travelling by rail etc. [163]

It was, however, recognized that standard-form contracts had advantages as well. The advantages included, saving time, trouble and expense in bargaining over terms. Also a legal decision in one case would, through the principle of precedent, provide a guide to disputed problems in other cases. [164]

But, it was the growth of monopolies and restrictive practices of all kinds, which gave rise to intellectual debate. Part of the debate included the decision to provide f protective measures to deal with the abuse by the monopolies and to deal with restrictive practices. Problems surrounding the inequality of bargaining power also stimulated the debate. Further, what was prominently advocated was the need for the protection by the law, of the vulnerable, against exploitative practices. [165]

Calls went out for the prohibition of some kinds of contracts or some kinds of contractual terms. For that reason state intervention was felt to be necessary. Many statutory changes in the English law of contract were introduced, as a consequence, during the twentieth century. The statutory changes in the law of contract were designed with the express purpose of redressing the balance between the weak and the strong. Legislation for the protection of the consumer was introduced, for example, the *Rent Act*, the *Purchase Act* 1965, the *Money Lenders Act*, the *Trade Descriptions Act* 1968, the *Unfair Contract Terms*

162 Atiyah (1995) 16.

163 Atiyah (1995) 16-17.

164 Atiyah (1995) 18.

165 Atiyah (1995) 18.

Act 1977, to illustrate just a few.

The, afore mentioned, legislative intervention demonstrates a method used for interfering with freedom of contract, in order to protect the public from exploitation, in circumstances warranting interference. This included the prohibition of `exemption clauses' in certain circumstances. It was thus widely accepted and acknowledged that legislative interference, by the state, with freedom of contract, is often justified on moral and economic grounds. [166] But, notwithstanding the legislative intervention, there are suggestions that the doctrine of the freedom of contract has not been halted, and the pendulum is again swinging in favour of freedom of contract. [167]

The main reasons advanced for the decline are said to be inter alia political, in that renewed faith is shown in the underlying principles behind freedom of contract. Great belief is shown in the individual making his own free choice instead of being governed by collective and bureaucratic decision-making. It is also felt that paternalism is less necessary in the modern day than, say, a hundred or hundred and fifty years ago, in that, the British people are today better educated and more sophisticated, requiring less paternalist protection. They are, thus, seen to be in a better position to make their own contracts and to judge their own interests without paternalist protection. [168]

8.2.3.2 Case Law

The judicial influence of the well known dictum of Sir George Jessel MR, in the case of *Printing and Numerical Registering Company v Sampson,* [169] in which he stated:

> *"If there is one thing which more than another 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. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contracts."* [170]

has been enormous in the English law of contract.

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166 Atiyah (1995) 18-20.

167 Atiyah (1995) 27-34.

168 Atiyah (1995) 28.

169 (1875) L.R. 19 Eq. 562.

170 *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 Eq. 462.

This judgement has been immense in that it cast its shadow very prominently over the English Law of Contract. Moreover, the classical theory of contract and its model of the typical contract, encapsulated in the dictum, have been expressed in similar terms, commencing with the case of *Manchester, Sheffield and Lincolnshire Railway Company v W Brown* [171] in which Lord Bramwell stressed the importance of freedom of contract when he stated:

> *"I am prepared to hold that unless some evidence is given to show that a contract voluntarily entered into by two parties is unjust and unreasonable, it ought to be taken that that contract is a just and reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable. First of all, its justice and reasonableness are prima facie proved against him by his being a party to it, and if he means to say that what he agreed to is unjust and unreasonable, he must show that it is so. I am prepared to hold that..... However, so it is, and I repeat that I am for my own part prepared to hold, not that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by them is the strongest possible proof that it is a reasonable agreement, and that I should enquire the strongest possible evidence, or something more even than a possibility, to show me that that was an unreasonable agreement."* [172]

During the nineteenth century the parties were regarded as the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it. In particular, the validity of a contract, or the terms of a contract, should not be challenged on the ground that its effect was unfair or socially undesirable (as long as it was not actually illegal or fraudulent) and it was immaterial that one party was economically in a stronger bargaining position than the other. The attitude of the court to clauses which attempted to regulate the damages payable, on breach of contract, was also one of neutrality, for the courts held that parties to a contract were able to limit or exclude liability, in damages, not merely for breach of contract, but also in tort. [173]

More recently the English Courts have also, in a number of cases, held that a person who signs a contractual document is bound by its terms however harsh they may be. [174] These are clear signs that, as a general principle, freedom of contract has considerable support in the modern judiciary. So strong was the belief in the doctrine of freedom of contract that

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171 (1883) 8 AC 703 (HL).

172 *The Manchester, Sheffield and Lincolnshire Railway Company v H.W. Brown* (1883) 8 AC 703 (HL); See also the judgements of Lord Bramwell *Salt v Marquis of Northampton* (1892) A.C. 1.

173 *Nicholson v Willan* (1804) 5 507.

174 *L'Estrange v F Graucob Ltd* (1934) 2 K.B. 394; *Levison v Patent Steam Cleaning Co Ltd* (1978) QB 69; *Singer (U.K.) v Tees and Hartepool Port Authority* (1988) 2 Lloyd's Rep 164 166; *Swisse Atlantique Societe d'Armenent Maritime SA v N.V. Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361 at 399.

Lord Reid in 1966, in the case of *Swisse Atlantique Societe d'Armenent Maritime SA v N.V. Rotterdamsche Kolen Centrale,* [175] rejected the idea that the doctrine of fundamental breach was a substantial rule of law, on the ground that this would restrict the general principle of English Law that "*parties are free to contract as they may think fit*." [176]

Lord Diplock, in 1980, in the case of *Photo Production Ltd v Securicor Transport Ltd* [177] in the same context observed:

"(A) basic principle of the common law of contract ..... is that parties to a contract are free to determine for themselves what primary obligations they will accept. Moreover, the courts have proved unwilling to strike down contracts on the ground simply that none of the parties suffered from an `inequality of bargaining power'." [178]

The House of Lords, in the case of *Liverpool City Council v Irwin,* [179] also made it clear that the courts ought not to add to the agreement which the parties have made by implying a term merely because it would be reasonable to do so. This can be done only where it is necessary.

The court also emphasized the judicial approach to the interpretation to contracts, namely, courts will not put a meaning on the words of a contract different from that which the parties clearly express. [180]

The judicial attitude in England with regard to the doctrine of the freedom of contract was once expressed by Lord Denning, in the case of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd,* [181] as follows, despite the courts at times invalidating the terms of agreements which were regarded as unfair or unreasonable, namely:

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175 (1967) 1 AC 361 at 399.

176 *Swisse Atlantique Societe d'Armement Maritime SAVN v Rotterdamsche Kolen Centrale* (1967) 1 A.L. 361 at 399.

177 (1980) AC 827, 848.

178 *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827, 848; See also *National Westminister Bank p/c v Morgan* (1985) A.C. 686, 708 disapproving the dictum of Lord Denning M.R. in *Lloyds Bank Ltd v Bundy* (1975) Q.B. 326, 339.

179 (1977) AL 239, 254.

180 *Liverpool City Council v Irwin* (1977) A.C. 239, 254; See also *Tai Hing Cottin Mill Ltd v Lin Chong Hing Bank Ltd* (1986) A.C. 80 at 104-105.

181 (1983) QB 284 (CA) at 297, (1983) 1 ALL E.R. 108 at 113-114.

"(Judges) ..... still had before them the idol, "freedom of contracts". They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract"." [182]

In a more recent judgement by the Court of Appeals in *Williams Roffey Bros and Nicholls (Contractors) Ltd,* [183] the court continued to pay lip service to the classical formulation of the doctrine of freedom of contract, but, departed significantly from it in this case; the court remarked:

"Because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract when there is shown to be a real consideration which is otherwise legal ....."

But, despite the firm stance taken by the courts to entrench the doctrine of freedom of contract, the English Courts, as will be seen, placed certain limitations on contractual freedom. Factors such as duress, undue influence, fraud, mistake, misrepresentation, inequality of bargaining power, unconscionability and the like, began and continue to play a significant roll.

8.2.3.3 Legal Opinion

Despite the influence of the positive law and legislative intervention, the principle of freedom of contract and the binding force of contract still remain the pillars of the English Law of Contract. [184] What has emerged however, during the twentieth century in England, is that the emergence of consumerism has impacted upon the almost unlimited application of freedom of contract and the sanctity of contract once entered into (save for instances which involved public interest or public policy). With the emergence of consumerism, the legal writers and the courts alike, started to give more and more attention to the inequality between the contracting parties and the hardship which the inequality of bargaining power

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182 *George Mitchell (Chester hall) Ltd v Finney Lock Seed Ltd* (1983) QB 284 (CA) at 297, (1983) 1 ALL E.R. 108 at 113-114.

183 (1991) 1 QB 1 (1990) 1 ALL E.R.512.

184 Chitty *Chitty on Contracts Volume 1 General Principles* (1999) Par 1-011; Tillotson *Contract Law in Perspective* (1995) 6-7; Stone *The Modern Law of Contract* (2002) 2-3; McKendrick *Contract Law Text, Cases and Materials* (2003) 4, 7-8; Atiyah *An Introduction to the Law of Contract* (1995) 27-36; Furmston Cheshire Fitfoot *Furmston's Law of Contract* (1986) 17-18. For the influential case see *Printing and Numerical Registering Company v Sampson* (1979) L.R. 19 EQ 462; *Manchester Sheffield and Lincolnshire Railway Co v H.N. Brown* (1883) A.L. 703.

brought with it. [185]

It was especially the advent of standard form contracts and the widespread use of these types of contracts which influenced the development of contract law in England. One of the most profound criticisms lodged against the use of standard form contracts is that the weaker contracting party was often at the mercy of the stronger contracting party and the choice of the form is often restricted to `*taking it*' or `*leaving it*'. He/she could therefore, not negotiate his/her own terms. It was especially the bigger organisations or monopolies who took advantage of the weaker contracting parties, who often found themselves in disadvantageous positions. [186]

This was so, particularly with the presence of exemption clauses in these types of contracts, often exonerating from liability in virtually any circumstances whatsoever, the bigger organisations. Consumer movements and academic writers, in identifying the various problems that these types of contracts brought with them, sought protective measures to deal with the restrictive practices. As a consequence, the legislature stepped in to address the imbalances between the weak and the strong. Various forms of legislation, as a protective measure for the consumer, were introduced in England, *inter alia*, the *Rent Act*, the *Purchase Act*, the *Money Lenders Act* and the *Unfair Contract Terms Act*. These legislative interventions made significant inroads into the freedom of contract, including the prohibition of exemption clauses in certain circumstances. [187]

But, there is a strong movement, in England today, to revert back to the autonomous position once held by the contracting parties. This move is said to be brought about by the increased educational levels and rise in sophistication of the average citizen, which calls for less paternalistic protection. [188]

8.2.4 The Influence of Freedom of Contract in the United States of America

8.2.4.1 Legal Writings

American contract law is founded on the philosophical grounding that every force in society should be permitted to act freely and exert itself without constraint, limited only by the

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185 Atiyah *An Introduction to the Law of Contract* (1995) 11, 16-18; Tillotson *Contract Law in Perspective* (1995) 6-7; Chitty *Chitty on Contracts Vol. 1 General Principles* (1999) Par 1-010, 1-011; Eccentric *Contract Law Text, Cases and Materials* (2003) 4.

186 Atiyah *An Introduction to the Law of Contract* (1995) 16-18.

187 Atiyah *An Introduction to the Law of Contract* (1995) 18-20.

188 Atiyah *An Introduction to the Law of Contract* (1995) 27-28.

constraint that it should not cause friction in society. [189]

In the business world the sanctity of the exchange between contracting parties and freedom of contract is reflected in the fact that the business system, along with its legal support structure, highly values the pious spirit of individualism and of *laissez-faire,* in which contracting parties are expected to keep to their promises in an exchange. [190]

With the development and recognition of the "*will*" theory, in the nineteenth century, by American jurists, contracts were defined in terms of the will of the contracting parties. [191] *Kessler,* [192] in this regard states that, since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.

The "*will*" theory is enthusiastically recognized by *Gilmore* [193] when he states:

"[One] of the finest flowers of nineteenth century subjectivism (was) an attitude which modulates smoothly into a theory of untrammelled autonomy of the individual will and thence into the idea of unrestricted freedom of contract which was surely one of the master concepts of nineteenth century thought." [194]

The individual's free will, as expressed by mutual assent, has become the core requirement for the foundation of a contract in American contractual jurisprudence in the 20th century. [195] The effect thereof, so it was felt, was that private parties should be left to their own free will, to use their own talents and devices to negotiate and conclude agreements

189 Pound "Liberty of Contract" (1908-9) 18 *Yale Law Journal* 454 at 457.

190 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Columbia Law Review* 629, 629-631 (1943); Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 85; Summers and Hillman *Contract and Related Obligation - Theory, Doctrine and Practice* (1987) 507; Graswell and Swartz *Foundations of Contract Law* (1994) 13; Hunter 5-3; Macauly, Kidwell and Whitford *Contracts: Law in Action* (1995) 7.

191 Schreiber *The State and Freedom of Contract* (1998) 67.

192 "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev*. 629, 629-631 (1943).

193 Gilmore *The Death of Contract* (1974) 40.

194 Braucher "Freedom of Contract and the Second Restatement" *Yale Law Journal* 78 (1969) 598 endorsed by Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 85.

195 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 85-86.

without the court's interventions. [196]

In this regard *Kessler* [197] wrote *"..... courts are extremely hesitant to declare contracts void as against public policy because there is one thing which more than another public policy requires it is that man of full age and competent understanding shall have the utmost liberty and voluntarily shall be held sacred and shall be enforced by the Courts of Justice."* [198]

The promotion and enforcement of contractual freedom have been so fierce that critics have found certain statutes to constitute an unwarranted interference with freedom of contract, even though the statutes were designed to protect certain contracting parties from being exploited by those holding superior bargaining power over them. [199]

The American courts, according to *Aronstam,* [200] have, until at least before the First World War, exaggerated private rights, at the expense of the public interest, by basing their decisions on the belief that the public good is best served by the protection of the rights of every individual. This freedom was subject only to the limitation that the right of contract, freely entered into, has to yield to the health, the moral welfare or the safety of the public.

Various states in the United States of America, under the common law, were also not prepared to police the content of a contract or the process of formation of a bargain. Save for instances where the contract formation was contaminated by fraud, undue influence or where the contract was illegal or against public policy, [201] or where the bargain is unconscionable, illegal or based on unequal bargaining power between the parties concerned, the legal consequences of the agreement would not be interfered with. Very often though, the consumer, because of his/her poor or middle class background, is placed

196 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943).

197 "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943).

198 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943).

199 Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 7.

200 *Consumer Protection, Freedom of Contract and the Law* 1979) 7.

201 Calamari and Perillo *Contracts* (1987) 429; Scheiber *The State and Freedom of Contract* (1998) 75; American College of Legal Medicine *Legal Medicine* (1991) 50-51; West Group *Corpus Juris Secundum* (1999) 67.

in an unequal bargaining position. Often, because of their position, they are compelled to accept the terms of an agreement without a possible alternative. Very often the terms were not even understood or read. [202] *Pound*, [203] in this regard, remarked some hundred years ago:

"The bigness of things in the economy today, which precludes the equality of the parties that the regime of free contract presupposed and throws upon the service state to ensure the fulfilment of reasonable expectations which are increasingly beyond the reach of the ordinary man." [204]

In time greater interest was shown in rescuing many contracting parties from the harm of bad bargains. In so doing pressure groups and legal writers re-aligned themselves with the changes in community values, inclusive of striving for fairness and justice in contract. [205]

A significant event in the long history of the American law of contract occurred when the American common law was codified, virtually putting a stop to the unlimited freedom of contract. Under the auspices of the American Law Institute, membership of which included Justices of the United States Supreme Court, Senior Judges of other divisions of the American courts, leading academics, the American Bar Association and the Association of American Law Schools, the common law was restated. One of the chief aims of the restatement of the common law was said to include to:

"*Clarify and simplify the law and to render it more of certain ...*"

The function of the courts was stated to include: *"to decide the controversies brought before them."* The function of the Institute was said to include: *"to state clearly and precisely, in the light of the decisions, the principles and rules of the common law."* [206]
There were two restatements, the first being 1932 and the second in 1981. Section 179 of the second restatement in particular, made a significant impact into the general jurisprudential premise of freedom of contract. It lays down the foundation for the non-enforceability of a contract, or of contractual terms, on the grounds of public policy. In

202 Calamari and Perillo *Contracts* (1987) 429.

203 "The Decadence of Equity" *Columbia Law Review* 5 (1905) 163.

204 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 86-87.

205 Burton *Contract Law: Selected Source Materials* (1995) 1-2.

206 Burton *Contract Law: Selected Source Materials* (1995) 1-2.

terms of Section 179, the courts are directed to intervene to void a negotiated contractual term if it conflicts with a public policy as expressed or implied in legislation or if it is against *"some aspect of public welfare."* [207]

The restatement also provides examples of the policies against *inter alia* restraint of trade and limitations on contractual duties or exculpatory clauses. S195 (1) expressly sanctions voiding of overly broad exculpatory clauses on the grounds of public policy. It provides that *"a term exempting a contracting party from tort liability is unenforceable on grounds of public policy."* [208]

Besides the restatements, the legislature also stepped into the American Law of Contract, bringing about fundamental changes to the American Law of Contract in the twentieth century. [209] In this regard, Article 2 of the Uniform Commercial Code (1990) is said to have supplemented much of the common law of contracts, in the area of sales. It is also said to grant judges a discretion to impose equitable corrections in the interests of justice, when, by applying the rules, it would lead to unfair results. [210]

The Uniform Commercial Code (1990) also addressed unconscionable clauses or agreements. Section 2-302 in this regard provides that:

"*If the court as a matter of law finds the contract or any clause to have been unconscionable, the court may refuse to enforce the contract."* [211]

The code has also introduced the adoption of the principles of equity and the notion of good faith in the enforcement of the code provisions. [212]
The American writers hold the view that legislative inroads into contract law have resulted in the replacement of the broad interpretive discretion delegated to the courts. The said

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207 *Restatement (Second) of Contracts* S179 (b) (1981).

208 *Restatement (Second) of Contracts* S195 (1) (1981).

209 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 99.

210 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 100.

211 *Uniform Commercial Code* S2-302(1) (1990) See also Summers and Hillman *Contract and Related obligation theory Doctrine and Practice* (1987) 506.

212 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 100-101; See also the *Uniform Commercial Code* 551-103, 1-203 (1990).

discretion has been substituted with the adoption of the principles of equity and good faith, ensuring maximally just legal outcomes. [213]

The American courts, according to *Aronstam,* [214] gradually recognized that statutory limitations to the individual's freedom to contract have just and reasonable results.

8.2.4.2 Case Law

The American courts have for centuries upheld the principle of freedom of contract. The effect thereof was that once a contract had been entered into, the task of the courts was to ensure that the principle of sanctity of exchange and the accompanying values pertaining to the keeping of one's promises, in an exchange, were fulfilled.

The rationale for acknowledging and enforcing the afore stated principles was stated, as follows, by Artherburn CJ in the case of *Weaver v American Oil Co.* [215]

"The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole ....." [216]

For that reason the American Courts have strongly resisted interference with contractual freedom and the sanctity of contract, so much so, that the courts used public policy as a reason for their resistance to interfere with contractual freedom. In this regard, the American courts have relentlessly followed the principles, laid down by Sir George Jessel, in the much quoted dictum of *Printing and Numerical Registering Co v Sampson* [217] in which it was stated:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void

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213 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 100-101; See also the *Uniform Commercial Code* SS1-103, 1-203 (1990); See also Atiyah *The Rise and Fall of Freedom of Contract* (1979) 617; See also Burton *Contract Law: Selected Source Materials* (1995) 6 on the uniformity the code has brought with it.

214 *Consumer Protection, Freedom of Contract and the Law* (1979) 7. See also Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 102; The *Uniform Commercial Code* SS1-103, 1-203 (1990); Atiyah *The Rise and Fall of Freedom of Contract* (1979) 617; Burton *Contract Law: Selected Source Materials* (1995) 6 on the uniformity the code has brought with it.

215 257 Ind. 458, 276 N.E. 2d 144 (Supreme Court of Indiana 1971).

216 *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (Supreme Court of Indiana 1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A 2d 69 (Supreme Court of New Jersey, 1960)

217 19 EQ. CAS. 462.

as being against public policy, because if there is one thing which more than another 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. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract." [218]

The general rule is therefore that competent persons shall have the utmost liberty of contracting and that these agreements, voluntarily and fairly made, shall be held valid and enforced by the courts. [219]

In the case of *Diamond Match Co v Roeber* [220] Andrews J, as far back as 1887, followed the case of *Printing and Numerical Registering Co v Sampson* 19 EQ CAS. 462 held:

"It is clear that public policy and the interests of society favour the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions." [221]

One of the first cases in which the American Courts refused to interfere with the freedom of contract and found that a statute constituted an unwarranted interference with freedom of contract, was that of *Godcharles v Wigeman*. [222] In this case the court found that a statute, requiring labourers to be paid their wages in money and not in goods, was degrading and insulting to the labourers in that it prevented them, as persons, having full legal capacity, from making their own contracts for the payment of wages.

In a subsequent case of *State v Hauen,* [223] the Supreme Court of Kansas, when dealing with a similar statute which prescribed payment of wages in money, went so far as to accuse the State legislature of placing the labourer under guardianship, thereby classifying

218 *Printing and Numerical Registering Co v Sampson* 19 EQ CAS. 462 followed in an unlimited number of American cases including but not restricted to *North Cutt et al v Highfill* 225 Ky. 456, 9 S.W. ed 209 (1928); *Anderson et al v Blair* 202 Ald 209, 80 So 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 282 U.S. 353, 51, S.Ct 476 (1931); *Diamond Match Co v Roeber* 106 N.Y. 433, 13 N.E. 419 (1887).

219 *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 253, 51 S. Ct 476 (1931); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A 2d 63 (1960); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1942); *Chicago Great Western Freeway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Smith v Seaboard Coast Line Railroad Company* 639 F. 2d 1235 (1981).

220 106 NY 473, 13 NE 419 (1887).

221 *Diamond Match Co v Roeber* 106 NY 473, 13 NE 419 (1887).

222 (1886) 113 PA at 427.

223 (1892) 61 KANS 146.

him, in right of freedom of contract, alongside the idiot, the lunatic or the felon in the penitentiary.

The doctrine of freedom of contract was emphasized in the well known case of *Lochner v State of New York*. [224] In this case the American Supreme Court decided that Art 8 Sec 110 of New York Laws 1897, which limited employment in bakeries to 60 hours a week and to 10 hours a day, constituted an arbitrary interference with the freedom to contract guaranteed by the 14th amendment to the Constitution of the United States of America. In this regard Mr Justice Peckham stated the following:

"There is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to match other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgement and of action. They are in no sense wards of the State. Viewed in the light of a purely labour law, with no reference whatever to the question of health, we think that a law like [this] one involves neither the safety, the morals not the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." [225]

Although the courts retained the power to declare a contract void for being in contravention of sound public policy, the American Courts have expressed caution before doing so. The court adopted the following approach in *Equitable Loan and Security Co v Waring*: [226]

"The power of the courts to declare a contract void for being in contravention of a sound public policy is very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. The authority of the law making power to interfere with the private right of contract has its limits and the courts should be extremely cautious in exercising the power to supervise private contracts which the law making power has not declared unlawful." [227]

Some of the American courts have enforced this general rule very vigorously and have invoked constitutional guarantees in the past. In the case of *Josie E Smith v Edward Simson JR and FL Cappaert* [228] it was stated:

"The right to contract and have contracts enforced is a basic one guaranteed by the Constitutions. The function of

224 (1898) 45 US 198.

225 *Lochner v State of New York* (1898) 45 US 198.

226 117 GA. 599(1) (2; 44 SE 320 (1903).

227 *Equitable Loan and Security Co v Waring* 17 GA 599(1) (2); 44 SE 320 (1903).

228 224 So. 2d 565 (1969).

the courts is to enforce contracts rather than enable parties to escape their obligation upon the pretext of public policy. This Court has adjudged contracts void only when the illegality is clearly shown."

And further:

"Contracts voluntarily made between competent persons are not to be set aside lightly. As the right of private contract is no small part of the liberty of the citizen. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy or illegality." [229]

In *Banfield v Louis Cat Sports Inc et al,* [230] the Appeal Court of Florida also endorsed the principle of freedom of contract when referring to constitutional provisions, when it stated:

"It is a matter of great public concern that freedom of contract be not lightly interfered with. Bituminous Casualty Corp v Williams. When a particular contract, transaction, or course of dealing is not prohibited under any constitutional provision, statutory provision, or prior judicial decision, it should not be struck down on public policy grounds unless it is `clearly injurious to the public good' or `contravene(s) some established interest of society." [231]

Traditionally however, only in limited instances, have the American courts been prepared to come to the rescue of one of the contracting parties.

The courts showed a willingness to depart from the principles of freedom of contract and the sanctity to enforce contracts in the following instances.

Firstly, courts have the power to invalidate agreements of parties on the grounds of public policy, but, only in those instances where the impropriety of a transaction is clear, in order to justify the exercise of the power. [232] For a full discussion on the requirements see Chapter 10.
Secondly, a contract may be set aside due to illegality, although a bare suspicion of illegality is not sufficient. [233] For a more in-depth discussion see Chapter 9.

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229 *Josie E Smith v Edward Simson JR and FL Cappaert* 224 So 2d 565 (1969); *Walker v American Family Mutual Insurance Co* 340 N.W. 2d 599 (1983).

230 589 So. 2d 441, 16 Fla. (1991).

231 *Banfield v Louis Cat Sport Inc* et al 589 So. 2d 441, 16 Fla. (1991).

232 *Banfield v Louis Cat Sport Inc* et al 589 So. 2d 441, 16 Fla. (1991).

233 *Ingalis v Perkins* 33 N.M. 269, 263 P. 761 (1928); *Styles v Lyon* 87 Conn. 23, 86 A. 564 (1913); *Anderson et al v Blair* 202 Ala. 209, 80 So. 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S6 476 (1921); *Smith v Simon and Cappaert* 224 So 2d 585 (1969); *Ryan v Griffin* 199 V.A. 891, 103 S.E. 2d 240

Thirdly, acts which are injurious to public interests will also be declared invalid, but only in those instances where the conduct is clear and free from doubt. [234] For a more in-depth discussion see Chapter 10.

Other factors impacting on contractual freedom include the principle of fairness, inequality of bargaining power between the contracting parties, the effect of exclusionary clauses in contracts etc.

8.2.4.3 Legal Opinion

Because American contract law is founded on the philosophical grounding that every force in society ought to be permitted to act freely and no unnecessary constraints be placed, in the business world, contracting parties were expected to honour, *inter alia,* freedom to contract and to keep to their promises once contracts have been executed. It was especially during the nineteenth century that the spirit of individualism and of *laissez-faire* was promoted. [235]

Courts were extremely hesitant, during this period, to declare contracts void as against public policy due to the principle of sanctity of contracts. Private rights were exaggerated almost at the expense of public interests. [236] The only limitation placed on freedom to contract during this period was due to health, moral welfare or the safety of the public. [237]

(1958); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358 161 A. 2d 69 (1960); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441; 16 Fla. (1991); *Stack and Stack v State Farm Mutual Automobile Insurance Company* 507 So. 2d 617 12 Fla. (1987); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1958).

234 *Ingalls v Perkins* 33 N.M. 269, 263 P 761 (1928); Anderson *v Blair* 202 Ala 209, 80 So. 31 (1918); *Smith v Simon and Cappaert* 224 So 2d 585 (1969); *Zeitz and Foley* 264 S.W. 2d 267 (1954); *Diamond Match Co v Roeber* 106 N.Y. 473 13 N.E. 419 (1887).

235 Pound "Liberty of Contract" (1908-9) 8 *Yale Law Journal* 424 at 457; Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Columbia Law Review* 629-63 (1943); Dimatteo *Equitable Law of Contracts: Standards and Principles* (2000) 85; Summers and Hillman *Contract and Related Obligation - Theory, Doctrine and Practice* (1987) 507; Graswell and Swartz *Foundations of Contract Law* (994) 3; Hunter *Modern Law of Contracts* 5-3; Macauly, Kidwell and Whitford *Contracts: Law in Action* (1995) 7.

236 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943); Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979) 7; *Henningsen v Bloomfield Motors Inc* 32 N.J. 351, 161 A 2d 69 (1960); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 253, 51 S. Ct 476 (1931); *Home Beneficial Ass'n. V White* 180 Tenn. 585, 177 S.W. 2d 545 (1949); *Chicago Great Western Freeway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Smit v Seaboard Coast Line Railroad Company* 639 F. 2d 1235 (1981); *Lochner v State of New York* (1898) 45 U.S. 198.

237 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943); Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979); For case law see *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971) 7; *Henningsen v Bloomfield Motors Inc* 32 N.J. 354, 161 A 2d 69 (1960).

This was later broadened to include contracts contaminated by fraud, undue influence, illegal contracts and contracts against public policy. [238]

In time, many organizations began to show great interest in consumer affairs. During this period it was identified that the fallacy which once existed, namely, contracting parties remain on equal footing, was not true. Especially with the advent of standard terms contracts, critics realised that it was the poor or middle class which were usually placed in an unequal bargaining position when contracting. They were compelled to accept the terms without a possible alternative, often resulting in great harm being suffered due to bad bargains. [239]

For that reason pressure groups and legal writers alike started advocating fairness and justice in contract. [240]

The pressure applied by the said courts eventually led to the American common law being codified in terms of the Restatement of the common law, under the auspices of the American Law Institute. [241] The Restatement provided for the intervention of the courts where contracts or contractual terms conflicted with some aspects of public welfare. [242]

Besides the Restatement, the legislature also stepped in, promulgating the Uniform Commercial Code (1990), which must also be seen as an attempt to curb contractual freedom. In this regard, the Code always empowers the American courts to refuse to enforce a contract or terms of the contract where the contract or clause is unconscionable. [243]

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238 Calamari and Perillo *Contracts* (1987) 429; Schreiber *The State and Freedom of Contract* (1998) 75; American College of Legal Medicine *Legal Medicine* (1991) 50-51; West Group *Corpus Juris Secundum* (1999) 67
For case law see *Josie E Smith v Edward Simson JR and FL Cappaert* 224 So. 2d 565 (1969); *Walker v American Family Mutual Insurance Co* 340 N.W. 2d 599 (1983); *Banfield v Louis Cat Sports Inc* et al 589 So. 2d 441, 16 Fla. (1981).

239 Calamari and Perillo *Contracts* (1987) 429; Burton *Contract Law: Selected Source Materials* (1995) 1-2.

240 Burton *Contract Law: Selected Source Materials* (1999) 1-7.

241 *Restatement (Second) of Contracts* Sec 179(b) (1981).

242 *Restatement (Second) of Contracts* S195 (b) (1981).

243 *Uniform Commercial Code* S2-302(1) (1990) See also Summers and Hillman *Contract and Related obligation theory Doctrine and Practice* (1987) 506.

It is today recognised, in the United States of America, that curbing freedom of contract through statutory interventions has just and reasonable results. [244]

8.2.5 Summary and Conclusions

It is evident from the contents and scope of this Chapter that the impact of freedom of contract is universally far reaching and profound. The history, including the origin and development, the nature and scope and the influence of freedom of contract in countries such as South Africa, England and America, was looked at in great depth. While it is clear that during the classical period the pure doctrine of freedom of contract applied, including an unlimited freedom to contract, certain limitations were however, in time, placed on freedom of contract. The nature of the pure doctrine of freedom of contract, as was seen during the discussion in this Chapter, entailed *inter alia,* that contracting parties should be free to negotiate the terms of their contracts without legislative or judicial interference. Further, where contracting parties have entered into an agreement, full legal effect should be given thereto. This could be achieved by holding agreements sacred and enforcing the obligations that flowed from such agreements.

It also emerged during the discourse in this Chapter that, in time, protagonists of the pure doctrine of freedom of contract were severely criticised by legal writers, the courts and consumer organisations. The ethos of pure freedom of contract became a target, especially, during the advent, and consequent influence, of standardised contracts. A factor most extensively debated is the general unequal bargaining position of contracting parties to standardized contracts. Often the weaker contracting parties find themselves at the mercy of the stronger contracting parties, which consequently lead to unfair and harsh results. The resistance to the application of the doctrine of pure freedom of contract shepherded in a new ethos, namely, a duty of good faith and fair dealing in the concluding of agreements and the enforcement of contracts.

From the discussion it also emerged that various doctrines were founded and developed, which played a role in the protection of the weaker party in the law of contract. They include paternalism, good faith, public policy, inequality and unconscionable ness.

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244 Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 7. See also Dematteo *Equitable Law of Contracts: Standards and Principles* (2001) 192; *The Uniform Commercial Code* SS1-103, 1-203 (1990; Atiyah *The Rise and Fall of Freedom of Contract* (1979) 617; Burton *Contract Law: Selected Source Materials* (1995) 6 on the uniformity the code has brought with it.

Having acquired a greater understanding of freedom of contract from an historical perspective, the remaining part of the Chapter was dedicated to the investigation of the influence which freedom of contract has had and continues to have in countries, *inter alia,* South Africa, England and the United States of America.

What flows from the discussion in this chapter is that western democracy and capitalism is deeply embedded in the respective political systems, as well as the business and commercial spheres of the countries selected for the research undertaken. Contract law in all three the said countries is based on the paradigm of a free market, where voluntary participation by individuals is perceived to occur on equal footing in a bargaining process.

From the afore stated perception a jurisprudence developed which caused legal writers and the courts to accept that an individual is free to decide whether, with whom, and on what terms to contract and once a contract has been concluded, the wishes of the contracting parties must be adhered to by the exact enforcement of the contractual obligations.

But, it is especially in countries such as England and the United States of America that voices have gone up, through legal writings and consumerism as well as, judicial pronouncements that the notion of autonomy and the principles derived from it, are not absolute. The most prominent factors influencing the paradigm shift included the changing values of society, the recognition of the inequality of bargaining power, public policy, as well as constitutional, judicial and legislative protection. From the application and workings of the aforementioned factors it is clear that they have had a profound effect in inhibiting private autonomy of contracting parties.

The significance and the effect of adopting the mentioned factors were especially seen after the emergence of the domination of standardized contracts. The factors served to counter the inequality of bargaining power which often led to harsh, unfair and unreasonable results. They contributed to a paradigm shift in thinking in countries, *inter alia,* England and the United States of America. More particularly, legislative interventions in both England and America have impacted severely on the notions of freedom of contract and the sanctity of contract. England introduced the Unfair Contract Terms Act 1977 and other forms of legislation, whereas, the United States of America introduced the Restatement of Contracts (First and Second) in 1936 and 1981, respectively. The United States of America also introduced the Uniform Commercial Code. The effect of the legislative intervention is that in terms of legislative prohibitions, certain contracts or contractual provisions are void *ab initio* and if challenged, the courts will make pronouncements upon legislative lines. Alternatively,

as is the case with the application of the American Uniform Commercial Code, American judges are given discretion to impose equitable corrections, in the interest of justice, where contracts or provisions of contracts would lead to unfair results. Sadly to say, South Africa still lags far behind in bringing transformation to contract law and all its facets, including, the influence of the freedom of contract and the sanctity of contract.

But, all in all, despite the interventions introduced in countries such as England and the United States of America, freedom of contract and the sanctity of contract still remains the pillar of contract law, especially in western, democratic countries.

The discussions in this Chapter have focused on the influence of freedom of contract in countries such as South Africa, England and the United States of America. The subsequent Chapters will consider, in more detail, factors impacting on contractual freedom alluded to in this Chapter, the legal effect of contracts containing exclusionary clauses and the factors impacting on the validity of exclusionary clauses.

Consequently, factors impacting on contractual freedom are the subject of the next Chapter.

Chapter 9

General Law of Contract: Selective principles influencing the law of contract and medical contracts. The influence of the *caveat subscriptor* rule

9.1 Introduction

From the discourse in the previous Chapter, it is undoubtedly so that the doctrine of freedom of contract and the sanctity of contract, have made serious inroads and impacted heavily on the law of contract, universally.

One of the consequences which flow from the doctrine of freedom of contract is the rule that once a contracting party concludes a written contract by signing the agreement, the contracting party is bound by the agreement notwithstanding the subsequent cause and effect, alternatively, that the terms of the contract are not to his/her liking. It is generally accepted the contracting party cannot complain as he/she has no-one to blame but him/herself. The rule is generally known as the *caveat subscriptor* rule which crudely translated, means `*let the signer beware*'. The *caveat subscriptor* rule has found recognition and is applied in the law of contract in all the jurisdictions chosen for the research undertaken in writing this thesis. The rationale for the continued recognition and implementation of the rule in the different jurisdictions is to give stability to written agreements or to enshrine an element of sacrosanct to writing. Besides the traditional defences recognized in the law of contract, including misrepresentation, mistake, undue influence, duress, illegality and fraud, which all serve as exceptions to the *caveat subscriptor* rule, the introduction and domination of standard contracts has also brought about the questioning, at times, of whether true assent has taken place between the contracting parties. This is especially relevant where the terms of agreement contained in the standard contract are oppressive, unfair, indecent or unconscionable.

In those instances, where a contracting party has not been afforded a genuine opportunity to read the clause containing the terms in question, true asset could not have taken place. The consequence thereof is said to influence the obviation of the required consensus between the contracting parties. Besides the afore stated traditional exceptions to the *caveat subscriptor* rule, it is especially the American Law which imposes certain duties on those contracting parties who occupy a stronger bargaining position, to bring certain terms and conditions to the attention of the weaker contracting party. This results, then, in a further exception to the *caveat subscriptor* rule if not complied with. But, the effect of the *caveat subscriptor* rule, otherwise, is far-reaching, in that, contracting parties, regardless of their literacy level or ignorance or the fact that they read the terms of the contract or not, are chargeable in law with knowledge of the terms of the contract which they choose to sign. A failure to seek advice or the negligence in not reading, whether a party signs in haste or not, will have the effect that he/she will suffer the consequence of their negligence, by being held to the terms of the agreement notwithstanding the terms being oppressive or unfair.

But, despite the influence and effects of the *caveat subscriptor* rule from what appeared in this Chapter, there are exceptions to the *caveat subscriptor* rule. The primary exceptions to the *caveat subscriptor* rule, which also serve as total defences in contract law in the jurisdictions selected for the research undertaken in this thesis, include, misrepresentation, mistake, also known as *Justus error*, illegality, duress, undue influences and fraud. For the purpose of introducing the various defences individually, a discourse of the rationale for their recognition in the various jurisdictions will be undertaken.

In so far as misrepresentations are concerned, it is generally recognised that as dissensus between the parties exist resultant from a misstatement of fact, there is no *animus contractus*. The legal consequence, generally, is that the contracting party to whom the misstatement is made and who acted thereupon may resile from the agreement.

Where a party relies on mistake as a defence, the contracting party who wishes to recile from the agreement may, depending on the circumstances, argue that to enforce the agreement would be contrary to the intention of the parties. To hold otherwise would, in certain cases, lead to unjust results. The consequence thereof is that the party relying upon mistake will have the remedy available to recile from the contract and seek cancellation.

Illegality has long been a defence to the *caveat subscriptor* rule. The rationale for the existence of illegality as an exception to the *caveat subscriptor* rule is founded on general

terms, namely, to allow an agreement founded in contravention of a statute or the common law would be contrary to public policy or *contra bones mores*. The courts would be wanting in their duty if they hesitated to declare such arrangements void. The underlying reason for the law's intervention in this way is also said to lie in the fact that it serves as a deterrence, in that, the law does not allow a person to benefit in any way from illegal behaviour. Also the courts should never be seen, by law-abiding members of the community, to be lending their assistance to claimants who have defied the law. The legal consequences, where these types of contracts are found to be illegal, are that these types of contracts are void.

In both duress and undue influence, the rationale for the recognition of both defences, lies in the fact that consent was not freely given and properly given when the transaction was entered into. It has also often been suggested, and quite rightfully so, that such an agreement, induced by duress or undue influence, such purported agreement lacks consensus or full intent between the contracting parties. The effect of duress is that such an agreement is voidable, at the instance of the party who wishes to recile from the agreement.

The final exception and defence to the *caveat subscriptor* rule is that of fraud. In this regard the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and be subject to the fraudulent conduct of the other. This will be contrary to public policy. The presence of fraud is generally said to vitiate any contract, as such agreements are generally regarded as odious and fatal in a court of law. The consequences of such agreements are they are void *ab initio*. The remedies available to the aggrieved party are cancellation and claiming restitution, or to keep the agreement in abeyance but claim damages.

9.2.1 SOUTH AFRICA

9.2.1.1 Legal Writings

The term `*caveat subscriptor*" is a term received in the South African Law of Contract from Roman law. Crudely translated it means `*let the signer beware*'. As a general rule it has been accepted, by the South African legal writers, that a person who signs a contractual document thereby signifies his assent to the contents of the document. Once a person has signed a contractual document, but it subsequently it turns out that the terms of the contract are not to his/her liking, he/she cannot complain, as he/she has no one to blame but him/herself. [1] The legal effect thereof is that once a contracting party to the document,

[1] Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65; Christie (2001) 199ff.

unaware that it contains a contract, or, in the mistaken belief that the document contains terms of a contract other than those he intended, he will, in general, not be permitted to rely on his mistake to escape liability. [2]

The underlying reason therefore is that a reasonable man generally takes care that the documents he signs correctly reflect his intentions. [3]

But, signing a document without reading it does not in every instance mean that the signatory will be bound by it. There are instances where one's signature can be voided, for example, through mistake, misrepresentation, duress, undue influence etc. [4] The rationale is founded upon the reliance theory in that, in circumstances in which there has been no true agreement between the parties and if a contractant had not created a reasonable impression that he/she intended to be bound, that party cannot be bound by that agreement. The importance thereof is that the person who relies on a signature must have a reasonable belief that the signatory intends to be bound by the terms of the agreement. But, this belief will not be reasonable if he/she is aware that a mistake has been made, or where he/she ought reasonably to have known that the terms do not reflect the signatory's true intentions, or where he/she was in some way responsible for the fact that the signatory was not aware of the contents of the contract. [5]

Therefore, the legal writers have stated that; in instances where the signatory has not read the document before signing it, in circumstances where, from his/her attitude, expressed or implied, it is easily conveyed through his/her attitude that he/she is bound by the terms, notwithstanding, the choice exercised not to read the contents of the agreement, he/she is bound to the terms. [6]

But the legal writers do recognise that there are circumstances when a contracting party despite his/her signing the document, will not be bound to the terms. In those instances,

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2 Christie (2001) 199-200; Joubert *The General Principles of the Law of Contract* (1987) 85; Farlam and Hathaway (1979) 65; Walker "*Caveat Subscriptor: How careful are we expected to be?*" (2003) 15 *SA Merc. LJ* 109 at 110.

3 Christie (2001) 199-200; Joubert (1987) 85; Farlam and Hathaway (1979) 65; Walker "*Caveat Subscriptor: How careful are we expected to be?*" (2003) 15 *SA Merc. LJ* 109 at 110.

4 Farlam and Hathaway (1979) 65; Joubert (1987) 85; Walker "*Caveat Subscriptor: How careful are we expected to be*?" (2003) 15 *SA Merc LJ* 109 at 110.

5 Walker (2003) 15 *SA Merc. LJ* 110 - 111; Christie (2001) 199-200; Farlam and Hathaway (1979) 65-66.

6 Christie (2001) 199-200; Joubert (1987) 85.

special defences, including the ignorance and handicap of the signatory to whom the contents of the document has been inadequately and inaccurately explained; where a trap has been set for the signatory; where despite the signatory appending his/her signature to the document without reading the document, the document contained a term or terms which the reasonable man would not expect to find therein, may be raised. [7]

The other defences to the *caveat subscriptor* rule, recognised by the legal writers, include misrepresentation, mistake, illegality, duress and undue influence. Consequently, each defence will be discussed individually hereinafter.

Misrepresentation

Misrepresentation, itself, may take the form of fraudulent, (intentional), negligent or innocent misrepresentation. [8]

Fraudulent misrepresentation includes the following elements, namely, a wrongful, pre-contractual false statement of fact, fraudulently (intentionally) made, with the intention to induce the person to whom it is made to conclude the contract or to agree to its terms, to which the person to whom the misrepresentation is made, would not otherwise have agreed. [9]

Negligent and innocent misrepresentation, on the other hand, includes the following elements, namely, a wrongful, pre-contractual false statement of fact, which is made either negligently or innocently, by one party to a contract and which induces the other party to enter into the contract or to agree to terms to which he/she/it would not have agreed had the truth been known. [10]

Misrepresentation is recognised as one of the defences to the *caveat subscriptor* maxim. [11] Although South African legal writers recognise that remedies for non-fraudulent misrepresentation can be excluded, by prior agreement between the parties, provided there

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7 Christie (2003) 201-203; See also Lubbe and Murray Farlam and Hathaway *Contract, Cases, Materials, Commentary* (1988) 132ff.

8 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 146; O'Brien *TSAR* 2001-3 597 at 599-600.

9 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 147.

10 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 149.

11 Christie (1996) 182; Kahn "Imposed Terms in Tickets and Notices" *Businessman's Law* (1974) 159.

is consensus between the parties, [12] the same cannot be said for fraudulent misrepresentation as the remedies for fraudulent misrepresentation cannot be excluded by a prior agreement between the parties. [13]

The harshness which is said to befall the operation of exemption clauses involving non-fraudulent misrepresentation may be mitigated in a number of ways, inter alia, the contract as a whole, including the exemption clause, is void where the misrepresentation has resulted in a dissensus between the parties. [14] Proof of fraud on the part of the representor is also said to be extremely difficult to prove in practise. For that reason our legal writers suggest that exemption clauses are ineffective on the grounds of public policy. [15]

Mistake (Justus error)

Justus error, or operative mistake, refers to a factual situation involving mistake of which the law will take notice. It is a mistake which is otherwise described as one "*which is reasonable and justifiable*", and which the law takes notice of. [16] The law takes notice of it, for as Pothier [17] states, "*error is the greatest defect that can occur in a contract, for agreements can only be formed by the consent of the parties, and there can be no consent when the parties are in error respecting the object of their agreement .....*" [18]

Therefore, according to the Roman law classification, there is no contract if there is a mistake as to the nature of the agreement (*error in negotia*); or as to the identity of the party, provided this is material (*error in persona*); or as to the identity of the subject-matter (*error in corpore*); or as to some essential quality (*error in substantia*). [19]

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12 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 150; Farlam and Hathaway (1988) 340.

13 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 148; Kerr (1998) 404-405; Christie (1996) 205.

14 Farlam and Hathaway (1988) 340; Ramsden "The Meaning of Mutual Mistake and Exemption Clauses" *SALJ* (1975) 139 at 141.

15 Farlam and Hathaway (1988) 340.

16 Christie (2003) 303; Kerr *The Principles of the Law of Contract* (2002) 242; Lubbe and Murray (1988) 132ff.

17 Pothier, *Traite Des Obligations translated by Evans* (1802) and quoted by Kahn *Contract and Mercantile Law through the cases* (1971) 85.

18 Pothier, Traite *Des Obligations translated by Evans* (1802) and quoted by Kahn *Contract and Mercantile Law through the cases* (1971) 85.

19 Farlam and Hathaway (1979) 65; Kerr (2002) 246ff; Joubert (1987) 73-74.

In modern times a distinction is drawn between a unilateral mistake i.e., when one party to the contract is mistaken but the other is not; so the existence of the mistake may not be known to the other party; there is a mutual mistake when each party is mistaken about the other party's state of mind - they are at cross purposes; there is a common mistake when both parties are of one mind and share the same mistake about anything other than the state of each other's mind. [20] *Christie* [21] holds the view that a person who makes a unilateral mistake ought not to be given relief, for the whole concept that a contract is a binding and enforceable agreement would be so destroyed. But, the author does recognise that when at the time of contracting he, personally, was labouring under some misapprehension; he has a better claim to the law's attention. The test, however, remains an objective test. Where the mistaken party has so conducted himself as to give the other party reasonably to believe that he was contracting with him on certain terms, he is nevertheless bound by the contract, whatever his subjective state of mind. Where however, the mistaken party can prove that the other party knew of his mistake, or that, as a reasonable person he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable, one justifying release from the contracting bond rest on him. But, cautions the writer, the possibility of a *justus error* being shown is limited. Where the mistake is caused by the other party, the mistaken party may seek recision of the contract, provided the mistake is sufficiently material and the mistaken party shows that he would not have entered into the contract if he had known the truth. An example hereof may occur with fraudulent conduct or the party is brought under the impression he signs for this type of transaction but, as it turns out, that, in fact, it is another transaction or it may take the form of mistakenly thinking that a written contract contains terms other than those it actually does contain. [22]

Mutual mistake occurs where the contracting parties are at cross purpose and not *ad idem*. Here the reasonableness of the understanding of both parties is compared. It is only where the mistake is regarded as reasonable that the mistake could be regarded as *justus*. The effect thereof is that a mutual mistake resulting from a misrepresentation, if substantiated, would render the contract void *ab initio*. [23]

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20 Christie (2003) 363-382; Kerr (2002) 255ff; Lubbe and Murray (1988) 132ff.

21 *The Law of Contract* (2003) 365; Kerr (2002) 251.

22 Christie (2003) 371.

23 Christie (2003) 378.

Parties who are commonly mistaken are, by definition, ad *idem* and the contract is not necessarily void. But, the matter is different where the common mistake is caused by one of the parties only. In such an instance relief may be sought by the party who was not responsible for the mistake. Where the mistake is due to him, he being the author of his own loss, he may not find relief. Common mistake will result in the contract being declared void *ab initio,* but only if impossible performance is present. [24]

Illegality

In so far as illegality as a defence to the *caveat subscriptor* rule is concerned, it has long been a principle in the South African Law of Contract that, if a contract is illegal it is void. [25] In general terms, a contract is said to be illegal if the making of it or the performance agreed upon, or the ultimate purpose of both parties in contracting is prohibited by statutory law or common law i.e., is contrary to public policy or is *contra bones mores*. [26]

The South African legal writers are, generally, *ad idem* that exemption clauses may also be struck down where they are contrary to public policy. [27] The trend is to interpret public policy, in terms of the interest of society, to general, as well as, the interest of individual contractants. [28]

Individual contracts affecting public interests may take many forms. There are no numerous clauses. A few notable examples may be mentioned which include: contracts which undermine the safety of the state and public order; contracts concerning or affecting the maintenance of the sexual morality of the community and the sanctity of marriage and the family; contracts which promote forced labour etc. [29]

It is also well established that exemption clauses purporting to exclude liability for wilful acts, whether of a delictual or constituting a breach of contract, are regarded as ineffective for the want of legality on the grounds of public policy. [30]

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24 Christie (2003) 378ff; Kerr (2002) 255ff.

25 Joubert *LAWSA* Part 1 (1994) Par 167; Christie (1987) 115ff; Lubbe and Murray (1988) 238-241.

26 Christie (1987) 129ff; Kerr (2002) 181ff; Joubert *LAWSA* (1994) Par 167; Joubert (1987) 129ff.

27 Van der Merwe et al (2003) 215; Kerr (2002) 404-405; Christie (2003) 204-205.

28 Van der Merwe et al (2003) 215; Kerr (2002) 401; Christie (2003) 341ff; Lubbe and Murray (1988) 238; Joubert *LAWSA* First Review 5 Part 1 (1994) Par 164-165.

29 Lubbe and Murray (1988) 238-340; Joubert *LAWSA* (1994) Par 163-165.

30 Lubbe and Murray (1988) 425; Van der Merwe et al (2003) 215; Kerr (2002) 405-406; Christie (2003) 205-206.

Although it is generally accepted that exemption clauses excluding liability for ordinary negligence and gross negligence (*culpa lata*) escape the effect of illegality, and are regarded as effective and not against public policy, [31] there are voices who hold the view that, notwithstanding the generally accepted principle as enunciated hereinbefore, there are rights which are inalienable and may never be waived, forfeited, or transformed in a contract. In this regard, *Hopkins* [32] persuasively argues that contracts, whose enforcement would entail the violation of a right in the Bill of Rights, are unenforceable, because they are contrary to public policy. The writer also persuasively argues that the right to human dignity is the core right in the South African Constitution. This core right can be applied in public policy considerations, regarding contracts, where there is a great disparity of bargaining power between the parties. Although the writer does not believe that every instance of unequal bargaining power calls for the intervention of the courts, where however, *"the inequality is such that the `stronger' party is able to abuse the power imbalance to such a degree that the `weaker' party's right to human dignity is impaired during the contracting process, then intervention by the courts may be appropriate."* [33]

With regard to the legality of waivers, *Hopkins* [34] further persuasively argues that the limitation of a contractant's constitutional right can only be done provided two requirements are met, namely, `reasonableness' and `*proportionality*'. The latter requirement represents a balance between *"the benefit obtained (it must be a social benefit and not merely a private one) and the harm done."* [35]

The afore stated argument, it is submitted, may contribute very richly in considering the central theme of this thesis, especially, in assessing whether an exclusionary clause in a hospital contract, in which the hospital's (including its staff) liability may be waived, regardless of the hospital, through it's staff, acting negligently in treating the patient.

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31 Lubbe and Murray (1988) 425; O'Brien "The Legality of Contractual terms exempting a contractant from Liability arising from his own or his servant's gross negligence or dolus" *TSAR* 2001-3 597 at 599; Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001) 16 *SAPR/SAPL* 122.

32 Hopkins (2001) *SAPR/SAPL* 122 at 137.

33 Hopkins (2001) *SAPR/SAPL* 122 at 133.

34 Hopkins (2001) *SAPR/SAPL* 122 at 133.

35 Hopkins (2001) *SAPR/SAPL* 122 at 133.

Duress and Undue Influence

Duress (*metus*) and undue influence are defences which may be raised successfully where, for example, an exemption clause, included in a contract, was so included, through the abusive conduct of one party to the contract over another. This may take the form of pressure which, in itself, is manifested through duress and undue influence. [36]

In order to set aside a contract on the ground of violence or fear or duress the South African legal writers require the following elements to be present, namely:

"(1) Actual violence or reasonable fear;
(2) The fear must be caused by the threat of some considerable evil to the party or his family;
(3) It must be the threat of an imminent or inevitable evil;
(4) The moral pressure used must have caused damage." [37]

The rationale for the recognition of the defence of duress lies in the fact that consent was not freely and properly given when the transaction was entered into. Furthermore, where a threat induces a contracting party to contract with another, the law would not stand back and allow someone to suffer to his/her prejudice especially where the pressure is exercised unlawfully or *contra bonos mores*. [38]

For that reason, if a person's consent to a contract is obtained by some form of pressure which may be regarded as improper conduct in terms of the law, the agreement is voidable at the instance of the contractant who is adversely affected by the improper conduct. [39]

Further, the rationale for the limitation placed on the *caveat subscriptor* rule in this form, is said to be based on the fact that the exemption clause, or even the entire contract of which it is a part, may fail for lack of consensus between the contracting parties. But, even where consensus has been reached, nonetheless, an exemption clause may be voided where the abuse of the one party to the contract over the other contracting party in the prevailing circumstances, is such that it can be said that consensus reached, was so obtained, in an

36 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 151; Van der Merwe et al (2003) 214-215.

37 Christie (2003) 349ff; Lubbe and Murray (1988) 355ff; Kerr (2002) 318ff; Farlam and Hathaway (1979) 215.

38 Kerr (2002) 318ff; Lubbe and Murray (1988) 362; Christie (2003) 355-396.

39 Joubert *LAWSA* (1994) Par 151; Christie (2003) 349, 358; Lubbe and Murray (1988) 367ff; Kerr (2002) 319.

improper manner.

The South African legal writers opine that before the defence of undue influence may be raised successfully and a contract can be set aside by the aggrieved party, it must first be shown:

(1) One person acquired an influence over another which weakened the other's powers of resistance and which rendered the will of the weaker party pliable;
(2) Such a party exercised his/her influence in an unconscionable manner to persuade the other to agree to a prejudicial transaction which he would not have entered into with normal freedom of will. [40]

Undue influence may, according to the South African legal writers, exist in a variety of circumstances, inter alia, between doctor and patient thought to be dying, priest and woman on her death bed etc. [41]

According to *Lubbe and Murray,* [42] the operation of the doctrine pre-supposes a victim who is psychologically dependant on the other party to the transaction to such an extent that his/her capacity to make decisions independently is impaired and his will is rendered pliable. Factors which have been identified as influencing the weaker party unduly include; extreme youth or age, illness, emotional immaturity, retarded intellectual development, naiveté exacerbated by a lack of education, the disintegration of personality resulting from the abuse of alcohol or other drugs, anxiety. [43]

The effect of influence, as with fraud, is to make the contract void *ab initio,* only if the influence induced the party seeking relief, to act by way of a fundamental mistake, but, which apparent assent to the contract is, in truth, not asset at all. [44]

Fraud

According to the South African legal writers one of the defences to the *caveat subscriptor*

40 Van der Merwe et al (2003) 214-215.

41 Farlam and Hathaway (1979) 215; Christie (2003) 359; Kerr (2002) 327.

42 Christie (2003) 360; Lubbe and Murray (1988) 374.

43 Lubbe and Murray (1988) 374; Christie (2003) 360; Kerr (2002) 328.

44 Christie (2003) 361; Lubbe and Murray (1988) 395; Kerr (2002) 327-328.

rule is that of fraud. [45]

The rationale for allowing the signatory to resile from the contract is based on the pre-contractual representation of a false fact, in which the signatory is induced to act upon, to his prejudice. The proviso is that the signatory must, of course, be ignorant of the falsity of the representation. [46] Furthermore, public policy dictates that an undertaking, by which one of the contracting parties bind himself to condone and submit to fraudulent conduct of the other, should not be recognized. [47]

9.2.1.2 Case Law

It is submitted that the *caveat subscriptor* rule has its roots firmly embedded in the case of *Burger v Central South African Railways*. [48] The facts briefly stated included:

This was an appeal from a decision of the First Civil Magistrate in Johannesburg. Burger, through his duly authorized agent, delivered a box of law books to the Railways, at Johannesburg, for carriage by rail to Grahamstown. The agent signed a consignment note, which was also signed by an official of the Railways, and which stated on the face of it that it was issued subject to the goods traffic regulations in force on the railway. Under s 147 of those regulations, the liability of the department was very materially limited in the case of loss or damage to goods entrusted to it, unless the value had been declared and the goods had been specially insured by the consignor. Burger read the note before the goods left Johannesburg, but did not make himself acquainted with the regulations. The goods were lost in transit, and Burger sued for their full value. The magistrate gave judgement for the amount tendered by the Railways in terms of the regulations, and Burger appealed.
Ultimately the question that came up for decision was as follows: *"..... can a man who has signed a document in the form of the one now before the court claim that he is not bound by it, simply because he did not read what he signed, and did not know what the document referred to?"*

The court per Innes CJ held:

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45 Christie (2003) 201; Kerr (2002) 104-105, 330-331.

46 Lubbe and Murray (1988) 330.

47 Christie (2003) 210; Kerr (2002) 188.

48 1903 TS 571.

"It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature." [49]

The court did, however, find that there are grounds upon which a contractant may repudiate a document to which he has put his signature. Although nothing was proved in this case, the court recognised misrepresentation as a ground.

This dictum has been followed and applied on numerous occasions in our courts, most notably for the purposes of this research, in *George v Fairmead (Pty) Ltd*. [50] The facts the court, on appeal, was confronted with were:

On 18 January 1955, George hired a room in the respondent company's hotel, for a fixed amount per month, by means of a verbal agreement with Miss Gurek, the hotel receptionist. He moved in on 1 February and at Miss Gurek's request, signed the hotel register. At the top of his form he filled in his name, date of arrival, tariff and nationality. Between this and his signature at the bottom, was a passage, in both English and Afrikaans, reading as follows:

`I hereby agree that it is a condition of my/our occupation or visit to these premises that notwithstanding the provisions of sec. 112 of the Liquor Act, 30 of 1928, a copy of which is exhibited in the hotel premises and to which my attention has been directed, the proprietor shall not be responsible for loss or damage to my/our property brought upon the premises, whether arising from fire, theft, or otherwise by whomsoever caused, or arising from the negligence or wrongful act of any person in the employ of the proprietor. Money or valuables may be handed to the proprietor for custody, when a special receipt will be issued accordingly. All visitors, whether or not they occupy rooms are deemed to contract with the proprietor on this basis.'

A month later certain clothing and personal effects were stolen from George's room in the hotel and he sued the company in the Magistrate's Court, Wynberg, Cape, for damages in the sum of 125 pounds. The magistrate granted absolution from the instance, and the Cape Provincial Division upheld his judgement. George appealed, his case being based on *justus error* i.e. he submitted that he was under a reasonable misapprehension that he was not signing a contract but merely a register, in that the receptionist had asked him to sign the hotel register without indicating that what he was asked to sign was really a contract, and without drawing his attention to the important new condition, which had been no part of his oral contract.

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49 *Burger v Central* SAR 1903 TS 571 at 578.

50 1958 (2) 465 (A).

As a general rule the court held the signatory is bound because, as Fagan CJ stated: *"Where a man is asked to put his signature to a document he cannot fail to realise that he called upon to signify, by doing so, his assent to whatever words appear above his signature."* [51]

The court recognized *justus error* as a ground to repudiate a contracting party's assent to a written contract.

In the case of *Glenburn Hotels PVT Ltd v England,* [52] the court followed the dictum *Burger v Central South African Railways* [53] when Lewis JA stated the position with regard to a contracting party signing an agreement, with or without reading an agreement, before signing the written contract:

" ..... as he has not said so in his reply, it must be taken that they were in fact visible although he may not have bothered to look at them or to read them."

The authorities establish that in such circumstances the plaintiff cannot avoid the limitation of liability expressly set out in the contract unless he can set up some special reason for doing so, such as fraud or misrepresentation on the part of the defendant. This is made quite clear in the leading case of Burger v Central South African Railways 1903 TS 571, a decision of the Full Bench of the Transvaal Supreme Court, in which the facts were somewhat similar to those of the present case." [54]

The learned judge continues to restate the position set out in the *Burger case* which provides:

"It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he has put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which his note was signed. Neither fraud nor misrepresentation have been alleged, nothing was said by any railway official who misled the signatory; the language of the document was one which the consignor understood; no pressure of any kind was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and it would be a decision unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such justus error as would entitle him to claim a restitution in integrum, or as could be successfully pleased as a defence to an action founded upon the written contract, and therefore it cannot be used for the purposes of attacking that

51 *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (AD) at 472 A.

52 1972 (2) SA 660 (RA).

53 1903 TS 571.

54 *Glenburg Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA) at 662.

contract when the railway seeks to rely upon it." [55]

The legal position with regard to the *caveat subscriptor* was also stated as follows in the case of *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd and Another*: [56] *"If a person receiving a document knows that there is writing on it and that it contains conditions relative to the contract, he is bound whether he reads them or not, if he knows that there is writing but does not know that it contains conditions relative to the contract, he is not bound, unless the other party has done what is reasonably necessary to bring the conditions to his notice."* [57]

The afore discussed principle was also applied in the dictum of *Diners Club SA (Pty) Ltd v Thorburn,* [58] in which an employee of a company applied for a credit card on behalf of the company, but was sued with the company for payment of the debt. The employee sought to avoid liability on the ground of mistake.

Burger AJ stated the legal position to be as follows:

"It is again trite law that a party who puts his signature to a document containing contractual terms has a very limited scope for escaping liability by saying that he did not know or understand the terms of the document (George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 472). The courts have allowed such a defence only in cases where the other party was in some way to blame for his mistake." [59]

The afore state dictum accords with the position found in *Burger v Central South African Railways* [60] in which Innes CJ stated:

"All that can be said is that the consignor did not choose to read what he was signing, and after he had signed did not know the particulars of the regulations by which he had agreed to abide. For the court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching

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55 *Burger v Central South African Railways* 1903 TS 571 at 577-579 quoted in the case of *Glenburg Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA) at 662.

56 1977 (2) SA 709 (W).

57 *Micor Shipping (Pty) Ltd v Trecor Gold and Sports (Pty) Ltd and Another* 1977 (2) SA 709 (W) at 713. See also *Central South African Railways v McLaren* 1903 TS 727; *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C); *Hughes N.O. v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C) at pp 803-804; *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at pp 642-644; *Kemsley v Car Spray Centre (Pty) Ltd* 1976 (1) SA 121 (SE) at pp 123-124.

58 1990 (2) SA 870 (C).

59 *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C).

60 1903 TS 571.

consequences and it would be a principle unsupported by any principle of our law." [61]

and stated in different wording in *George v Fairmead (Pty) Ltd*: [62]

"But she knew that she was assenting to something, and indeed to something in addition to the terms she had herself filled in. If she chose not to read what that additional something was, she was, with her open eyes, taking the risk of being bound by it. She cannot then be heard to say that her ignorance of what was in it was a justus error." [63]

The position with reference to the duty of a contracting party, where notices are prominently displayed, was also set out, as follows, in the Supreme Court of Appeals judgement of *Durban's Water Wonderland (Pty) Ltd v Botha and Another*. [64] In this case an exemption clause was displayed in notices at an amusement park. The respondent purchased a ticket for herself and her daughter. During one of the rides she and her daughter were injured.

Consequently the respondent sued the amusement park for damages. The appellant, in turn, relied upon the *caveat subscriptor* rule and the fact that the sale of the tickets was subject to a disclaimer absolving the amusement park from liability.

Scott JA's reasoned, handing down the judgement, that had the customer read the terms of the notices in question, there would be actual consensus. Further, had the customer seen one of the notices and realised that it contained terms relating to the use of the amenities, but did not bother to read them, there would similarly have been actual consensus on the basis that she would have agreed to be bound by these terms, whatever they may have been. It was held that, as Botha had not seen any of the notices, Durban's Water Wonderland was obliged to establish that she was bound by the terms of the disclaimer on the basis of quasi-mutual assent.

Scott JA explained this involves an inquiry into whether Durban's Water Wonderland was reasonably entitled to assume from the customer's conduct in going ahead and purchasing

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61 *Burger v Central South African Railways* 1903 TS 571 at 578.

62 1998 (2) 465 (AD).

George v Fairmead (Pty) Ltd 1958 (2) SA 465 (AD) at 472 H; See also *Booysen v Sun International (Bophuthatswana) Ltd* Case no 96/3261 Delivered 23 March 1988 (WLD) (Unreported).

64 1999 (1) SA 982 (SCA).

a ticket that she had assented to the terms of the disclaimer, or was prepared to be bound by them without reading them. The answer depends upon whether, in all the circumstances, Durban's Water Wonderland did what was `*reasonably sufficient*' to give customers notice of the terms of the disclaimer. That is, an objective test is applied, based on the reasonableness of the steps taken by the proferens, to bring the terms in question to the attention of the customer.

The court goes on to state:

"Had she seen one of the notices, realised that it contained conditions relating to the use of the amenities but not bothered to read it, there would similarly have been actual consensus on the basis that she would have agreed to be bound by those items, whatever they may have been (Central South African Railways v James 1908 TS 221 at 226)."

As to when it can reasonably be assumed that the contractant had assented to the terms of the disclaimer or was prepared to be bound by them without reading them, the court held:

"The answer depends upon whether in all the circumstances the appellant did what was reasonably sufficient to give patrons notice of the terms of the disclaimer."

The test according to the court is *"an objective test based on the reasonableness of the steps taken by the proferens to bring the terms in question to the attention of the customer or patron."* [65]

In two more recent decisions, the Witwatersrand Local Division and the Supreme Court of Appeals were faced with the question of whether a contracting party may repudiate a contract, in circumstances where contracts were concluded, via facsimile but only the front pages of the contracts were transmitted. Certain terms were contained on the reverse side of the documents, but were never sent through to the signing parties. Consequently they were unaware of these terms. Later disputes arose and attempts were made, by the relevant parties, to rely on these undisclosed terms.

The first case was that of *Home Fires Transvaal CC v Van Wyk and Another* [66] in which the respondents wanted to acquire a freestanding furnace, for their home, from the appellant, a dealer in such furnaces. The pre-typed, standardized contract was sent to the respondents

65 *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA).

66 2002 (2) SA 375 (W).

for signature. One of the terms was an exclusion clause that had the effect of freeing the appellant from liability. After the installation of the furnace, a fire broke out and the respondent's home was badly damaged. When putting the appellants on terms, the appellants refused to pay, relying on the exemption clause. Much was made in argument that, as one of the respondents admitted he was aware that there should have been terms on the back of the document; his failure to call for them signified his willingness to sign. The court set out the general legal position as follows, namely; that if someone is aware that there is writing in a document and he/she chooses not to read it, he/she may be bound by the writing, even where the other party is aware that he/she has chosen not to read the document. In its discussion of this issue, the Full Bench referred to *RH Christie The Law of Contract in South Africa* 4 ed (2001) 20, who states *"on the basis of quasi-mutual assent the cases in which it is clear (sometimes even to the other party) that the signatory has not read the document before signing are easily understood." "I haven't read the document but I'm signing it because I'm prepared to be bound by it without reading it" is an attitude whether expressed or implied, that entitles the other party to regard the document as binding."*

Despite the rule, neither the trial court nor the Full Bench, were prepared to extend this to cover the situation where the terms were never transmitted.

The Full Bench (Barber AJ, Goldstein J and Boruchowitz J) confirmed the decision of the trial court. It stated that by omitting to send the reverse side of the order to the respondents, the appellant must be held not to have intended to conclude the contract on the basis of the terms and conditions therein set forth. (At 382A-B). The Full Bench held further that the words appended at the foot of the `order', that referred to conditions on the reverse side were meaningless and had to be considered as *pro non scripto* (at 382B).

The facts of *Solar (Pty) Ltd v Divwatt (Pty) Ltd* [67] are similar to those of Home Fires. The appellant was the manufacturer of certain panels that were used to convert solar energy into electricity. The respondent wanted to purchase these to use them to operate water pumps, for its customers, in areas where conventional electricity was not available or too expensive. The agreement between the parties arose in the following circumstances. During 1993, a meeting between representatives of the two parties took place. At this meeting it was agreed that Africa Solar would provide five panels, free of charge, to Divwatt, so that it could test them. Shortly before delivery of these free panels, one Ms Gerber, from Africa

67 2002 (4) SA 681 (SCA).

Solar, contacted Divwatt's financial director, Mr Pichulik. She asked him to supply certain information regarding Divwatt, as it was a new company and Africa Solar wanted to check it out before supplying it with the expensive panels. She faxed a form for him to complete. Puchulik received a single page that was headed `Application for Credit Facilities'. At first he did not complete the form, because he was not applying for credit. But, after again being requested for the information, he completed it, signed it, and returned it to her. The free panels were then supplied. They were tested and found to be acceptable. Divwatt did not apply for credit and no further terms on which the panels were to be supplied were discussed. Divwatt ordered panels to the value of R600 000.00. Some of them were installed. After a period of time Divwatt started receiving complaints about the performance of the pumps. It was established that the panels did not meet the quoted specifications.

Divwatt withheld payment of the balance due to Africa Solar because of the ongoing dispute that ensued between the parties. Africa Solar sued Divwatt for the outstanding amount.

The question to be decided by the Full Bench was whether the respondents were entitled to repudiate the agreement and to withhold payment to the appellant company.

The Full Bench dismissed the appeal. This court (Van der Walt and Roos JJ) stated:

"Where a document specifically states "conditions on the reverse hereof" you have the opportunity to read the conditions. If you choose not to read them or if the conditions appear above in the document, in the contract, you are able to read them, then you are bound. That is logical. But if the document specifically states as annexure A does "as printed on the reverse hereof" and there is no printing on the reverse, no matter how lame the excuse of the secretary as to why he signed or why he did not read the clause the factual position is there is no printing to which he has subscribed. And lacking such printing he may be criticized for not inquiring after the printing, but he cannot be held to be bound by something which he has not seen, and that is the simple issue as far as I am concerned (quoted at 695D-F)"

The appellant subsequently appealed to the Supreme Court of Appeals who upheld the decision of the Full Bench, but took a different approach, similar to that of the trial court. The Supreme Court of Appeal, like the trial court, focused on Pichulik's state of mind when he completed the form. It accepted that Pichulik believed that the form was for information purposes only and that he was not on his guard when he signed it. At that stage he was not committing himself to a future contractual relationship with Africa Solar (at 697F2D-G). Gerber, too, knew that she required the form for information purposes only. Although her superiors were unaware of the circumstances in which the document was completed, her knowledge was imputed her principal, as it was acquired during the course and scope of her

employment (at 697H).

The court reiterated the principle that the burden of proof was on the person who sought to rely on a contract to prove its terms. Here, proof of those terms included proof that the parties had the requisite intention to contract (at 698C). The court went on to state that the production of the signed document was a telling indication that Divwatt intended to be bound. But the court found that this was counterbalanced by Pichulik's evidence that the document had been sent to him for a limited purpose only. Although the majority referred to the fact that only one page had been transmitted, its decision rested on the finding that Pichulik had misunderstood the purpose for which this document was going to be used, or could be used. He completed the document for information purposes only. He was not applying for credit. Gerber was responsible for this misunderstanding. She was aware of the specific limited purpose for which the document was transmitted. So, at that stage of the negotiations, there was no *animus contrahendi*.

In a dissenting judgement, Streicher JA reasoned that, as the document was clear and unambiguous, Pichulik should have called for the reverse side. He did not accept Pichulik's version that he misunderstood why the document was required. As a result, the judge was of the view that the Full Bench had erred in holding that a person `*cannot be held to be bound by something which he has not seen*' and that if `*a person is prepared to contract subject to standard conditions which he has not seen, there is nothing preventing him from doing so*.' (At 706A).

More recently, the Supreme Court of Appeal, in the case of *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* [68] was confronted with the question whether the respondent, a courier service, who was tasked to convey certain travellers' cheques from South Africa to the Jersey Islands, and lost, in the process, the cheques, could escape liability by relying on standard terms and conditions, including an exclusionary clause exempting the courier company from liability.
The court, in coming to a conclusion, relied on the *caveat subscriptor* rule in rejecting the appellant's version that he made a mistake. The court also found that the exclusionary clause was part of the contract between the parties and consequently clause 8.7 was fatal to the appellants claim. The court concluded *"to hold otherwise would be to introduce a degree of paternalism in one law of contract at odds with the caveat subscriptor rule."* [69]

68 2007 (2) SA 599.

69 *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA) 603.

But, the *caveat subscriptor* doctrine, according to the South African courts, does not operate unconditionally. The following factors have vitiated its effectiveness, especially in exemption clauses. Firstly, our courts have held, ever since the dictum of *Morrison v Anglo Deep Gold Mines Ltd,* [70] those contracts will be valid only in instances where a man contracts without duress, without fraud and understanding what he does.

The South African courts, as with the legal writers, do recognise exceptions to the *caveat subscriptor* rule including misrepresentation, mistake, illegality, duress and undue influence, fraud, consequently, a discussion on each exception follows.

Misrepresentations

The South African courts have acknowledged before that relief, on the basis of misrepresentation, may be excluded by means of contractual stipulation. [71]

The South African courts have at the same time, played a protective role towards contractants, especially, as a result of the harshness which exemption clauses, in their operation, often bring. Consequently, the courts do not allow these practises to operate unchecked and the courts have protected the public from the worst abuses of exemption clauses. Recent cases have concluded that the contract as a whole, including the exemption clause, is void where the misrepresentation has resulted in a *dissensus* between the parties. [72] Whether or not an exemption clause has been incorporated, in some form of disguise, into a contract has been highlighted in the case of *Du Toit v Atkinson's Motors Bpk*: [73]

"If certain characteristics were attributed in an advertisement to a res which was offered for sale and an unsuspecting purchaser later, on request, signed a document in which the seller's liability for representations concerning the res is excluded, the seller's silence in respect of the provision in question can obviously also constitute a misrepresentation."

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70 1905 TS 775.

71 *Maritz v Pratley* (1894) 11 SC 345; *National and Overseas Distributory Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Trollip v Jordaan* 1961 (1) SA 238 (A); *Janowski v Fourie* 1978 (3) SA 16 (O); *Goldberg and Another v Carstens* 1997 (2) SA 854 at 858-859.

72 *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Goldberg and Another v Carstens* 1997 (2) SA 854 at 859.

73 1985 (2) SA 873.

The court consequently held:

" ..... that, by saying nothing to the appellant concerning the effect of Para 6 of the document, the respondent's employees instilled in the appellant the trust that the document was not in conflict with the advertisement and therefore did not exclude liability in respect of representations contained in the advertisement." [74]

Fraudulent misrepresentation, when proved, is handled differently by South African courts than that of non-fraudulent misrepresentations. In the former instance, the Appellate division (as it was known then) as long ago as 1927, in the case of *Wells v SA Alumenite Co* [75] decided:

"On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation, for to do so would be to protect and encourage fraud." [76]

This also appears to be the position in respect of a clause which excludes liability for an intentional breach of contract, although it may not have resulted from fraudulent misrepresentation. In the dictum of *Hughes v SA Fumigation Co (Pty) Ltd*, [77] Herbstein J remarked:

"If the contractor `deliberately caused the fire no exclusionary clause would serve to relieve it from liability". [78]

The courts are more tolerant when confronted with a question of non-fraudulent misrepresentation. The leading case in this regard is that of *Essa v Divaris,* [79] in which the garage keeper contracted to garage a lorry "*at owner's risk*". The Appellate Division held that a parking garage keeper is not subject to the strict liability applied to *stabularri* by the praetor's edict, so the clause could not have been intended to apply to such non-existent liability. *"The minimum degree of blameworthiness for which he would be liable was negligence, so the clause was interpreted as exempting him from liability based on*

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74 *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 at 896.

75 1927 AD 69.

76 *Wells v SA Alumenite Co* 1927 AD 69 at 72; See also *Sissons v Lloyd* (1) SA 367; *Claassens v Pretorius* 1950 (1) SA 738 (0); *Trollip v Jordaan* 1961 (1) SA 238 (A).

77 1961 (4) SA 799 (C) at 805 G.

78 *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) 799C at 805C.

79 1947 (1) SA 753 (A).

negligence." [80]

Following the principle enunciated in *Essa v Divaris* the court in *South African Railways and Harbours v Lyle Shipping Co Ltd* [81] held:

"Generally speaking, where in law the liability for the damages which the clause purports to eliminate, can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect, but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded upon negligence." [82]

In order to ascertain the common intention of the parties from the language used in the contract, the South African courts, have often utilized the various canons of construction, the first of which is the `*golden rule*' of interpretation which provides, that the language in the document is to be *"given it grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument."*

More recently, in the case of *Van der Westhuizen v Arnold*, [83] applying the mode of construction enunciated in the case of *Coopers and Lybrand and Others v Bryant,* [84] cautioned that exclusionary clauses *"should be construed bearing in mind that they seek to limit or oust a party's common-law rights."* With regard to the construction of exclusion clauses, Lewis AJA stated:

"There does not, therefore, appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in a contract. But that does not mean that courts are not, or should not be, wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible. The very fact, however, that an exclusion clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application. This requires a consideration of the background circumstances, as described in Coopers and Lybrand v Bryant (above) and a resort to surrounding circumstances if there by any doubt as to the application of the exclusion."

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80 *Essa v Divaris* 1947 (1) SA 753 (A) at 767.

81 1958 (3) SA 416 (A).

82 *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A).

83 2002 (6) SA 453 (SCA).

84 *Coopers and Lybrand and Others v Bryant* 1995 (3) SA 761 (A) 768.

Marais JA consequently considered language as a factor which may influence the effect of exemption clauses when he remarked:

"It appellant wished to exclude liability for a breach of the warranty against eviction which warranty arose ex lege and existed whether or not the parties turned their minds to it, it behoved him to say so plainly and unambiguously. Having initially thought otherwise, mature reflection has led me to conclude that the language he chose failed to achieve that purpose (if that was indeed his purpose)."

Marais JA then held:

"In my judgement, plainer language than that which appellant chose would have been necessary to exclude effectively such a warranty." [85]

Mistake (Justus error)

Case Law

A factor which has also weighed against, especially, the validity of exemption clauses is that of a *justus error*. Although it is trite law that a party who puts his/her/its signature to a document, containing terms, has a very limited scope for escaping liability by saying that he/she/it did not know or understand the terms of the document, [86] the courts nevertheless, have allowed a defence of *justus error* only in cases where the other party was in some way to blame for the mistake. [87] Moreover, such blame would more commonly exist where the other party has himself/herself/itself created or fostered the mistake, by previously advertising, or describing the transaction, in terms of variance with those contained in the document, also now containing the clause in question. [88] In a later decision, the court in the case of *Du Toit v Atkinson's Motors Bpk* [89] recognised the defence of *justus error,* to

85 *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at 469-470.

86 *Burger v Central SAR* (1903)(TS) 571; *SAR and H v Conradie* 1922 AD 137; *Goedhals v Massey-Harris and Co* 1939 EDL 314; *Bhikhagie v Southern Aviation (Pty) Ltd* 1949 4 SA 105 (E); *Mothle v Mothle* 1951 (1) SA 256 (T); *George v Fairmead (Pty) Ltd* 1958 116 (2) SA 465 (A); *Glenburg Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA); *National and Grindays Bank Ltd v Yelverton* 1972 (4) SA 114 (R); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599.

87 Blame could come in the form of fraud as a result of which the signatory signs in error, which will then be accepted as a justus error. See *Musgrove and Watson (Rhodesia) (PVT) Ltd v Retra* 1978 (4) SA 656 (R) *contra Standard Credit Corporation Ltd v Naicher* 1987 (2) SA 49 (N) in which the court held that where the signatory was negligent in signing the error would not be justus; See also *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 in which it was held that where a party does not bother to read the contract the party's unilateral mistake as to the terms of the contract is not excusable and reliance cannot be placed on a *justus error*.

88 *Shepherd v Farelo's Estate Agency* 1921 TPD 62.

89 1985 (2) SA 893 (A).

the maxim *caveat subscriptor*, in a case involving an advertisement concerning the sale of a motor vehicle, in which there was a misrepresentation regarding the model year of the motor vehicle. The court found that the seller's silence, in not saying anything to the purchaser concerning the effect of the provision, constituted a trust instilled in the purchaser that the document was not in conflict with the advertisement. The purchaser's mistake concerning the liability of the seller under the document was, accordingly, found to be a *justus error*.

In a subsequent dictum of *Spin Drifter (Pty) Ltd v Lester Donovan (Pty) Ltd,* [90] the court followed the judgement of *Du Toit v Atkinson's Motors Bpk* when the court ruled that a standard form contract concerning trade exhibitions, duly signed by the Appellant and the Respondent's agent, in which the Respondent's agent had earlier implanted a certain belief with the Appellant, which, due to the Respondent's subsequent silence, turned out to be a misrepresentation, to be a *justus error*.

Hoexter JA, considering when can an error be said to be *justus* for the purpose of entitling a man to repudiate his/her apparent assent to a contractual term, after referring to a number of decisions by the South African courts (vide *Logan v Beit* 7 SC B 197; *Pieters and Co v Salomon* 1911 AD 121 esp. at 130, 137; *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417, esp. at 422, 423, 424; *Hodgson Bros v South African Railways* 1928 CPD 257 at 261) laid down the following test: The first question to be asked is: *"Has the first party - the one who is trying to recile - been to blame in the sense that by his conduct he had lead the other party, as a reasonable man, to believe that he was binding himself?"* If the said contractant relies on a mistake, the next question to be asked is *"whether the mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then of course, it is the second party who is to blame and the first party is not bound."* Consequently, the court held that *"the Respondent's agent's failure to disabuse the mind of the Appellant when getting the Appellant to append his signature to the contract that the reverse side of the contract contained a clause in terms whereof the Respondent might with impunity alter the dates of the exhibition and nevertheless exact from the Appellant payment in full"*, [91] constituted a *justus error*.

In a more recent case of *Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd,* [92] a case

90 1986 (1) SA 303.

91 *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 at 318-319.

92 2007 (4) SA 577 (CPD).

involving the export of grapes to Europe, in which the defendant had not read the agreement before signing it, and stating that he would not have entered into the agreement if he had been aware of this clause, the court held that for the defendant to avoid the written agreement on the basis of the mistake as to the content of the agreement, he needed to convince the court that he had been misled as to the purport of the words to which he had signified assent by appending his signature. The court held that he needed to prove that the nature and tenor of the written agreement had not been explained to him before he had signed the agreement. But, adds the court, the conduct and statements of the contracting parties should be judged in accordance with the practise in the industry as the background. The court continues to hold that it would be reasonable to believe that someone participating in the industry had a basic understanding and grounding as to the norms of the industry. A similar approach was adopted in the case of *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers,* [93] in which the court attached significant weight to the fact that the appellant was a senior attorney, with 44 years experience, who practised commercial law in Zimbabwe and who did a fair amount of contract work and a fairly substantial amount of litigation. The court consequently found the attorney's conduct inexcusable.

Our courts have also previously held that such blame can also attach to the other party if he/she has drafted and presented the document in such a way as to set a trap for the unwary signatory. This issue formed the basis of a decision in the dictum *Keens Group Co (Pty) Ltd v Lötter*. [94] In this case, the defendant, a senior director of a company which subsequently entered liquidation, signed a document purporting to be an application for credit facilities on behalf of the company. After supplying all the information required in respect of the company, the defendant signed without further reading the conditions, which contained two clauses in which was stated that the signatory bound himself as surety. From what was stated both at the beginning and immediately above his signature, it appeared that it was purely an application by the Applicant Company, binding the Applicant to its terms. The Defendant, after being sued as a surety, attempted to recile from the agreement, averring that he did not know he signed as a surety.

The court acknowledged that:

"It has long been a principle of our law embodied in the caveat subscriptor rule that a man, when he signs a

93 2007 (2) SA 599.

94 1989 (1) SA 585 (C).

contract, is taken to be bound by the ordinary C meaning and effect of the words that appear above his signature. (See, for example, Burger v Central South African Railways 1903 TS 571 at 578 and George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 472A) As Fagan CJ put it in the last mentioned case:

`When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his D assent to whatever words appear above his signature'."

The court, notwithstanding, recognized *justus error* as a defence and subsequently found that, the fact that the defendant *"had been misled as to what he thought he was signing,"* [95] and he was not bound by his signature to the document in question.

The courts also recognize that trapping may result in a *justus error*. The prohibition against trapping was restated in *Diners Club SA (Pty) Ltd v Thorburn* [96] when Burger AJ stated:

"I consider it sound in principle that the party who drafts a contractual document would be blameworthy if he did so in such a way as to turn it into a trap containing onerous clauses which would not reasonably be expected by the other party. A signatory can be misled by the form and appearance of the document itself just as must as by a c prior advertisement or representation. Obviously, however, each case must be decided on its own facts." [97]

Other instances in which the South African courts have held an error to be *justus* include:

(1) Where an ignorant and handicapped signatory, to whom the contents of the document were inadequately and inaccurately explained; [98]

(2) Representations are being made during negotiations which are inconsistent with the terms of the contract to be signed; [99]

(3) Where the signatory is misled by the format of the written document, for example, by tucking away an important clause in very fine small print; [100]

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95 *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) at 590-592.

96 1980 (2) SA 870 (C).

97 *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C) at 875; See also *Goldberg and Another v Carstens* 1997 (2) SA 854 (CPD) at 858.

98 *Hatzen v Mguno* 1954 (1) SA 277 (T).

99 *Spindrifter (Pty) Ltd v Lester Dononvon (Pty) Ltd* 1986 1 SA 303 (A); *Kempstone Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T); *Dlovo v Braam Porter Motors Ltd* 1994 (2) SA 518 (C) 526; *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) 495; *Fourie v Hansen* (2000) 1 ALL SA 510 (W) 517.

100 *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) 590; *Dlovo v Brian Porter Motors Ltd v Livingstone* 1995 (4) SA 495; It is especially, Sachs J in the Constitutional court dictum of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) who looked at the effect of the one-sided clauses, the existence or import of which, the consumer, is likely to be largely or totally unaware. In this category Sachs J not only places the owner of the jalopy close to the scrap-yard, who signs with a thumbprint, but also the computer literate owner of a relatively new BMW who buys on-line. In both instances the impact is the same. He goes on to state *"it is not only the indigent and the illiterate who in practise remain ignorant of everything the document contains; the fact that consumer protection is specially*

(4) Where a document is signed without reading it, but the document contained a term or terms which the reasonable man would not expect to find therein. [101]

Illegality

Illegality is recognised by our courts as a valid defence to the *caveat subscriptor* rule. Despite the signatory signing the written agreement, the law does not hold the signatory to the contract, as a valid contract cannot come into existence if the agreement is illegal.

Our courts, however, draw a distinction between common law illegality and statutory illegality.

In so far as common law illegality is concerned, the South African courts have relied heavily upon public policy in deciding whether a contract or transaction is illegal and unenforceable or not. As far back as 1902, in the case of *Eastwood v Shepstone,* [102] Innes CJ makes an authoritarian statement of the court's power to condemn a contract. In this case, A sold B two farms, together with all rights under an agreement, with a Bantu chief and his council of indunas, to supply Bantu labour, which was void as against public policy, intending to produce a system of forced labour. One of the contracting parties challenged the validity of the contract to supply labour. Innes CJ in consequence held:

"Now this court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is the tendency of the proposed transaction, not its actually proved result." [103]

In another of the early cases involving a lease and tenancy in violation of regulations dealing with the occupation of stands in the so-called white areas, the court, in the case of *Jajbhay v Cassim,* [104] was asked to look at, *inter alia,* the following facts namely: Jajbhay was the registered holder of a licence entitling him to occupy a stand in the Malay location at

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important for the poor does not imply that it is irrelevant for the rich. The rich too have rights. They have the same entitlement as everybody else to fair treatment in their capacity as consumers."

101 *Dlovo v Brian Porter Motors Ltd* 1994 (2) 518 (C) 525; *Fouche and Hansen* (2000) 1 ALL SA 510 (W) 516.

102 1902 (TS) 294.

103 *Eastwood v Shepstone* 1902 TS 294 at 302.

104 1939 (AD) 537.

Johannesburg. He sub-let the stand to Cassim on a monthly tenancy and Cassim carried our all the terms of the sub-lease. During the currency of the sub-lease, Jajbhay applied to the Transvaal Provincial Division for an order ejecting Cassim on the grounds that in terms of the regulations dealing with the occupation of stands in the location, Cassim's occupation was unlawful, the sub-lease was illegal and that Jajbhay was therefore entitled to reclaim possession.

The court, per Stratford CJ, looked at the Roman Dutch authority and identified the two maxims, namely *ex turpi causa non oritur actre* and the *ex parte delicto potion conditio defendentis,* which, *inter alia,* prohibits the enforcement of immoral contracts and curtails the right of the delinquents to avoid the consequences of their performance or part performance. The import of the said maxims is stated as follows by Stratford CJ:

"..... It is to discourage illegality and immorality and advance public policy. So much is trite and certain, and our pronouncement of law on the matter before us must be in conformity with that principle." [105]

But, the court decided, this was not a case in which any of the parties advanced issues of public policy, hence no interference by the court.

In a subsequent judgement the Transvaal Provincial Division in the case of *Padayachey v Lebese,* [106] the facts, briefly stated, were: The respondent, agent of one Suliman, was to deliver 25 cases of condensed milk to the appellant. All three parties knew that the condensed milk was stolen property. The appellant paid the agreed purchase price of $24 on delivery, but discovered a day later that bricks had been substituted for the condensed milk. The court was satisfied that neither Suliman nor the respondent was responsible for the substitution. Subsequently the respondent signed a promissory note for $24 in favour of the appellant. The appellant claimed on this note.

Murray J, delivering the judgement, recognized the principles enunciated in *Jajbhay v Cassim* 1939 AD 540. Relying upon public policy to decide this matter, Murray J held:

" ..... I think that it is against ordinary justice that persons in the position of the respondent and Ismail Suliman should be enriched by permitting them to retain, as against the appellant, moneys for which they have in fact given no value; and in fact it would be in accordance with public policy, as I see it, to hold them to any specific subsequent agreement made by them to refund such moneys I therefore consider the first ground of defence

105 *Jajbhay v Cassim* 1939 (AD) 540.

106 1942 (TPD) 10.

fails." [107]

In another matter concerning the Group Areas Act, decided in the Cape High Court, in the case of *Osman v Reis,* [108] the court, in the following facts, had to decide whether to uphold an illegal contract. The plaintiff purchased a half share in a business known as "Eddies Take Aways" from the defendant. The agreement contravened s17 of the Group Areas Act 36 of 1966 and was, therefore, illegal and invalid. The partnership was dissolved and the plaintiff reclaimed a sum paid towards the purchase price.

Watermeyer J, delivering the judgement, recognized the general rule in that a plaintiff who is *in pari delicto* cannot recover what he has parted with pursuant to the illegal contract. But, the rule can be relaxed, but only to prevent injustice or to satisfy the requirements of the public policy.

The court accordingly found the plaintiff had made out a case for the return of his money as the contract was illegal. Other cases wherein the South African courts decided the cases on common law illegality include the cases of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*. [109] The facts briefly stated included:

Ellis initiated litigation by claiming outstanding commission from his former employer; Magna Alloys and Research (SA) (Pty) Ltd. Magna Alloys counterclaimed for damages in terms of clause 6 of its agreement with Ellis and requested an interdict restraining him from continuing to act in breach of the cause.

In terms of clause 6(b) and (c) of the agreement, Ellis, *inter alia*, undertook that, for a period of two years following the termination of the agreement for any cause, and within a radius of 10 kilometres of the perimeter of a defined area, he would not seek employment.

Clause 6 also included:
In the event of breach of the terms of the provisions of the agreement by the plaintiff, the defendant would suffer damages at the rate of R250 per week for the period during which the plaintiff was in violation of the provisions of clauses 6(b) and 6(c) and that such sum

107 *Padayachey v Lebese* 1942 (TPD) 10.

108 1976 (3) SA 710 (C).

109 1984 (4) SA 874 (A).

would constitute a genuine pre-estimate of the damages which would be suffered by the defendant as a result of plaintiff's breach of the foregoing provisions (883).

On the termination of his employment with Magna Alloys, Ellis took up employment with a company called Welding Advisory Services (Pty) Ltd. This was in breach of clause 6 of his agreement with Magna Alloys. At a pre-trial conference it was agreed that Magna Alloys owed Ellis outstanding commission of R35.18 and the parties proceeded to trial on the counterclaim. The trial court rejected the counterclaim on the basis that clause 6 constituted an unenforceable agreement in restraint of trade and ordered that Magna Alloys should pay costs, including the costs of two counsel and attorney/client costs. Magna Alloys appealed successfully against this decision.

In this landmark judgement, Rabie CJ laid down the following principles with regard to restraint of trade clauses, namely, as a general rule; covenants in restraint of trade are valid. But the court states they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a contract which is unreasonable, one which unreasonably restricts the covenants freedom to trade or to work. The court sums up the position as follows:

"Dit is in beginsel van ons reg dat ooreenkomste wat teen die openbare belang is, nie afgedwing word nie, en 'n mens sou dus kon sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang, en dus onafdwingbaar is, indien die omstandighede van die betrokke geval sodanig is dat die Hof van oordeel is dat die afdwing van die ooreenkoms die openbare belang sou skaad." [110]

In a subsequent decision of *Sasfin (Pty) v Beukes,* [111] in the Appellate Division (as it was known then), Smalberger JA adopted a very cautious approach in deciding a contract contrary to public policy and thus illegal and unenforceable. In this regard His Lordship stated:

"Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised, but once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is the tendency of the proposed transaction, not its actually proved result." [112]

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110 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897I; See also the dictum of Didcott J in *J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N) at 243 B-D in which his Lordship stated: *"Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought."*

111 1989 (1) SA 1 (A).

112 *Sasfin (Pty) v Beukes* 1989 (1) SA 1 (A).

A few months later, the Appellate Division (as it was known then), was again faced with the difficult decision in the case of *Botha (now Griesel) v Finanscredit (Pty) Ltd* ,[113] to decide the question when a contract is regarded as illegal and unenforceable. Hoexter JA adopted and restated the principles enunciated in Sasfin when he stated:

"I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgement in the Sasfin case (at 8C-D).
Contracts clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience ..... and accordingly, unenforceable on the ground of public policy. In such an investigation (see the remarks of Smalberger JA at 9A-G of the Sasfin case) there must be borne in mind: (a) that, while public policy generally favours the utmost freedom of contract it nevertheless properly takes into account the necessity for doing simple justice between man and man' and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the propriety of the transaction and the element of public harm are manifest.

So approaching the inquiry in the instant matter I am not persuaded that the provisions of clause 7 of the suretyships are plainly improper and unconscionable. While at first establish the provisions of clause 7 may seem somewhat rigorous they cannot, I think, having regard to the particular circumstances of the present case, fittingly be described as unduly harsh or oppressive. The enquiry is directed to ` ..... The tendency proposed transaction, not its actually proved result.' (Per Innes CJ in Eastwood v Shepstone 1902 TS 294 at 302, the Sasfin case supra at 8I-9A; 14F)" [114]

In so far as statutory illegality is concerned, the South African courts, for decades, have had to pronounce upon the illegality and unenforceability of contracts. Commencing with *Schierhout v Minister of Justice*: [115]

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: Ea quse lege fieri prohibentur, si feurint facta, non solum inutilia, sed pro infectis habeantur, licent legislator fieri prohibuerit tantum, nec specialiser diserit inutile esse debere guod factum est' (Code 1.1.4.5) So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act ....." [116]

In a succeeding case of *Standard Bank v Estate van Rhyn* [117] the court stated:

"The contention on behalf of the respondent is that when the Legislature of an act it impliedly prohibits it, and that

113 1989 (3) SA 773.

114 *Botha (now Griesel v Finanscredit (Pty) Ltd* 1989 (3) SA 773.

115 1926 (AD) 99.

116 *Schierhout v Minister of Justice* 1926 (AD) 99.

117 1925 (AD) 266.

the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. The general proposition may be accepted, but it is not a hard and fast rule when applicable. After all, what we have to get at is the intention of the Legislature if we are satisfied in any case that the Legislature did not intend to render it invalid, we should not be justified in holding that it was. As Voet (1.13.16) `but that which is done contrary to law is not ipso jure null and void, where the content with a penalty laid down against those who contravene it.' Then after some instances in illustration of this principle, he proceeds: `The reason for all I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act its done contrary to the law. These remarks are peculiarly applicable to the present case, and I find it difficult to conceive that the Legislature had any intention to enacting the directions referred to in sec. 116(1) other than that of punishing the executor who did not comply with them." [118]

In more recent cases involving the illegality of contracts, the Cape High Court, in the case of *Lende v Goldberg* [119] dealt with the following facts: Lende, the appellant, who at all material times had been disqualified, by the provisions of the Blacks (Urban Areas) Consolidation Act 25 of 1945, from being in the Cape Peninsula, was dismissed from her employment with the respondent, without notice and without payment in lieu of notice, immediately upon the respondent's discovering that she was not in possession of a work permit as required by the provisions of s 10 bis of the Act. Lende's action, in a magistrate's court, for recovery of salary and/or payment in lieu of notice, was dismissed because, as the respondent had breached the provisions of s 10 bis, the contract of employment was found to have been illegal and null and void *ab initio*. On appeal, the appellant contended that, upon a proper interpretation of s 10 bis, a contract which was entered into, contrary to its provisions, was not itself prohibited by that section and that the legislature, thus, could not have intended that such a contract should be void.

The court, referring to a string of authorities, concluded, after considering the intention of the legislature:

"In my view all these indications point to the conclusion that the Legislature intended a contract in contravention of ss (1) of S 10 bis to be a nullity and of no force and effect. I do not think that the fact that the section is not per se directed at the Black employee vitiates this conclusion. Probably for good reasons the Legislature considered it not prudent to expose the employee to a criminal penalty and consequently it was neither necessary nor appropriate to make ss (1) in terms applicable also to the employee. It seems to me, however, to be necessarily implied by the section that a Blank employee cannot claim (289) to be lawfully employed contrary to the terms of the subsection and that such an employee could not therefore claim specific performance of the contract itself or any relief involving enforcement of the terms of, or the contractual incidents of, the contract."

Consequently the court held:

"I am therefore of the opinion that the Legislature intended a contravention of S 10 bis to be a nullity ab initio and that, in as much as plaintiff's claim is clearly based on the extract and would require recognition of the contract for

118 *Standard Bank v Estate van Rhyn* 1925 (AD) 266 at 274-275.

119 1983 (2) SA 284 (C).

its enforcement, the magistrate correctly gave judgement against the plaintiff." [120]

In an Appellate Division case of *Metro Western Cape (Pty) Ltd v Ross,* [121] the court was confronted with the interpretation of an ordinance as provided for in terms of The Registration and Licensing of Business Ordinance 15 of 1953 (C) and whether the contracts in question were rendered illegal. Consequently the court held:

"I am consequently of the view that on a proper construction of the ordinance the purpose thereof is sufficiently served by the penalties prescribed for illegal trading. The ordinance was not intended to render contracts entered into between a trader and his customers void. Indeed the avoidance of the contracts concluded by a trader with his customer would cause grave inconvenience and injustice to innocent members of the public without furthering the object of the ordinance." [122]

Duress and Undue Influence

The South African courts have, for decades, recognized that there are circumstances when the courts will set aside a contract, in favour of one of the contracting parties, on the ground that his/her consent was improperly obtained. Two of these factors giving rise to the void-ability of the contract include duress and undue influence.

In one of the first cases involving duress, wherein a South African court had to decide upon the effect of consent improperly obtained through threat or force, was that of *White Bros v Treasurer-General,* [123] in which De Villiers CJ stated:

"Where a man is forced by menaces to his person to make payments which he is not legally bound to make, it cannot be said that there is a total absence of consent - but, in as much as his consent is forced and not free, the payment is treated as involuntary and therefore subject to restitution." [124]

Sometime later, in the case of *Broodryk v Smuts N.O.*, [125] the court dealt with an exception to the plaintiff's declaration.

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120 *Lende v Goldberg* 1983 (2) SA 284 (C) 289.

121 1986 (3) SA 181 (A).

122 *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) 195.

123 (1883) 2 SC 322, 351.

124 *White Bros v Treasurer-General* (1883) 2 SC 322, 351.

125 1942 (TPD) 47.

The plaintiff alleged that he had entered into a contract of voluntary enlistment and had taken the prescribed oath under a threat that, failing such enlistment, he would be regarded as a person unwilling to support the Government and would be interned. At the time of enlistment he was a road-worker, employed by the Government. He was married, with a minor child dependant upon him. He also alleged that the threat was made by the officials, in the service of the Government, who were authorized to enlist persons for military service and to give them information in this connection. He claimed rescission of the contract, citing JC Smuts in his capacity as the Prime Minister and Minister of Defence, as the defendant. The defendant exempted to the declaration on the grounds, *inter alia*, that the duress alleged was insufficient to support a claim for the rescission of the contract.

Ramsbottom J, with reference to the five elements enunciated in Wessels on Contract (Vol. 1, Para 1167), namely:

(1) Actual violence or reasonable fear;
(2) The fear must be caused by the threat of some considerable evil to the party or his family;
(3) It must be the threat of an imminent or inevitable evil;
(4) The threat or intimidation must be contra bonos mores;
(5) The moral pressure used must have caused damage.

The court subsequently held *"the evil alleged to have been threatened would undoubtedly be considerable both to the plaintiff and his family. Should he be deprived of his freedom and his family be deprived of his support, it would be a grave matter to them. The fear of unlawful imprisonment, including unwarranted internment is a grave matter."*

Consequently, the court held *"to threaten to exercise that power not because the person threatened is a danger to the state but because he is unwilling to join the army or to volunteer for service outside South Africa would, I think, clearly be contra bonos mores."* [126]

The court also, consequently, held that a contract entered into through fear, induced by the duress of a third party, is voidable, on the principle that there is no consent. In a subsequent decision of *Arend v Astra Furnishers (Pty) Ltd,* [127] the court was confronted by

126 *Brooderyk v Smuts NO* 1942 (TPD) 47.

127 1974 (1) SA 298 (C).

the following facts, namely:

The respondent sued the appellants on an acknowledgement of debt regarding money and goods, allegedly misappropriated by the first appellant and a deed of suretyship in respect of this indebtedness, signed by the second appellant. When the appellants entered an appearance to defend, the respondent applied for summary judgement under Rule of Court 32, alleging in a supporting affidavit that no *bona fide* defences could be raised against the claims. Both appellants opposed this application. Presently relevant is the first appellant's allegation that he had been moved to sign the acknowledgement by duress.

Corbett J recognised duress as a defence when he stated:

"(305) It is clear that contract may be vitiated by duress (metus), the raison d'etre of the rule apparently being that intimidation or improper pressure renders the (306) consent of the party subjected to duress no true consent (see Broodryk v Smuts NO 1942 TPD 47 at p 53; also Steiger v Union Government 1919 NPD 75 at p 79)."

The court went on to recognise the different forms of duress and the elements required when Corbett J stated:

"Duress may take the form of inflicting physical violence upon the person of a contracting party or inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established.

(i) The fear must be a reasonable one;
(ii) It must be caused by the threat of some considerable evil to the person concerned or his family.
(ii) It must be the threat of an imminent or inevitable evil;
(iv) The threat or intimidation must be unlawful or contra bonos mores;
(v) The moral pressure used must have caused damage.
(See Broodryk v Smuts NO supra at pp 51-2)"

The court consequently summed up the South African law as follows:

"..... It seems to me that an important consideration is the fact that, generally speaking an agreement of the type under discussion would constitute an unlawful compounding. This would not only render the threat unlawful, from the point of view of the application of the principles of duress, but would vitiate the entire agreement as being void for illegality (cf. the comment on the Janse Rautenbach case, supra, in 1970 Annual Survey at p 106)."

With regard to the acknowledgement of debt in question the court held:

"I hold that the validity of the acknowledgement of debt cannot be upheld on the ground that plaintiff was merely receiving that to which he was in any event entitled ....
(311) In view of the foregoing I have come to the conclusion that generally speaking a contract induced by the threat of criminal prosecution is unenforceable on the ground of duress and, in certain instances, also on the

ground that it involves the compounding of a crime and the stifling of a prosecution." [128]

In a subsequent case of *Hendricks v Barnett,* [129] the court relied upon the dictum of De Villiers CJ in *White Brothers v Treasurer-General* (1883) 2 SC 322 at pp351-2, wherein it was stated:

"Where a man is forced by menaces to his person to make payments which he is not legally bound to make, it cannot be said that there is a total absence of consent - but, in as much as his consent is forced and not free, the payment is treated as voluntary, and therefore subject to restitution." [130]

The Witwatersrand Division of the High Court in 1979 dealt with the case of *Machanick Steel and Fencing (Pty) Ltd v Wesrhodean (Pty) Ltd; Machanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd*. [131] The following were the facts presented:

The applicant, a steel merchant, alleged that the respondents, to whom it had supplied steel for the purpose of its being converted to sheeting, had misappropriated the finished product by selling it for their own account. It claimed an amount of R128 000.00 in terms of an acknowledgement of debt, annexure B, under which the respondents undertook to pay the amount in instalments together with interest at 12%, on the grounds that the whole sum had become due by virtue of the operation of an acceleration clause contained in the contract. The respondents averted that annexure B was not binding on them, inter alia, because it had been entered into under duress or because it amounted to an unlawful compounding of an offence.

Nestadt J recognises the defence of duress and endorses the basic elements of this defence as set out by Ramsbottom J in *Broodryk v Smuts NO* 1942 TPD 47 at 51-2 namely:

"1. Actual violence or reasonable fear;
2. The fear must be caused by the threat of some considerable evil to the party or his family.
3. It must be the threat of an imminent or inevitable evil;
4. The threat or intimidation must be unlawful or contra bonos mores;
5. The moral pressure used must have caused damage."

128 *Arend v Astra Furnishes (Pty) Ltd* 1974 (1) SA 298 (C).

129 1975 (1) SA 765 (N).

130 *Hendricks v Barnett* 1975 (1) SA 765 (N).

131 1979 (1) SA 265 (W).

Nestandt J set out the Transvaal courts' approach to the defence of duress in the following terms:

" ..... it seems to me that in deciding whether the contract had been entered into under duress or whether it amounts to a compounding, the same test in determining whether the threat of prosecution was contra bonos mores has to be applied, namely did the creditor thereby exact or extort something to which he otherwise was not entitled." [132]

Relying on the case of *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C), in which it was held by a Full Bench that, generally speaking, a contract induced by the threat of criminal prosecution is unenforceable on the ground of duress and, in certain instances, also on the ground that it involves the compounding of a crime and the stifling of a prosecution. The court held this position should be followed.

Undue influence has been recognised by the South African courts as a defence to a contract consented to, where undue influence is used in concluding the agreement.

The *locus classicus* in this regard is the Appellate Division (as it was known then) case *Preller v Jordaan,* [133] the facts of this case included: Jordaan, an elderly farmer, entered into a contract with Preller, a medical practitioner, who for years had acted as his doctor and adviser, in terms of which he gave and transferred to Preller four farms - to be administered by Preller for the benefit of Jordaan's wife and farm labourers. Preller had subsequently transferred one of the farms to his son and two of them to his daughter.

Jordaan averred that at the time the contract had been entered into he had been sick, and bodily, spiritually and mentally weak and exhausted; he had been influenced in an improper and unlawful manner by Preller and would never have entered into the contract had he not been so weak and exhausted and totally under the influence of his doctor. He claimed against Preller (first appellant) an order declaring that the authority to pass transfer that he had signed, and the transfer, was null and void, together with an order for the retransfer to him, of the farm which Preller had retained. Against the son and daughter (second and third appellants), he claimed re-transfer of the farms registered in their names.

The defendants raised an exception to Jordaan's declaration on the grounds that it

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132 *Machanick Steel and Fencing (Pty) Ltd v Wesrhodean (Pty) Ltd*; *Mackanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 26 50 (W).

133 1956 (1) SA 483 (A).

disclosed no cause of action, because undue influence was not a good ground for setting aside the transaction in Roman-Dutch Law. The Orange Free State Provincial Division dismissed the exception and the defendants appealed. In the appeal it was contended, for the first time on behalf of the son and daughter, that, as the transaction was voidable and not void, and as transfer had been passed to them, Jordaan could not claim back the farms from them by *vindicatio*.

The court, per Fagan JA, considered the Roman-Dutch Law authorities and, in particular, Introduction to Roman-Dutch Law P204, Voet 2.14.9, 2.14.18 and translated by Gane:

"It is true also that no obligation appears to have been contracted when sick persons in stress of anguish tender to their Aesculapiuses, who do not even ask for them, much less wring them out by fear, specious promises to meet the event of their cure - promises which they would never have tendered had they calmly reflected that the restoration to health does not depend on the art of doctors merely, nor does the decision of life and death rest with them. This is simply what the Emperors stated in their written answer that "We allow doctors to take what sound men offer for attendance, but not what men in danger promise in return for health." [134]

Fagan JA found that, with reference to the Roman-Dutch sources, the grounds for *restitutio in integrum* in Roman-Dutch law were wide enough to cover a matter where a person exerts an influence over another, which weakens the weaker party's resistance, as well as his will to resist. Moreover, the stronger party would then exert his influence in an unscrupulous manner and in so doing, to influence the weaker to agree to a transaction to his prejudice, which normally he would not enter into.

Relying on several cases in which restitution was sought due to undue influence, *inter alia, Executors of Serfonteyn v O'Haire* 1873 Buch 47; *Armstrong v Magid and Another* 1937 AD 269 (per De Villiers RA, op bl. 273, en De Wet RA, op bl 276); *Ktzenellenbogen v Katzenellenbogen and Joseph* 1947 (2) SA 528 (W); *Mauerberger v Mauerberger* 1948 (4) SA 902 (KPA) en sake daar aangehaal op bl 910-11; *Ratanee v Maharaj and Another* 1950 (2) SA 538 (D) en (KLA), the court recognised the void-ness of these type of agreements in a later judgement by the Appellate Division (as it was known then). The court dealt with the following facts in the case of *Patel v Grobbelaar*: [135] The respondent consulted Dr Patel, an herbalist, in connection with his marital problems. The latter, portraying himself as a `Slams' and the possessor of supernatural powers, suggested, *inter alia,* that he was capable of capturing Grobbelaar's spirit and confining it in a bottle. Grobbelaar belonged to

134 Voet 2.14.9, 2.14.18 translated by Gane.

135 1974 (1) SA 532.

that stratum of society known for its gullibility, particularly as regards the doings and goings-on of ghosts and wandering spirits..... He was a simple, artless, wholly naive person. He believed Patel's claims and a relationship of dependence developed. At Patel's instigation, Grobbelaar acknowledged, in writing, that he owed Patel R40 000, an admission which was totally without foundation. A mortgage was subsequently registered over Grobbelaar's farm to secure his supposed indebtedness to Patel.

The court a quo set aside the mortgage on account of the undue influence exercised by the latter.

The Appellate Division, with reference to the case of *Preller v Jordaan* 1956 (1) SA 483 (A), confirmed that the onus to discharge, in these types of cases involving undue influence, included:

"(1) than an influence was exerted over one of the contracts;
(2) That the influence over the over contractant weakened that other's powers of resistance and renders his will pliable;
(3) Such a person exercises his influence in an unconscionable manner to persuade the other to agree to a prejudicial transaction which he would not have entered into with normal freedom of will;" [136]

The court consequently held that the contract entered into under undue influence is voidable.

Fraud

The South African courts, for many decades, have identified fraud as one of the exceptions or defences to the *caveat subscriptor* rule. [137]

The courts have, however, added a proviso to the above principle, namely; despite fraudulent conduct but, the signatory is aware of the fraudulent fact and still signs or where the signatory was negligent in concluding the contract, he cannot resile from the contract as he/she is bound by his signature on the doctrine of estoppels, in that the *caveat subscriptor* rule applies. [138]

136 *Patel v Grobbelaar* 1974 (1) SA 532.

137 *Burger v Central* SAR 1903 TS 571, 578; *Goedhals v Maasey-Harris and Co* 1939 EDL 314, 322; *George v Fairmead* 1958 2 SA 465 (A) 471; *Glenhurd Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA) 662; *National and Grindlays Bank Ltd v Yelverton* 1972 (4) SA 114 (R) 117; *Janowski v Fouche* 1978 (3) SA 16 (0); See also *Donners Motors (PVT) Ltd v Kufinya* 1968 (1) SA 434 (RA) of an unsuccessful attempt to use the *caveat subscriptor* doctrine as a fraudulent trap.

138 *Musgrove and Watson (Rhodesia) (PVT) Ltd v Rotta* 1978 (2) SA 918 (R); *Standard Credit Corporation Ltd v Naicker* 1987 (2) SA 49 (N).

The courts have had no difficulty, especially, with contracts containing exemption clauses, in prohibiting exemption from liability for fraud. In the words of Innes CJ in *Wells v SA Alumenite Co*: [139]

"On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud." [140]

In the Wells case the fraudulent misrepresentation was made by the salesman.

That was also the position adopted by the court in the case of *Goodman Brothers (Pty) Ltd v Rennies Group Ltd*. [141]

In this case, the respondent, on appeal, sought to rely on a clause exempting the respondent from liability for the handling of goods including watches unless `*special arrangements*' were made beforehand. The principal issue was whether the exemption clause absolved the respondent from liability for loss, even for theft by the respondent's employees. The appellant, on appeal, sought to rely on the principle adopted in the case of *Wells v South African Alumenite Co* 1927 AD 69, that the law would not, on grounds of public policy, recognise an undertaking in which one of the contracting parties bound itself to condone the fraudulent conduct of the other.

Cloete J (Streicher J concurring) subsequently held that the ambit in the dictum in *Wells v South African Alumenite Co* 1927 AD 69, should not be confined to fraudulent conduct narrowly defined, but extended to any deliberate dishonest conduct (such as theft) by a contracting party.

Cloete J also held:

"An agent, who concludes a contract for and on behalf of his principal, does so for the benefit of his principal. To allow the principal to take advantage of fraudulent misrepresentation by relying on a clause excluding liability for misrepresentations by the servant or agent would encourage fraud." [142]

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139 1927 (AD) 69.

140 *Wells v Alumenite Co* 1927 (AD) 69 at 72.

141 1997 (4) SA 91.

142 *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1977 (4) SA 91 at 99.

Our courts have also, on occasions, held that where loss, damage, shortage or delay was occasioned by, or through, the wilful conduct of the supplier or contractor, no exclusionary clause would serve to relieve it from liability. [143]

In *Hughes v SA Fumigation Co (Pty) Ltd* [144] Herbstein J said: *"If the contractor deliberately caused the fire no exclusionary clause would serve to relieve it from liability."* [145]

Contra however, *Galloon v Modern Burglar Alarms (Pty) Ltd* [146] and *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd,* [147] in which cases the view was expressed that a party could exempt himself from liability *"even for his own wilful default."*

9.2.1.3 Legal Opinion

The *caveat subscriptor* rule is firmly entrenched in the South African Law of Contract. Crudely translated it means `*let the signer beware'*. As a general rule it has been accepted, by the South African legal writers and the South African courts, that a person who signs a contractual document thereby signifies his/her assent to the document. [148]

The effect of the *caveat subscriptor* rule is this, once a person has signed a contractual document, but it subsequently turns out that the terms of the contract are not to his/her liking, he/she cannot complain, as he/she has no one to blame but himself. The contracting party who faces that position can, generally therefore, not recile from the contract and rely

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143 *SA Railways and Harbour v Conradie* 1921 (AD) 137 143; See also *Essa v Divaris* 1947 (1) SA 753 (A) 767; *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A) 205.

144 1961 (4) SA 799 (C).

145 *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C).

146 1973 (3) SA 647 (C).

147 1973 (3) SA 743 (C).

148 For legal writings see Christie *The Law of Contract in South Africa* (2001) 199; Joubert *The General Principles of the Law of Contract* (1987) 85; Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65; Woker "Caveat Subscriptor: How careful are we expected to be? (2003) 15 *SA Merc. LJ* 109 at 110. For case law see *Burger v Central South African Railways* 1903 TS 571; *George v Fairmead (Pty) Ltd* 1958 (2) 465 (A); *Glenburn Hotels PVT Ltd v England* 1972 (2) SA 660 (RA); *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd and Another* 1977 (2) SA 709 (W); *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C); *Booysen v Sun International (Bophuthatswana) Ltd* Case No 96/3261 delivered 23 March 1988 (WLD) (Unreported); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1959 (1) SA 982 (SCA); *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375 (W); *Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599.

on mistake to escape liability, as the law dictates that a reasonable man, generally, takes care that the document, a contracting party signs, correctly reflects his/her intention. [149] But, signing a document, without reading it, does not in every instance mean that the signatory will be bound by it. The law allows for instances where one's signature can be voided, for example, through mistake, misrepresentation, illegality, duress, undue influence, fraud etc. [150]

The rationale for the exception to the general rule is founded upon the reliance theory, in that, in circumstances wherein it has been found that there was no true agreement between the parties, alternatively, where a contractant had not created a reasonable impression that she/he intended to be bound by the terms of the agreement, that contractant cannot be bound by that agreement.

For that reason, the contracting party who relies on a signature must have a reasonable belief that the signatory intends to be bound by the terms of the agreement and not be aware that a mistake had been made or he/she was in some way responsible for the fact that the signatory was not aware of the contents of the contract. [151]

Both the legal writers and the courts do recognise certain special defences which have the effect that, despite the contracting party appending his/her signature to a contract, he/she is not bound by the terms. The special defences include the ignorance or handicap of the signatory, to whom the contents of the document, so signed, have been inaccurately explained or where a trap has been set for the signatory or the document contained a term

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149 For legal writings see Christie *The Law of Contract in South Africa* (2001) 199; Joubert *The General Principles of the Law of Contract* (1987) 85; Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65; Woker "Caveat Subscriptor: How careful are we expected to be? (2003) 15 *SA Merc. LJ* 109 at 110. For case law see *Burger v Central South African Railways* 1903 TS 571; *George v Fairmead (Pty) Ltd* 1958 (2) 465 (A); *Glenburn Hotels PVT Ltd v England* 1972 (2) SA 660 (RA); *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd and Another* 1977 (2) SA 709 (W); *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C); *Booysen v Sun International (Bophuthatswana) Ltd* Case No 96/3261 delivered 23 March 1988 (WLD) (Unreported); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1959 (1) SA 982 (SCA); *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375 (W); *Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599.

150 For legal writings see Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65; Woker "Caveat Subscriptor: How careful are we expected to be? (2003) 15 *SA Merc.LJ* 109 at 110. For case law see *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 setting out the general exception to the rule.

151 For legal writings see Woker `Caveat Subscriptor" How careful are we expected to be?' (2003) 15 *SA Merc. LJ* 110-111; Christie *The Law of Contract in South Africa* (2001) 199-200; Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65-66. For case law see *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375(w); *Solar (Pty) ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA).

which the reasonable man would not expect to find therein. [152]

The other defences to the *caveat subscriptor* rule include firstly, misrepresentation. It is especially in exclusionary clauses, which are couched in the form of an admission, that for example, no representation had been made, alternatively that the contracting party had not been influenced by any representation, that both the legal writers and the courts have shown protection towards the contracting party who is most affected by the hardship which these clauses often bring. [153]

The rationale for the intervention is said to be founded upon the fact that the South African Legal writers and the courts alike, opine that fraud or wilful conduct, to the detriment of a contracting party, should never be encouraged. Hence, exemption clauses, containing exemptions for fraudulent misrepresentation and conduct, are ineffective on the ground of public policy. [154] Likewise, exemption clauses exonerating a contracting party for wilful conduct will not be upheld. [155]

One of the other underlying reasons for the intervention arises from the fact that through the misrepresentation made by one of the contracting parties, there is dissensus between the parties. For that reason, a remedy for fraudulent misrepresentation cannot be excluded by a prior agreement between the parties. [156]

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152 See Christie *The Law of Contract in South Africa* (2003) 201-203. For case law see *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) regarding terms or the contents which had changed from when the negotiations had started; In *Katzen v Mgune* 1954 (1) SA 277 (T) the *caveat* doctrine was not applied against an ignorant and handicapped signatory to whom the contents of the document were inaccurately explained; In *Dlovo v Brian Porter Motors Ltd* 1994 (2) SA 518 (C) the contracting party who signed, may rely on the special defence that the reasonable man would not expect to find unexpected terms in the contract.

153 For legal writings see Lubbe and Murray *Farlam and Hathaway Contract Cases, Material, Commentary* (1988) 340; Christie *The Law of Contract in South Africa* (2001) 199-200; Kahn "Imposed Terms in Ticket and Notices" *Businessman's Law* (1974) 159. For case law see *Wells v SA Alumenite Co* 1927 AD 69 at 72. See also *Sissons v Lloyd* 1960 (1) SA 367 (SA); *Claassens v Pretorius* 1950 (1) SA 738 (0); *Trollip v Jordaan* 1961 (1) SA 238 (A); *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Goldberg and Another v Carstens* 1997 (2) SA 854 at 859.

154 For legal writings see Lubbe and Murray *Farlam and Hathaway Contract Cases, Material, Commentary* (1988) 340; for case law see *Wells v SA Alumenite Co* 1927 AD 69; *Sissons v Lloyd* 1960 (1) SA 367 (SA); *Claassens v Pretorius* 1950 (1) SA 738 (0); *Trollip v Jordaan* 1961 (1) SA 238 (A).

155 *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C).

156 For legal writings see Joubert *The Law of South Africa* Volume 5 Part 1 (1994) Par at 148, 150; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 340; Kerr *The Principles of The Law of Contract* (1998) 404-405; Christie *The Law of Contract in South Africa* (1996) 205. For case law see *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Goldberg and Another v Carstens* 1997 (2) SA 854 at

Although the South African courts have previously acknowledged that relief on the basis of misrepresentation may be excluded by means of contractual stipulation, [157] today it appears fairly settled that where the contractual provisions, based upon misrepresentation, are regarded as contrary to public policy, the courts will not hesitate to pronounce these clauses as ineffective and void. [158]

Besides relying upon public policy to curb the exploitation of contracting parties where one of the contracting parties invokes an exclusionary clause to escape liability arising from misrepresentation, the courts have also limited the effect of exemption clauses.

In these circumstances, by restrictive interpretation therefore, where more than one ground of liability exists, the clause will then be given the minimum of effectiveness, by being interpreted to involve the least degree of blameworthiness. [159] The *contra proferentum* rule has also been widely adopted by the South African courts. The rule works as follows: What must be established firstly, is what the parties intended the exemption clause to convey? Where doubt exists, in which the defendant is the proferens, the clause must be construed against him. [160]

It is especially, in the case of *Van der Westhuizen v Arnold* [161] that the court cautions:
"There does not, therefore, appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in a contract, But that does not mean that courts are not, or should

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157 For case law see *Maritz v Pratley* (1894) 11 SC 345; *National and Overseas Distributory Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Trollip v Jordaan* 1961 (1) SA 238 (A); *Janowski v Fourie* 1978 (3) SA 16 (O); *Goldberg and Another v Carstens* 1997 (2) SA 854 at 858-859.

158 For legal writings see Joubert *The Law of South Africa* Volume 5 Part 1 (1994) Par at 148, 150; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 340; Kerr *The Principles of The Law of Contract* (1998) 404-405; Christie *The Law of Contract in South Africa* (1996) 205. For case law see *Wells v SA Alumenite Co* 1927 (AD) 69. See also *Sissons v Lloyd* 1960 (1) SA 367 (SA); *Claassens v Pretorius* 1950 (1) SA 738 (O); *Trollip v Jordaan* 1961 (1) SA 238 (A).

159 For legal writings see Van der Merwe et al *Contract: General Principles* (2003) 215-216; Christie *The Law of Contract in South Africa* (1996) 204, 209-210; Kerr *The Principles of the Law of Contract* (1998) 258-259; Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979) 33-36, 206; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 340. For case law see *Essa v Divaris* 1947 (1) SA 753 (A); *South African Railways and Harbours v Lyle Shipping Co Ltd* (1958 (3) SA 416 (A).

160 For case law see *Bristow v Lycett* 1971 (4) SA 223 at 236. See also *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C); *Van der Westhuizen v Arnold* 2002 (6) SA 457 (SCA) 458; *Government of the Republic of South Africa v Fibre Spinners* 1978 (2) SA 794 (A) at 804.

161 2002 (6) SA 457 (SCA) at 468.

not be, wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible. The very fact, however, that an exclusion clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application. This requires a consideration of the background circumstances, as described in Coopers and Lybrand v Bryant (above) and a resort in surrounding circumstances if there by any doubt as to the application of the exclusion." [162]

The second general defence to the *caveat subscriptor* rule is that of mistake or *justus error*, as it is also known. In the South African Law, it is also described as a mistake which is reasonable and justifiable and of which the law takes notice. [163]

A unilateral mistake is, however, not enough for a contracting party to escape the consequences of a contract. But, if the party was labouring under some misapprehension and the other party knew of his mistake, or if a reasonable person would have known of the mistake, or he/she caused the mistake, the contracting party who relies upon the mistake, to be reasonable, may recile from the contract, provided the mistaken party can show he/she would not have entered into the contract had he/she known the truth. [164]

A mutual mistake, on the other hand, is recognized and occurs where the contracting parties are at cross purposes and not *ad idem*. Mutual mistake resulting from a misrepresentation may result in the contract be declared void *ab initio* provided it can be shown the mistake was reasonable. [165]

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162 *Van der Westhuizen v Arnold* 2002 (6) SA 457 (SCA) at 468.

163 For legal writings see Christie *The Law of Contract* (2003) 363; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 132ff. For case law see *Burger v Central SAR* 1903 TS 571; *SAR and H v Conradie* 1922 AD 137; *Goedhals v Massey-Harris and Co* 1939 EDL 314; *Bhikhagie v Southern Aviation (Pty) Ltd* 1943 4 SA 105 (E); *Mathole v Mothle* 1951 (1) SA 256 (T); *George v Fairmead (Pty) Ltd* 1958 (2) SA 485 (A); *Glenburn Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA); *National and Grindays Bank Ltd v Yelveton* 1972 (4) SA 114 (R); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Spin Drifter (Pty) ltd v Lester Donovan (Pty) Ltd* 1996 (1) SA 303; *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C); *Diners Club SA (Pty) Ltd v Thorburn* 1980 (2) SA 870 (C); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 509.

164 For legal writings see Christie *The Law of Contract* (2003) 365; Kerr *The Principles of the Law of Contract* (2002) 251. For case law see *Musgrove and Watson (Rhodesia) (PVT) Ltd v Rotta* 1978 (4) SA 656 (R); *Shepherd v Farelo's Estate Agency* 1921 (TPD) 62; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893(A); *Spin Drifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303. The latter cases concern a contracting party remaining silent, notwithstanding, knowing the other contracting party is under a mistaken belief. See also *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) re setting a trap for the other contracting party to make a mistake. See further *Diner's Club SA (Pty) Ltd v Thorburn* 1980 (2) SA 870 (C).

165 For legal writings see Christie *The Law of Contract* (2003) 378.

Other instances in which the South African courts have held an error to be justus include:

(1) Where an ignorant and handicapped signatory, to whom the contents of the document were inadequately and inaccurately explained; [166]

(2) Representations have been made during negotiations which are inconsistent with the terms of the contract to be signed; [167]

(3) Where the signatory is misled by the format of the written document, for example, by tucking away an important clause in very fine, small print; [168]

(4) Where a document is signed without reading it but the document contained a term or terms which the reasonable man would not expect to find therein. [169]

The third defence to the *caveat subscriptor* rule is that of illegality. Despite the signatory signing the written agreement, the law does not hold the signatory to the contract, as a valid contract cannot come into existence if the agreement is illegal. It has been a long-standing principle in South African law, that a contract which is illegal is void. [170]

In general terms, a contract is said to be illegal if the making of it, or the performance agreed upon, or the ultimate purpose of both parties in contracting, is prohibited by statute law or common law, contrary to public policy or *contra bones mores*. [171]

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166 For case law see *Katzen v Mguno* 1954 (1) SA 277 (T).

167 For case law see *Spindrifter (Pty) Ltd v Lester Dononvon (Pty) Ltd* 1986 1 SA 303 (A); *Kempston Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T); *Dlovo v Braam Porter Motors Ltd* 1994 (2) SA 518 (C) 526; *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) 495; *Fourie v Hansen* (2000) 1 ALL SA 510 (W) 517.

168 For case law see *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) 590; *Dlovo v Brian Porter Motors Ltd v Livingstone* 1995 (4) SA 495; See also the significant comments of Sachs J in *Barkhuizen v Napier* 2007 (5) SCA 323 (CC).

169 For case law see *Dlovo v Brian Porter Motors Ltd* 1994 (2) 518 (C) 525; Fouche v Hansen (2000) 1 ALL SA 510 (W) 516.

170 For legal writings see Joubert *The Law of South Africa* First Review 5 Part 1 (1994) Par 167; Christie *The Law of Contract* (2003) 115ff; Lubbe and Murray *Farlam and Hathaway Contract Cases Materials Commentary* (1988) 238-241

171 For legal writings see Christie *The Law of Contract* (1987); Kerr *The Principles of the Law of Contract* (2002) 181ff; Joubert *LAWSA* (1994) Par 167; Joubert *General Principles of the Law of Contract* (1987) 129ff. For case law dealing with common law illegality see *Eastwood v Shepstone* 1902 TS 294; *Padayachey v Lebese* 1942 (TPD) 10; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773. For case law dealing with statutory regulations see *Jajbhay v Cassim* 1939 (AD) 537; *Osman v Reis* 1976 (3) SA 710 (C); *Standard Bank v Estate Van Rhyn* 1925 (AD) 266; *Linde v Goldberg* 1983 (2) SA 284 (C); *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A).

South African legal writers [172] hold the view that exemption clauses, in certain circumstances, may be struck down, due to illegality, where they are contrary to public policy. Although there are no *numerus clauses*, a few notable examples have emerged including: contracts which undermine the safety of the state and public order; contracts concerning or affecting the maintenance of the sexual morality of the community and the sanctity of marriage and the family; contracts which promote forced labour etc.

It is also well established that, exemption clauses purporting to exclude liability for wilful acts, whether of a delictual nature or constituting a breach of contract, are regarded as ineffective, for the want of legality on the grounds of public policy. [173]

Although it is generally accepted that exemption clauses excluding liability for ordinary negligence and gross negligence (*culpa lata*) escape the effect of illegality, and are regarded as effective and not against public policy, [174] there are voices who hold the view that, notwithstanding the generally accepted principle as enunciated hereinbefore, there are rights which are inalienable and may never be waived, forfeited, or transformed in a contract. [175]

The writer Hopkins [176] persuasively argues that, although not every instance where there is an unequal bargaining position between the contracting parties necessarily justifies intervention by the courts, where a contracting party's human dignity is impaired during the contracting process, intervention by the courts may very well be appropriate.

The writer further persuasively argues that before a contracting party may legally limit,

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172 See Van der Merwe et al *Contract: General Principles* (2003) 215; Kerr *The Principles of the Law of Contract* (2002) 404-405; Christie *The Law of Contract in South Africa* (2003) 204-205; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 238-340; Joubert *The Law of South Africa* (1994) Par 163-165.

173 Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 425; Van der Merwe et al *Contract: General Principles* (2003) 215; Kerr *The Principles of the Law of Contract* (2002) 405-406; Christie *The Law of Contract in South Africa* (2003) 205-206.

174 See Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials Commentary* (1988) 425; O'Brien "The Legality of Contractual terms exempting a Contractant from Liability arising from his own or his servant's gross negligence or dolus" *TSAR* 2001-3 597 at 599; Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001)16 *SAPR/SAPL* 122.

175 Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001) *SAPR/SAPL* 122 at 137.

176 "Constitutional Rights and the question of waiver: How fundamental are fundamental rights?" (2001) *SAPR/SAPL* 122 at 133.

through a waiver or exemption clause, a contracting party's rights and which effects a party to a contract's constitutional right, two requirements first have to be met, namely, `*reasonableness*' and `*proportionality*'. The latter requirement represents a balance between a socially obtained benefit and the harm done. [177]

The afore state argument, it is submitted, contributes very richly in considering the central theme of this thesis, especially in assessing whether an exclusionary clause in a hospital contract, in which the hospital's (including its staff) liability may be waived, regardless of the hospital, through it's staff, acting negligently in treating the patient.

It is argued that the hospital/hospital staff's duty to care and exercise reasonable skill is a right which a patient cannot waive.

The fourth general exception to the *caveat subscriptor* rule is that of duress and undue influence. Both duress (*metus*) and undue influence are defences which may be successfully raised where an exemption clause, included in a contract, was so included through the abusive conduct of one contractant over another. The abusive conduct may take the form of pressure, which in itself is manifested through duress and undue influence. [178]

The rationale for the recognition of both duress and undue influence lie in the fact that consent (although given) was not freely obtained when the transaction was entered into. In the event of duress, usually threat is present which induces a contracting party to conclude the contract, whereas, in the event of undue influence, the capacity of one of the contracting parties, due to illness, age, lack of education, emotional immaturity etc, to make a decision independently is impaired and his/her will is rendered pliable. [179]

In both instances, the law will not stand back and allow someone to suffer to his/her prejudice, especially where the pressure is exercised unlawfully, or *contra bonos mores* or

177 Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001) *SAPR/SAPL* 122 at 133.

178 For the legal writings see Joubert *The Law of South Africa* Volume 5 Part 1 (1994) Par 151; Van der Merwe et al *Contract: General Principles* (2003) 214-215. For case law involving duress see *White Bros v Treasurer-General* (1883) 2 SC 322, 351; *Broodryk v Smuts N.O.* 1942 (TPD) 47; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Hendricks v Barnett* 1975 (1) SA 765 (W); *Machanick Steel and Fencing (Pty) Ltd v Wesrodean (Pty) Ltd*; *Mackanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 269 (W). For case law involving undue influence see *Preller v Jordaan* 1956 (1) SA 483 (A); *Patel v Grobbelaar* 1974 (1) SA 532.

179 See Kerr *The Principles of the Law of Contract* (2002) 318ff 328; Lubbe and Murray *Farlam and Hathaway Contract Cases Materials Commentary* (1988) 362, 374; Christie *The Law of Contract* (2003) 355-358, 360.

the influence induces the party seeking relief to assent to the contract. [180]

Whereas when duress is invoked, as a defence, due to improper conduct in terms of the law, the agreement is voidable at the instance of the contracting party who is adversely affected by the improper conduct. [181] The effect of undue influence, especially where a contracting party assents due to fraud or wilful conduct, is that the contract is regarded, by the courts, as void *ab initio*. [182]

Finally, fraud has also been identified, by both the South African legal writers and the courts alike, as one of the exceptions or defences to the *caveat subscriptor* rule. [183]

The rationale for allowing a contracting party, who signs an agreement, to resile from the contract is based on the law placing a prohibition on the pre-contractual representation of a false fact, in which the signatory is induced to act thereupon, to his prejudice. Public policy dictates that such conduct is invalid and *contra bones mores* and void. [184]

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180 For legal writings see Kerr *The Principles of the Law of Contract* (2002) 318, 327-328; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 362, 595; Christie *The Law of Contract in South Africa* (1996) 355-358, 361. For case law concerning duress see *Broodryk v Smuts N.O.* 1942 (TPD) 47; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Hendricks v Barnett* 1975 (1) SA 765 (W); *Machanick Steel and Fencing (Pty) Ltd v Wesrodean (Pty) Ltd; Mackanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 269 (W). For case law concerning undue influence see *Preller v Jordaan* 1956 (1) SA 483 (A); *Patel v Grobbelaar* 1974 (1) SA 532.

181 For legal writings see Joubert *LAWSA* (1994) Par 151; Christie *The Law of Contract* (2003) 349; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 367ff; Kerr *The Principles of the Law of Contract* (2002) 319. For case law see *Broodryk v Smuts N.O.* 1942 (TPD) 47.

182 For legal writings see Christie *The Law of Contract* (1987) 361; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 395; Kerr *The Principles of the Law of Contract* (2002) 327-328. For case law see *Preller v Jordaan* 1956 (1) SA 483 (A); *Patel v Grobbelaar* 1974 (1) SA 532.

183 For legal writings see Christie *The Law of Contract* (2003) 201; Kerr *The Principles of the Law of Contract* (2002) 104-105, 330-331; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 330. For case law see *Burger v Central SAR* 1903 TS 571; *Goedhals v Massey-Harris and Co* 1939 EDL 314, 322; *George v Fairmead (Pty) Ltd* 1958 (2) SA 485 (A); *Glenburn Hostels (PVT) Ltd v England* 1972 (2) SA 660 (RA); *National and Grindays Bank Ltd v Yelverton* 1972 (4) SA 114 (R); *Janowski v Fourie* 1978 (3) SA 16 (0). See also *Donners Motors (PVT) Ltd v Kuftinya* 1968 (1) SA 434 (RA) of an unsuccessful attempt to use the *caveat subscriptor* doctrine as a fraudulent trap.

184 For legal writings see Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 330; Christie *The Law of Contract* (2003) 210; Kerr *The Principles of the Law of Contract* (2002) 188. For case law see *Wells v SA Alumenite* 1927 AD 69; *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (H) SA 91. These cases dealt with contracts containing exemption clauses in prohibiting exemption from liability for fraud. See also the more recent case of *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 at 34 Para (10). See also the position for wilful conduct *SA Railways and Harbour v Conradie* 1921 AD 137, 143; See also Essa v Divaris 1947 (1) SA 753 (A) 767; *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A) 205; *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 791 (C).

9.2.2 ENGLAND

Before the different exceptions to the *caveat subscriptor* rule in English Law are discussed, it is necessary to briefly look at the legal position surrounding the *caveat subscriptor* rule in general.

In the English Law of Contract, as a general rule, in the absence of fraud or misrepresentation, a person is bound by his signature to a document, whether he reads it or understands it, or not. [185]

For that reason, people who put their signature to contracts without reading or understanding them are treated with very little sympathy. Likewise, a person will, therefore, be taken to have notice of and to be bound by, all the provisions of a contract which has been signed, whether the contract has been read or not. This includes, according to the legal writers, people who are careless in signing documents. [186]
As will be seen from what follows, English Law does, however, recognise that in certain instances contracting parties may deviate from the *caveat subscriptor* rule in invoking defences, including, misrepresentation, duress, mistake, illegality and undue influence. Mistake, on the other hand, may include the defence of *non est factum*. [187]

In order to have a greater understanding of the aforementioned requirements, it is necessary to briefly deal with each requirement individually.

9.2.2.1 Legal Writings

Misrepresentation

Misrepresentation has been recognised by English legal writers as a defence to pre-contractual statements, which turn out in the end (after conclusion of the agreement) to be a misstatement of fact and which induced the other contracting party, to enter into the agreement, which he would, otherwise, not have entered into.[188]

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185 Koffman and MacDonald *The Law of Contract* (2004) 337; McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 302; Beatson *Anson's Law of Contract* (2002) 335.

186 Stone (1998) 202; Stone (2003) 302; McKendrick (2005) 651; Treitel *The Law of Contract* (2003) 329; Beatson (2002) 335.

187 Stone (1998) 202; Stone (2003) 302; McKendrick (2005) 651; Treitel (2003) 329; Beatson (2002) 335.

188 Beatson (2002) 243ff; Koffman and MacDonald (2004) 356ff; Stone (2004) 266ff; Stone (1998) 177ff; McKendrick (2004) 310ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 310ff; Treitel (2003) 343.

English legal writers are *ad idem* that, before a contracting party may successfully rely upon misrepresentation as a remedy to rescind the contract or to claim damages, certain requirements must first be met, including:

(1) The false statement or representation must have been made by one of the contracting parties to the other;
(2) It must be a statement of fact, not an opinion of law;
(3) And the statement must have induced the other party to enter into the contract. [189]

The general rule is that the false statement must have been made by, or on behalf of, the other contracting party. For that reason, if a person has entered into a contract on the basis of a misrepresentation by a third party, this will have no effect on the contract.

Only a misrepresentation of fact will give rise to liability. Other sorts of statements, such as exaggerated, flippant comments not intended to be taken seriously (sometimes referred to as mere puffs), statements of opinion, or statement of future intention, will generally not be actionable. [190]

English writers are also in agreement, mere silence does not generally constitute a misrepresentation, what is required is some positive statement or some conduct from which a statement can be implied, in order to amount to an operative misrepresentation. [191] There are, however, some exceptions to the general rule, namely, the maker of the statement must not give only half the story on some aspects of the facts; if a statement is made, but then circumstances change, making the statement false, a failure to disclose this will be treated as a misrepresentation. [192] Certain contracts, such as those of insurance, are treated as being of the utmost good faith (*uberima fidei*) and as requiring the contracting party to disclose all relevant facts. There are, furthermore, also some contracts which involve a fiduciary relationship, which may entail a duty to disclose, for example, between a solicitor

189 Stone (2003) 260-261; Stone (1998) 173-174; Beatson (2002) 237; McKendrick (2005) 657; Koffman and MacDonald (2004) 350; O'Sullivan and Hilliard (2004) 300; Treitel (2003) 340-341.

190 Treitel (2003) 330; Koffman and MacDonald (2004) 343; O'Sullivan and Hilliard (2004) 300; Beatson (2002) 237; McKendrick (2005) 659-660; Stone (1998) 174; Stone (2003) 261.

191 Beatson (2002) 237-238; Stone (2004) 262-263; Stone (1998) 174-175; McKendrick (2005) 659; Koffman and MacDonald (2004) 346; O'Sullivan and Hilliard (2004) 296-297.

192 Stone (2004) 263-264; Stone (1998) 174-175; O'Sullivan and Hilliard (2004) 297-298' Beatson (2002) 238; Koffman and MacDonald (2004) 347-350.

and client, doctor and patient, agent and principal. [193]

It is not enough for the claimant to rely on the remedies available for misrepresentation, by pointing out some false statement of fact made by the defendant prior to the conclusion of the agreement; it must be shown, as well, that the claimant relied upon the representation to such an extent that it induced the contract. [194]

The remedies available for misrepresentation depend, to some extent, on the state of mind of the person making the false statement.

In modern misrepresentation law, the inducing of the formation of a contract may either be fraudulent, negligent, or innocent. Depending on whether the false statement was made fraudulently, negligently or innocently, the remedies available may be under common law and equity and/or the *Misrepresentation Act*, 1967. [195]

Consequently, the state of mind at the time when the claimant was induced into entering into the agreement will be looked at.

The three categories misrepresentation in English Law resort includes:

(a) Fraudulent misrepresentation

At common law a fraudulent misrepresentation renders the contract voidable at the instance of the party misled. In addition, it also gives rise to an action for damages in respect of the deceit and the injured party will be entitled to recover damages in respect of any loss which may be suffered by reason of the fraud. What has to be established though, is that there was clear knowledge that the statement made was false and the absence of any belief in the truth.

(b) Negligent misrepresentation

A person who has been induced to enter into a contract as a result of negligent misrepresentation, made to him or to her by the other party to the agreement, is

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193 Koffman and MacDonald (2004) 350-351; Beatson (2002) 241-242; McKendrick (2005) 661; Stone (2004) 264-265; Stone (1998) 175-177; Treitel (2003) 338; O'Sullivan and Hilliard (2004) prefers to speak about `reliance' as the causation requirement instead of inducement which ought to be restricted to fraud.

194 Koffman and MacDonald (2004) 350-351; Beatson (2002) 241-242; McKendrick (2005) 661; Stone (2004) 264-265; Stone (1998) 175-177; Treitel (2003) 338; O'Sullivan and Hilliard (2004) 338 prefers to speak about `reliance' as the causation requirement instead of inducement which ought to be restricted to fraud.

195 Beatson (2002) 243ff; Koffman and MacDonald (2004) 356ff; Stone (2004) 266ff; Stone (1998) 177ff; McKendrick (2005) 657; O'Sullivan and Hilliard (2004) 310ff; Treitel (2003) 343.

entitled to rescind (as is the case of fraud), the agreement.

The claimant also has a statutory right to damages in terms of the *Misrepresentation Act*, 1967, more particularly Section 2(1) of the act which provides:

> *"Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true."* [196]

(c) Innocent misrepresentation

The term innocent misrepresentation is defined to mean a misrepresentation in which no element of fraud or negligence is presented. [197]

Where a person had been induced to enter into a contract as a result of an innocent misrepresentation made to him by the other contracting party, he/she is entitled to the remedy of rescission or to damages in terms of the *Misrepresentation Act*, 1967. Where a contracting party has been misled by an innocent misrepresentation by the other contracting party, the party so misled may plead the misrepresentation as a defence to an action against him for specific performance of the contract. [198]

Mistake

Mistake is also regarded, by English legal writers, as a ground on which a contract may be set aside by the courts. Although mistake is generally regarded as another form which allows for an exception to the general rule of contract, namely, the freedom of contract or sanctity of contract, in its application, it is rather the exception than the rule. [199] It is generally regarded therefore, as another exception to the *caveat subscriptor* rule.

But, the legal writers are, generally, *ad idem* that the rules designed for allowing a contracting party to successfully invoke such a ground for setting aside a contract, impose

196 Sec 2(1) of the *Misrepresentation Act*, 1967.

197 Beatson (2002) 251ff; Koffman and MacDonald (2004) 366.

198 Beatson (2002) 251; Koffman and MacDonald (2004) 366.

199 Stone (2003) 281; McKendrick (2005) 572; Beatson (2002) 308; Stone (1998) O'Sullivan and Hilliard (2004) 448ff; Koffman and MacDonald (2004) 306ff.

a fairly heavy burden on the party who seeks to make use of it. [200]

The rationale for such reasoning is said to be founded upon the pillars of contract law, in that, to allow a party each time to conveniently say *"I am sorry, I made a mistake"* and recile from a contract, would be to strike at the purposes of the law of contract, which has as one of its primary functions, the provision of a structure, within which, people can organize their commercial relationships with a high degree of certainty. [201]

On the other hand, English legal writers do acknowledge that one of the fundamental principles of English Law of Contract is that contracting parties as far as possible should be assisted in giving effect to their intentions. Therefore, if either, or both, of the parties have genuinely made a mistake as to the nature of their contract, to enforce the agreement may be contrary to their intentions. Intervention by the courts, according to the writers, may thus be necessary, using mistake, even if it means destroying contractual obligations. To hold the parties strictly to their agreement, according to them, would be unjust. [202]

The effect of mistake in contract is stated, by *Treitel,* [203] thus: *"mistake negatives consent where it puts the contractants at cross-purposes, namely, as to prevent them from reaching agreement, for example, they intend to contract on different terms etc."* [204]

The effect of a mistake at common law is that, where it has been invoked successfully as a defence, the contract is rendered void *ab initio,* as if the contract had never existed, and therefore, as far as it is feasible, the contractants must be placed in the position they were in before the contractants concluded the purported agreement.

But, English Law is particularly clear, before mistake at common law may successfully be invoked as a defence, one or two requirements must first be met. They include:

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200 Stone (2003) 281; McKendrick (2005) 571; Beatson (2002) 308; Stone (1998) 187; Beatson (2002) 308; O'Sullivan and Hilliard (2004) 449ff.

201 Stone (2003) 281; Stone (1998) 187; Beatson (2002) 308; McKendrick (2005) 571; O'Sullivan and Hilliard (2004) 449.

202 Stone (1998) 187; Stone (2003) 281; Beatson (2002) 309; Treitel (2003) 286.

203 Treitel (2003) 286.

204 Treitel (2003) 286.

(1) The mistake as to the other party or as to the subject matter of the contract must be fundamental. What it means is this, the mistake must relate to something which both contracting parties have accepted in their minds as an essential and integral element of the subject matter. [205]

(2) The mistake must also induce the contract and be operative. What this entails is that the one contracting party induced the mistaken party to enter into the contract. A mistake, on the other hand, will be operative when a party to the contract acts on a representation to his detriment, or ambiguity is present, or the mistake is known to the other party. [206]

Non est factum

Non est factum is an extension of the defence of mistake. It can be invoked by someone who does not understand a document that he has signed. But, the defence of *non est factum* operates within very narrow limits, in that it will only be successfully invoked in rare instances. [207] A claimant who seeks to rely on this defence needs to comply with two requirements. Firstly, he needs to establish that he was permanently or temporarily unable, through no fault of his own, to have, without explanation, any real understanding of the document he has signed. Secondly, he is required to show that there was a risk, or substantial difference, between the document which he signed and the document which he thought he had signed.

Duress

The recognition of duress as a defence has been acknowledged by the English legal writers as a further illustration of the general trend towards the erosion of the sanctity of contract. In this regard the common law has always recognised that duress of the person constitutes grounds for avoidance of a contract. The underlying idea, surrounding the acceptance of duress as a defence, is said to be that it is consistent with the will theory of contract, since, a contract induced by duress is not made with full intent. [208]

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205 Treitel (2003) 298; Beatson (2002) 319; McKendrick (2005) 572.

206 Treitel (2003) 298, 304-308; Stone (2003) 288 opines that an operative mistake can arise *"where the mistake has a sufficiently serious effect in relation to matters which are fundamental to the contract."*

207 McKendrick (2005) 651; Treitel (2003) 329; Koffman and MacDonald (2004) 338; Stone (1998) 202-203; Stone (2002) 302-303; Beatson (2002) 332-333.

208 Peden *The Law of Unjust Contracts including the Contracts Act* 1980 (NSW) (1982) 10.

The authors *O'Sullivan and Hilliard* [209] describe duress as an *"act involving one party's coercing or pressuring the other party into making a contract."* [210]

Traditionally, the principal forms of this defence included, duress of the person and duress of goods. English writers are also of the view that outside the category of duress to the person, the English law has been slow to develop. [211] During 1976 another form of duress, namely economic duress, found its niche in English law, when the legal writers recognized its existence. [212]

A brief discussion on the main characteristics of each principal form follows.

In so far as duress of the person is concerned, this is the most frequently used form of duress, for which relief is sought and given, at common law. The act of duress, generally, takes the form of a threat of violence to the person, whether actual or threatened, in concluding the contract. Actual threat, for example, can include a contract signed at gunpoint, whereas, an illegitimate threat can include a non-violent, express or implicit act, whereby pressure is applied to a person leaving him with no practical choice, but to enter into the agreement. [213] Although, the term `illegitimate' is used to determine whether there is a sufficient, causal link between the illegitimate pressure and the entry, by the claimant, into the contract, factors such as the illegitimate pressure can be a cause of the claimant's decision to enter into the contract and could be indicative. [214]

Duress of goods is recognized, by most legal writers today, as a fully fledged defence. Moreover, it has now been fairly settled English legal writers are in general agreement that a threat to seize another's property, or to damage it (duress to property), will justify a claim of duress and result in the ensuing contract being set aside. [215]

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209 *The Law of Contract* (2004) 338.

210 O'Sullivan and Hilliard (2004) 338.

211 McKendrick (2005) 314; O'Sullivan and Hilliard (2004) 339; Poole *Textbook on Contract Law* (2004) 352.

212 McKendrick (2005) 714; O'Sullivan and Hilliard (2004) 342; Poole (2004) 353.

213 O'Sullivan and Hilliard (2004) 339; McKendrick (2005) 714; Poole (2004) 352.

214 McKendrick (2005) 714.

215 Poole (2004) 352; O'Sullivan and Hilliard (2004) 341; McKendrick (2005) 724.

It is now also well established that economic duress serves as the third principal form of duress, recognized by English law. [216] Typical situations raising the possibility of a claim of economic duress include, where for example, one party threatens breach of contract unless the contract is renegotiated, and the other agrees rather than face disastrous consequences as a result of the breach, contract changes are achieved by means of unfair pressure or extortion. [217]

The English legal writers recognize that in order to rely on economic duress as a ground to set aside an agreement, the following ingredients need to be shown to be present, namely:

(a) Coercion of the will that vitiates consent; and
(b) The pressure or threat must be illegitimate, and
(c) which is a significant cause inducing the claimant to enter into the contract. [218]

The illegitimate pressure of threat is said to be something more than the `*rough and tumble of the pressures of normal commercial bargaining*'. The pressure exerted must also be executed, which distinguishes it from normal conduct. Factors which will influence the courts in determining whether `*illegitimate*' pressure was exercised or not, may include, the arm's length commercial dealings between two trading companies, the lawful nature of the threat; the bona fide belief of entitlement by the defendant; the bad faith shown by one of the parties; a threat to breach an agreement etc. [219]

The ingredient `*significant cause*' entails that relief will only be given for economic duress, if the threat or pressure was the main or overwhelming reason why the victim agreed to enter into the agreement. Factors influencing this ingredient include whether the victim had another choice to escape entering into the agreement; whether legal remedies existed to assist the victim; whether the victim protested; did the victim take steps to avoid entering into the agreement; would a reasonable person have acted as the victim did. [220]

The effect of raising duress successfully as a defence will result in the contract being set

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216 McKendrick (2005) 724ff; O'Sullivan and Hilliard (2004) 341-342; Poole (2004) 353ff.

217 O'Sullivan and Hilliard (2004) 341-342; Poole (2004) 353.

218 Poole (2004) 354-358; O'Sullivan and Hilliard (2004) 342-343; McKendrick (2005) 715-718.

219 Poole (2004) 355-357; O'Sullivan and Hilliard (2004) 343-347; McKendrick (2005) 729.

220 O'Sullivan and Hilliard (2004) 349-350; Poole (2004) 357.

aside and any money paid could be recovered. [221]

Undue Influence

Undue influence, like misrepresentation, duress and mistake is a recognized defence in English Contract law, which may render a contract voidable. In other words, the relieved party can seek to rescind or `set aside' the contract. Where he is a defendant, he may choose so, by raising it as a defence, alternatively, where he is a plaintiff who has to ward off a counterclaim against him, he may do so by raising undue influence as a defence to the counterclaim. [222]

The argument surrounding the recognition of this type of defence is said to be based on striking the right balance between protecting the vulnerable from exploitation, without unduly patronizing them or restricting their freedom to contract. [223]

Although there is no clear cut definition for undue influence, (the academic writers finding it difficult to define) [224] nonetheless, it has been described before as *"an act in which one party exploits another contracting party for his own advantage, which, arises from a relationship built on trust and confidence or vulnerability and dependence between the two parties."* [225]

Because of its difficulty to define and the many forms it takes, a distinction is drawn between actual undue influences and presumed undue influences. [226]

On the one hand, actual undue influence can be equated with the type of pressure required to establish duress. The unacceptable conduct takes the form of improper pressure or coercion, such as unlawful threats. For that reason, it has been stated before, that undue influence overlaps with the principle of duress. [227]

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221 Poole (2004) 352; O'Sullivan and Hilliard (2004) 339; McKendrick (2005) 715.

222 O'Sullivan and Hilliard (2004) 359-360; Poole (2004) 358-359.

223 O'Sullivan and Hilliard (2004) 360.

224 O'Sullivan and Hilliard (2004) 360; McKendrick (2005) 753.

225 O'Sullivan and Hilliard (2004) 360; Poole (2004) 359.

226 McKendrick (2005) 753; O'Sullivan and Hilliard (2004) 361.

227 McKendrick (2005) 753; Poole (2004) 360.

Examples of such acts may include: where someone gives in to a campaign of sustained pressure, or, someone agrees to a transaction not freely and voluntary entered into. What needs to be shown is that their free will to enter into or to dealing with a particular contract was in some way overcome by the influence of another. [228]

But, there are also instances where, although there is no evidence of undue influence, yet, a subtle level of influence is exerted, arising from the relationship between the two parties, as a result of which, the vulnerable and dependant suffers loss. There may be no documentation assisting in proving undue influence, for that reason, depending on the evidence, undue influence could be presumed on the facts, unless, there was evidence to the contrary to rebut the presumption. [229]

But, the relationship itself has to fall into a class of relationship in which the law presumed that one party was in a position to exercise influence, or dominion, over the other, for example, parent and child, guardian and ward, doctor and patient, solicitor and client, trustee and beneficiary. Here, a relationship of trust and confidence exists between the parties. [230]

Once the relationship has been proved and a suspicious transaction is shown, this would be sufficient for the presumption of undue influence to kick in and the defendant bears the onus to rebut the presumption. It is left, thereafter, for the court to consider whether the presumption has been rebutted. [231]

The effect of undue influence, as was seen in the opening remark, is that contracts affected by undue influence are void-able, not void. One of the reasons advanced is that the doctrine is not concerned with the reality of consent, but with the protection of victims of improper behaviour. Since tainted contracts are only void-able, the victim must bring a claim for rescission or have the agreement set aside. [232]

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228 Poole (2004) 361.

229 O'Sullivan and Hilliard (2004) 361.

230 McKendrick (2005) 755; O'Sullivan and Hilliard (2004) 364ff; Poole (2004) 361ff.

231 McKendrick (2005) 755; O'Sullivan and Hilliard (2004) 363ff; Poole (2004) 365.

232 Poole (2004) 366ff; O'Sullivan and Hilliard (2004) 373.

Illegality

In the workings of English law, public interests sometimes demand that an ostensibly valid contract may be declared unenforceable as it is tainted by illegality. [233]

In this way, the courts interfere to render contracts which are "*illegal*" unenforceable. The underlying reasons for the law's intervention in this way is said to firstly, lie in the fact that it serves as a deterrent, in that, the law does not allow a person to benefit in any way from "*illegal*" behaviour, and secondly, protecting the integrity of the judicial system by ensuring that the courts are not seen, by law-abiding members of the community, to be lending their assistance to claimants who have defied the law. [234]

The source of the illegality, itself, as will be seen hereinafter, may arise by statute or by virtue of the principle of common law. [235] In certain instances the law prohibits the agreement itself, and the contract, by its very nature, is illegal. In other instances, which form the majority of cases, the illegality lies in the object which one, or both, of the contractants have in mind or in the method of the performance. [236]

Where the illegality arises by way of statute, the following give rise to the contract being illegal from the outset, namely:

The words of a statute may expressly prohibit a particular type of contract. When contracting parties, nevertheless, enter into an agreement, the contract is said to be illegal *per se*. In other instances the statutory prohibition might also be inferred from the terms of the statute.

In that event, a close examination of the precise term of the statute is necessary, in order to ascertain that parliament intended to prohibit a particular type of contract.

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233 McKendrick (2003) 348ff; Stone (2003) 343; Beatson (2002) 804-805; O'Sullivan and Hilliard (2004) 413ff; Treitel (2003) 439ff; Poole (2004) 379.

234 Stone (2003) 343-344 quoting Atiyah An Introduction to the Law of Contract (1995) 342-344; see also Treitel (2003) 439 who suggests that the rationale for intervention by the courts lies in the fact that *"illegal" contracts bring about a state of affairs of which the law disapproves as it harms the public."*

235 Beatson (2002) 804-805; McKendrick (2003) 34ff; Stone (2003) 343; Poole (2004) 379; O'Sullivan and Hilliard (2004) 413ff; Treitel (2003) 429ff.

236 Beatson (2002) 804.

There are, however, instances where the contract, when entered into, was not illegal *per se* as expressly prohibited by a statute, but, the contract was performed in a manner which rendered the agreement illegal. [237]

There are also situations where, although a contract is not expressly or impliedly prohibited by statute, nevertheless, the policy of the common law dictates that the agreement cannot be enforced. Agreements outlawed in terms of the policy dictates, include: Agreements to commit a crime or civil wrong, or to perpetrate a fraud, agreements which injure the state in its relations with other states, agreements which tend to injure good government, agreements which tend to prevent the course of justice; agreements which tend to abuse the legal process; agreements which are contrary to good morals etc. [238]

The effects of illegality of contracts in English law is this: The general rule is that the courts will neither enforce an illegal contract nor will they permit the recovery of any benefit arising from the performance of an illegal contract. The two common law rules are founded in the maxims, *ex turpi cause non oritur actio* (no action can be based on a disreputable cause) and *in pari delicto potior est conditio defendentis* (where both parties are equally at fault, the position of the defendant is stronger). But neither rule is without exceptions. The courts will protect an innocent party, who is unaware of an illegal act, committed by the defendant, in the course of performance of the contract, in that the innocent party may be entitled to enforce the contract, notwithstanding the illegality.

Furthermore, while the courts will not, in general, enforce an illegal contract, a party to an illegal contract may be able to obtain damages for a breach of collateral warranty, where the defendant is held to have warranted that he will perform the contract lawfully, but fails to do so, for example in licensing cases. [239]

9.2.2.2 Case Law

The English courts, in general, have, for centuries, enforced, to this end, the *caveat subscriptor* rule. The English courts have often been very reluctant to assist contracting

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237 O'Sullivan and Hilliard (2004) 429-432; Poole (2003) 344-345; McKendrick (2003) 348-352; Stone (1998) 251-253.

238 McKendrick (2003) 352-365; Treitel (2003) 439-477; O'Sullivan and Hilliard (2004) 414ff; Poole (2004) 384-387; Beatson (2002) 807-810; Stone (1998) 251-253; Stone (2003) 344-351.

239 Beatson (2002) 845-847; O'Sullivan and Hilliard (2004) 433ff; Poole (2000) 387-389; Stone (1998) 253; Stone (2003) 351-357; McKendrick (2003) 395ff.

parties, who put their names to contacts without reading or understanding them. For that reason, a person of sound mind and literacy, would be taken to have noticed the terms of an agreement and be bound by all the provisions of a contract which had been signed, whether they have been read or not. [240]

Even where a contracting party has been careless in signing the document or has simply failed to read the document properly, the courts will be unsympathetic. [241] But despite the court's reluctance to come to the rescue of contracting parties who sign contracts without reading or understanding them, or act carelessly in signing contracts without reading the contents, the courts have recognised exceptions to the *caveat subscriptor* rule, namely, misrepresentation, mistake (including *non est factum*), duress and undue influence.

Consequently, each of these exceptions, which serve as fully fledged defences, will be discussed briefly.

Misrepresentation

The English courts have for century's recognised misrepresentation as a defence. This is a remedy available to a contracting party, who was induced into entering into an agreement, to avoid a contract. [242]

English courts do recognize that misrepresentation may take place through a positive act or through an omission. An example of the latter occurs where there is non-disclosure of certain facts. According to the English courts, a contracting party is bound to disclose only facts which he/she knew (or which he/she would have known if he/he had not *"wilfully shut his eyes"* to them. [243] He/she may also be under a duty to disclose facts which he/she ought to have known, if there is a "*special relationship*" between the parties. This formed the subject matter in *Hedley Byrne and Co Ltd v Heller and Partners Ltd,* [244] in which the claimants suffered loss as a result of having given credit to a firm called Easi Power Ltd, in

240 *L'Estrange v Graucob* (1934) 2 KB 394.

241 *United Dominions Trust Ltd v Western* (1976) QB 513 at 343.

242 *Smith v Hughes* (1871) LR 6 QB 597. In this case, the court identifies the rationale for recognizing this type of defence, namely `a man of high honour would not take advantage of the ignorant'.

243 *Blackburn, Low and Co v Vigors* (1887) 12 App. Cas 531; *Economides Commercial Union Assurance Co plc* (1998) QB 587 at 602.

244 (1964) A.C. 465 at 494, 502, 538, 539.

reliance on a reference, carelessly given, by Easi Power's bank, who knew of the purpose for which the reference was required. Although the court decided that the bank was not liable, nevertheless, the House of Lords made it clear that, had there been no disclaimer in the contract entered into between the contracting parties, the bank would have owed, to the claimants, a duty to take reasonable care arising from the "special relationship" between the claimants and the bank.

The duty of disclosure may also arise from a professional skill, in which, the representor owes a duty of care towards, for example, a client and he makes the statement in the exercise of some professional skill. [245]

But, this duty of care is not restricted to professional people. It now exists at common law, even in a purely commercial relationship, such as a landlord and tenant. This formed the subject matter in *Esso Petroleum Co Ltd v Marden*. [246] In this case the facts relied upon amounted, briefly, to this; tenant was induced to take a lease of a petrol station, from an oil company, by a statement made by an experienced salesman, on the company's behalf, as to the potential future turnover of the premises. Following the principles laid down in the Hedley Byrne case, the court held; as the tenant had relied on the salesman's superior knowledge and experience, there existed a duty of care, at common law, to disclose the true facts.

The English courts have identified several requirements which must first be complied with, before the courts will recognise misrepresentation as a defence and grant the necessary relief. The requirements include: As mere silence does not constitute a misrepresentation, [247] what is required is a positive statement or some conduct from which a statement can be implied. [248] Where a contracting party makes a representation which is true at the time it is made, but, which the representor knows has subsequently become false, the representor is bound to disclose the changing circumstances to the other party. [249]

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245 *Hedley Byrne and Co Ltd v Heller and Partners Ltd* (1964) A.C. 494.

246 (1976) QB 801.

247 *Keates v Lord Cadogen* (1851) 10 C.B. 591.

248 *Walters v Morgan* (1861) 3 De G.F. and J 718; *Spice Girls Ltd v Aprilia World Service B.V.* (2000) E.M.L.R. 478. In this case the participation by the Spice Girls in the making of a commercial to be shown in the future constitutes a representation by conduct that no-one had the intention to leave the group.

249 *Davies v London and Provincial Marine Insurance Co* (1878) 8 Ch. D 469; *White v O'Flanagan* (1936) Ch. 575.

The English courts have also stated that the statement made prior to concluding the agreement must be one of fact, not opinion, or law. This formed the subject matter in the case of *Bisset v Wilkinson*. [250] The facts, briefly stated, were: Wilkinson agreed to purchase, from Bisset, certain lands at Avondale, in the Southern Island of New Zealand, for the purpose of sheep farming. Wilkinson did so in reliance on Bisset's statement that he estimated the lands would carry two thousand sheep. Bisset had not, and no other person, in truth, had, at any time, carried out sheep-farming on the lands in question. When Bisset claimed the balance of the purchase price, Wilkinson counter-claimed rescission of the contract on the ground of misrepresentation.

The Privy Council consequently held that the statement was merely an opinion, honestly held, by Bisset and not one of fact. Accordingly, the claim for rescission failed.

The English courts have also held a mere commendatory, or so-called puff, is insufficient to qualify as a misrepresentation. Where, for example, at a sale by auction, land was described by the auctioneer as "fertile and improvable" but was, in fact, found to be abandoned and useless, the court, in *Dimmock v Hallett*, [251] found this statement to be *"lawful flourishing description and not a statement of fact."*

One of the requirements paramount to misrepresentation is; the representation must hold a real inducement to the party to whom the statement is made. Whether or not a person, who has entered into a contract, was induced to do so by a particular representation, is a question of fact. The test was laid down by Lord Blackburn in *Smith v Chadwick* [252] when he stated:

> *"I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and if it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement."* [253]

This requirement is sometimes referred to as material. In other words, it must be a statement which affects the judgement of a reasonable person or induces that person to

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250 (1927) A.C. 177.

251 (1866) L.R. 2 ch. App 21; See also *Lambert v Lewis* (1982) A.C. 225 at 262-3.

252 (1884) 9 App. CAS. 187.

253 *Smith v Chadwick* (1884) 9 App. Cass. 187.

enter into the contract without making the enquiries as he would otherwise make. [254]

It is, further, a requirement that the person to whom the misrepresentation was made must have relied on it, to such an extent, that it invoked him to enter into the agreement. [255]

English case law does recognise the three different categories of misrepresentation, namely; fraudulent, negligent or innocent and have formulated the appropriate relief, depending upon the frame of mind of the contracting party making the misstatement. [256]

In so far as fraudulent misrepresentation is concerned, a party willing to rely upon fraud must show the following, as per Lord Herschell in *Derry v Peek*: [257]
"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, carelessly whether it be true or false. [258]

The remedies available for fraudulent misrepresentation include, affirming of the contract and a damages claim for deceit or rescission of the contract and sue for damages. [259]

An action for negligent misrepresentation was recognised for the first time in the case of *Hedley Byrne and Co Ltd v Heller and Partners Ltd,* [260] in which the House of Lords extended liability in damages in tort, to negligent misstatement, in cases, where there is a duty of care in instances of an assumption of responsibility, such as to create a `*special relationship*'. The remedies available include, claims for damages that are foreseeable.

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254 *Smith v Chadwick* (1884) 9 App. CAS. 187 at 196. See also *Barton v County Natwest Ltd* (1999) Lloyd's Rep 408.

255 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1995) 2 A.L. 501; *Spice Girls v Aprilia World Service BV* (2002) EWCA 15 at 68-72.

256 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1995) 2 A.; 501; *Spice Girls v Aprilia World Service B.V* (2002) EWCA 15 at 68-72.

257 (1990) 14 App. CAS. 337.

258 *Derry v Peek* (1990) 14 App. CAS 377 at 374.

259 *Long v Lloyd* (1958) 2 All ER 402; *Leaf v International Galleries* (1950) 2 KB 86; (1950) 1 All ER 693; *Derry v Peek* (1990) 14 App. Cas 377; *Smith New Court Securities Ltd v Scimgeour Vickers (Asset Management) Ltd* (1997) AC 254.

260 (1964) A.C. 465.

Innocent misrepresentation has been recognised by the English courts. The party, to whom the innocent misrepresentation was made, is entitled to the remedy of rescission or to damages in lieu of rescission. [261]

Besides the remedy under common law, the courts also recognise a claim for damages under the *Misrepresentation Act*, 1967. In *Howard Marine and Dredging Co Ltd v A Oeden and Sons (Excavations) Ltd* [262] the court held that Section 2(1) of the *Misrepresentation Act* goes further than the common law which requires a special relationship or special skill before the representation will be recognised. The statute, according to the court, imposes an absolute obligation not to state facts which the representor cannot prove it had reasonable ground to believe were true. The damages, recoverable under this statute, include the damages directly flowing from the misrepresentation although not foreseeable. [263]

In so far as the exclusion of liability for misrepresentation is concerned, although at common law, a party to a contract was entitled to exclude his liability for misrepresentation, except in cases of fraud, [264] the courts have recognised that with the enactment of the *Misrepresentation Act*, 1967, the *Unfair Contract Terms Act*, 1977 and the *Unfair Terms in Consumer Contracts Regulations*, 1999, exemption clauses are *prima facie* invalid. But, the courts are empowered to give effect to them, if they were fair and reasonable terms included in a contract, having regard to all the circumstances. [265] But, the English Courts have held, a clause purporting to exclude liability for fraudulent misrepresentation will generally not be held to be reasonable. [266]

Mistake

The English courts, as far as possible, give effect to the fundamental principle of English Law, namely, to give effect to the intentions of the parties to a contract. Nevertheless, the

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261 *Redgrave v Hurd* (1881) 20 Ch. D. 1.

262 (1978) QB 574.

263 *Roy Scott Trust Ltd v Rogemon* (1991) 2 QB 297; *South Australia Asset Management Corp. v York Montage Ltd* (1997) A.C. 191 at 214.

264 *Pearson (s) and Son Ltd v Dublin Corporation* (1907) A.C.351; *Toomey v Eagle Star Insurance Co Ltd* (No 2) (1995) 2 Lloyds Rep 88 at 91-92.

265 *Walker v Boyle* (1982) 1 W.L.R. 475; *McCullough v Lane Fox and Partners* (1996) 49 Con. L.R. 124.

266 *Thomas Witter Ltd v TBS Industries* (1996) 2 ALL.E.R. 573 at 598; *South West Water Services Ltd v International Computers Ltd* (1999) B.L.R. 420.

English courts do recognise the possibility of mistake, affecting or even destroying the contractual obligations between the contracting parties. They do also recognise that, in appropriate circumstances, mistake affects the intentions of the contracting parties, so much so, that it vitiates consent. But, the English courts do caution, the power to intervene in this way should be used with considerable circumspection. [267]

English case law does also clearly distinguish between the different categories of mistake. In this regard, Lord Atken in *Bell v Level Bros Ltd* [268] identifies two types of mistake which may affect a contract, namely, those which nullify consent or put differently, the agreement, and those, which negate consent or the agreement.

The courts have held, consent is nullified where both parties make a fundamental mistake of fact, which may include, mistake as to the existing of the subject-matter; [269] mistake as to the identity of the subject-matter; [270] mistake as to the possibility of performing the contract; [271] legal impossibility; [272] mistake as to quality; [273] mistake as to the quantity. [274]

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267 *Bell v Lever Bros Ltd* (1932) A.C. 161 at 217 per Lord Atken stated *"if mistake operates at all, it operates so as to negative or in some cases nullify consent."*

268 (1932) A.C.161.

269 *British Homephone Ltd v Kunzi* (1932) 152 LT 589 at 593; *Galloway v Galloway* (1914) 30 T.K. 531 (This case involved the dealings of a purported marriage which did not exist); *Stricklam v Turner* (1852) 7 EX 208 (This case dealt with the purchase of an annuity under circumstances which the annuitant had died prior to the purchase, resulting in the annuity no longer existed).

270 *Grains and Fourrages SA v Hayton* (1997) 1 Lloyds Rep 628. Here both parties thought they were dealing with one thing when they were in fact dealing with another.

271 *Skeikh Bros v Ochsner* (1957) A.C. 136 following the principles laid down in Bell v Lever Bros (1932) A.C. 161. In this case it was a physical impossibility to produce the quantity of sisal intended by the parties.

272 *Bell v Lever Bros Ltd* (1932) A.C. 161 at 213 as a matter of law that what is intended cannot be executed. *Norwich Union Fire Insurer Society Ltd v Price* (1934) A.C. 455 at 463.

273 *Kennedy v Panama, ET v Royal Mail Co* (1867) L.R. 2 QB. 980 where the mistake is an error in substantia relates to the "substance" of the matter; *Bell v Lever Bros Ltd* (1932) A.C. 161 but stringent requirements accompany such relief. *Leaf v International Galleries* (1950) ZK.4. 86; *Solle v Butcher* (1950) 1 K.B. 671; *Oscar Chess Ltd v Williams* (1957) 1 WLR 370. In these cases it was commonly held that a mere mistake was not sufficed to render a contract void.

274 *Cox v Prentice* (1815) M and S 344; *De Vaux v Connolly* (1849) 8 C.B. 640 at 659. A contract may be treated as void for mistake where it inter alia affects the weight of for example a silver bar. In *Bell v Lever Bros Ltd* (1932) A.C. 161 the court put the position in the following terms: *"I agree that an agreement to take an assignment of a lease for five years is not the same thing as to take an assignment of a lease for three years, still less a term for a few months."*

Instances in which mistake negates consent, arise in circumstances in which the parties are at such cross-purposes that they do not reach agreement. But, before it can be held that a mistake had negative consent, which resulted in the agreement being rendered void, certain requirements must first be complied with, which include:

(1) The mistake must be fundamental in inducing the contracting party to enter into the agreement. [275]

(2) A mistake can be fundamental if one of the contracting parties is mistaken as to the identity of the other. [276]

Consent is also negative where there is a mistake as to the subject matter, in other words, if one party intends to deal with one thing and the other with a different one. [277] Likewise, mistake as to the terms of the contract negatives the agreement. [278]
In English Law, a mistake was held to have induced "mistaken belief" in the following cases. In *Bell v Lever Brothers Ltd,* [279] the *locus classicus* on mistake in contract, Lord Thankerton spoke about *"..... can only properly relate to something which both must have necessarily accepted in their minds as an essential and integral element of the subject matter."* [280]

An additional requirement is that the mistake must be operative. The courts have also held it occurs due to ambiguity, [281] but, the mistake must be known to the other party and nevertheless, the other contracting party induces him to enter into the agreement. [282]

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275 *Cundy v Lindsay* (1878) 3 APP CAS 459. In this case the court set aside the agreement where one of the contracting parties did not intend to deal with the other. In *Shogun Finance Ltd v Hudson* (2001) EWCA Civ. 1000 (2002) QB 834 This is a case involving the forgery of the name of the contracting party, the court of appeal held that X was no party to the agreement.

276 *Phillips v Brooks Ltd* (1919) 2 K.B. 243; *Denrant v Skinner* (1948) 2 K.B. 164; *Lewis v Averay* (1972) 1 QB 198; *Whittaker v Campbell* (1984) QB 319.

277 *Smith v Hughes* (1871) L.R. 6 Q.B. 597; *Sullivan v Constable* (1932) 49 T.L.R. 369.

278 *Bell v Lever Bros Ltd* (1932) A.C. 161 at 235; *Raffies v Wichelhaus* (1864) 2 Hand C 906.

279 1932 A.C. 161 at 235.

280 *Bell v Lever Bros Ltd* 1932 A.C. 161 at 235.

281 *Raffles v Wickerhaus* (1864) 2 HandC906.

282 *Lundy v Lindsay* (1878) 3 App. CAS 459; *Smith v Hughes* (1871) C.R. 6 QB 597.

Non est factum

Although the courts, as was discussed earlier, are not inclined to be sympathetic towards people who put their names to contracts without reading or understanding them, especially, where contracting parties are of clear mind, [283] there are exceptional circumstances however, where the courts will allow a plea of *non est factum*. [284] But, before the defence may successfully be invoked and for the courts to grant such relief, what has to be shown is that, the claimant falls into the category of those with `*defective education, illness, or innate incapacity*". [285]

A further requirement laid down by the courts is that, the claimant ought not to have been careless in concluding the agreement, and that, the document signed was radically different from that which it was supposed to be. [286]

Duress

Duress has been recognized and applied by the English courts, as an English Common Law defence, in numerous cases, spanning over several decades. [287]

English case law however, distinguishes between three principal forms of duress at common law. In the first place, there is duress to the person, which takes the form of

283 *Thoroughgood v Cole* (1582) 1 and 129, 2 Co; *Saunders v Anglin Building Society* (1971) AC 1004; *Norwich and Peterborough Building Society v Steed* (No 2) (1993) 1 ALL ER 330; *L'estrange v Graucob* (1934) 2 KB 394, (1934) ALL ER Rep 16, 152; *Saunders v Anglia Building Society* (1971) AC 1004.

284 *Gallie v Lee* (1969) 2 Ch 17 (1969) 1 ALL ER 1066, (1969) 2 WLR 901; *Saunders v Anglia Building Society* (1971) AC 1004; *Lloyds Bank PLC v Waterhouse* (1990) FAM LAW 23; *Thoroughgood v Cole* (1582) 1 and 129, 2 Co; *Foster v Mackinnon* (1869) LR 4 CP 704 at 711.

285 *Saunders v Anglia Building Society* (1971) AC 1004 at 1016; See also *Lloyds Bank PLC v Waterhouse* (1990) Fam. Law 23.

286 *Saunders v Anglia Building Society* (1971) AC 1004 at 1016; See also *Lloyds Bank PLC v Waterhouse* (1990) Fam. Law 23.

287 *Skeate v Beale* (1841) 11 AD @ E 893; *Williams v Bayley* (1886) LR 1 HL 200; *Barton v Armstrong* (1976) 1 AC 104; *Occidental Worldwide Investment Corp. v Skibs A/S Avanti* (1976) 1 Lloyds Rep 293; *North Ocean Shipping Co Ltd v Hyanday Construction Co Ltd* (1979) 3 WLR 419; *Pao On v Lau Yiu Long* (1979) 3 WLR 435; (1980) AC 614; *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1991) 4 ALL ER 871 (1992) 2 AL 152; *Dimskall Shipping Co SA v International Transport Workers Federation, (The Evia Luck)* (1991) 4 ALL ER 871; *Universe Tankships Inc of Moncovia v International Transport Worker's Federation, The Universe Sentinel* (1983) 1 AC 366; *Bands Contracts and Design Ltd v Victor Green Publications Ltd* (1984) 1 CR 419; *Atlas Express Ltd v Kafco (Importers and Distributors Ltd* (1989) 1 ALL ER 641; *Camillion Construction Ltd v Felix* (UK) Ltd (2001) QB 51; *CTN Cash and Carry Ltd v Gallacker Ltd* (1994) 4 ALL ER 714; *GMAC Commercial Credit Ltd v Dearden Unreported* May 28 (2002); *Huyton SA v Peter Cremer GMBH and Co* (1999) 1 Lloyd's Rep 620; *Williams v Roffey Bros and Nicholls (Contractors) Ltd* (1991) 1 QB 1; *DSDN Sub Sea Ltd v Petroleum Geo-Service ASA* (2000) BLR 530.

either a physical act or an illegitimate threat, coercing or pressurizing the other party into making a contract. [288]

The best known case involving duress to the person is that of *Barton v Armstrong*. [289] The facts briefly stated include: Armstrong was the chairman of a company and Barton was its managing director. Armstrong made death threats against Barton to persuade Barton to buy out Armstrong's shareholding in the company, but ironically, Barton wished to acquire Armstrong's shares anyway, because, he thought (wrongly, as things turned out) that this was a commercially desirable course of action. So Barton executed a deed purchasing Armstrong's shares, but, later regretted the transaction and sought to undo the transaction. Armstrong argued that Barton would have executed the deed even if there had been no threats, so his threats were not a `*but for*' cause and thus, there should be no relief.
The Privy Council, hearing the appeal, per Lord Cross, recognised the most general form of duress namely:

"for if A threatens B with death if he does not execute some document and B, who takes A's threats seriously, executes the document it can be only in the most unusual circumstances that there can be any doubt whether the threats operated to induce him to execute the document."

Applying the facts of this case to the law applicable Lord Cross found:

" ..... that during the 10 days or so before the documents were executed Barton was in genuine fear that Armstrong was planning to have him killed if the agreement was not signed. His state of mind was described by the judge as one of `very real mental torment' and he believed that his fears would be at an end when once the documents were executed."

Lord Cross concludes:

" ..... if A's threats were "a" reason for B's executing the deed he is entitled to relief even though he might well have entered into the contract if A had uttered no threats to induce him to do so." [290]

Although the English courts, at one stage, were reluctant to recognize duress in respect of goods, [291] in more recent English decisions, in the 1970's and 1990's, in the cases of

288 *Barton v Armstrong* (1976) 1 A.C. 104 involves a threatened or actual violence; Williams v Bayley (1886) LR 1 HL 200 involves a threat of imprisonment.

289 (1976) 1 A.C. 104.

290 *Barton v Armstrong* (1976) 1 A.C. 104.

291 See the case of *Skeate v Beale* (1841) 11 AD @ E 893.

Occidental Worldwide Investment Corpn v Skibs A/S Avanti; [292] *North Ocean Shipping Co Ltd v Hyunday Construction Co Ltd*; [293] *Pao On v Lau Yiu Long*; [294] *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* [295] the continued validity of *Skeate v Beale* must be considered doubtful.

It is especially in the case of *Dimskall Shipping Co SA v International Transport Workers Federation (The Evia Luck)* [296] that Lord Goff made it clear that pronouncement in *Skeate v Beale* (1841) 11 AD and El 983 has been replaced by what Lord Goff describes as `economic duress'. This is how Lord Goff sets out the position:

"We are here concerned with a case of economic duress. It was at one time thought that, at common law, the only form of duress which would entitle a party to avoid a contract on that ground was duress of the person. The origin for this view laid in the decision of the Court of Exchequer in Skeate v Beale (1941) 11 Ad and El 983. However, since the decisions of Kerr J in Occidental Worldwide Investment Corporations v Skibs A/S Avanti (The Siboen and The Sibotre) (1976) 1 Lloyd's Rep 293, of Mocatt J in North Ocean Shipping Co Ltd v Hyunday Construction Co Ltd (1979) QB 705, and of the Judicial Committee of the Privy Council in Pao On v Lau Yiu Long (1980) AC 614, that limitation has been discarded, and it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract." [297]

The third principal form of duress is that of economic duress recognised by the English courts for the first time in the case of *Occidental Worldwide Investment Corporation v Skibs A/S Avanti (The Siboen and the Sibotri)*. [298]

However, obiter, Micatia J recognized that a contract could be voidable because economic duress had been present when it was made, and that is now an accepted principle. `*Economic*' duress simply refers to the fact that it is the economic interest of the individual which is being threatened, and if the law will react to threats even to that interest, it can be

292 (1976) 1 Lloyd's Rep 293.

293 (1979) 3 WLR 419.

294 (1979) 3 WLR 435.

295 (1992) 2 AC 152.

296 (1992) 2 AC 152.

297 *Dimskall Shipping Co SA v International Transport Worker's Federation* (The Evia Luck) (1992) 2 A.C. 152 at 165.

298 (1976) 1 Lloyd's Rep 293.

said that there is a general principle, in English law, that duress will render a contract voidable. The law is now prepared to look at a very wide range of threats in deciding if the decision to contract was made in unacceptable circumstances or not.

One of the difficulties experienced by the courts after economic duress was first recognised as a defence, was to identify the elements that had to be proved in order to make out a case of economic duress. But, in *Pao v Lau Yiu Long,* [299] the Privy Council not only approved Kerr J's distinction between commercial pressure and coercion sufficient to vitiate consent, it also laid down the following list of enquiry for a determination as to coercion:

"Whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in Maskell v Horner (1915) 3 KB 106, relevant in determining whether he acted voluntarily or not." [300]

Furthermore, Lord Scarman also identified two essential conditions for the operation of the doctrine of economic distress, namely:

(a) Coercion of the will that vitiates consent; and

(b) The pressure or threat must be illegitimate.

Most of these types of cases involve a situation where there was no practical choice other than to agree to enter into an agreement. This formed the subject matter in numerous cases, examples of which appear below.

In *B and S Contracts and Design Ltd v Victor Green Publications Ltd,* [301] the Court of Appeal held that the defendants had been affected by duress because they had no realistic choice other than to pay.

Similarly, in *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd,* [302] the defendant had no realistic choice other than to sign a revised contract for carriage of its goods because it could not, at such short notice, have obtained alternative carriage for the goods

299 (1979) 3 WLR 435; (1980) A.C. 614.

300 *Pao v Lau Yiu Long* (1979) 3 WLR 435 at 450.

301 (1984) ECR 419.

302 (1989) 1 ALL ER 641.

and without the ability to deliver, it would have lost the contract to supply its major customer (Woolworths).

What has to be shown is that the victim would not otherwise have made such a contract, or would not otherwise have contracted on those terms [303] and that the pressure was illegitimate. As to the meaning of what is deemed to be illegitimate or when is a threat `*illegitimate*' for the purposes of the law relating to economic duress? This question was decided in *DSDN Sub Sea Ltd v Petroleum Geo-Services ASA*. [304]

Dyson J, delivering the judgement, stated that:

"In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining." [305]

The court subsequently found that the threat was not, in the circumstances, illegitimate, since it was reasonable behaviour by a contractor acting *bona fide* in a different situation.

The effect of a successful plea of economic duress is that it renders a contract voidable, in that the coercion of the will vitiates consent. The victim may also claim restitution. [306]

Undue Influence

One of the other exceptions to the *caveat subscriptor* rule recognized by the English courts is that of undue influence.

One of the earliest cases, in which the doctrine of undue influence was recognized by the English courts, occurred in the mid 1800's in the case of *Smith v Kay,* [307] in which, a

303 *Huyton SA v Peter Cremer GMBH and Co* (1999) 1 Lloyd's Rep 620.

304 (2000) BLR 530.

305 *DSND Sub Sea Ltd v Petroleum Geo-Service ASA* (2000) BLR 530 at 545; See also *Universe Tankships Inc. Of Moncovia v International Transport Worker's Federation, The Universe Sentinel* (1983) 1 AC 366.

306 *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* (1976) 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* (1979) QB 705; *Pao v Lau Yiu Long* (1980) AC 614; *Hayton SA v Peter Cremer GMBH and Co* (1999) 1 Lloyd's Rep 620 at 636-639; *B and S Contracts and Design Ltd v Victor Green Publications Ltd* (1984) 1 CR 419 CA; *Universe Tankships of Moncovia v International Transport Workers Federation (The Universe Sentinel)* (1983) 1 AC 366 HC.

307 (1893) 1 CH 736.

young man came completely under the influence of an older man, called Johnston, with whom he was living. As soon as Kay reached 21, Johnston persuaded him to execute various securities in his favour. Fraud was alleged, but the House of Lords held that the securities could be set aside on another ground, that of undue influence.

English law cases, until the case of *Royal Bank of Scotland PLC v Etridge (No 2),* [308] always distinguished between actual undue influences and presumed undue influence. From its plain meaning, actual undue influence, usually involved an act of inducement or domination. In the past, cases of domination frequently involved spiritual advisers. An example thereof occurred in *Morley v Loughman*. [309] This was an action brought by executors to recover $140,000, paid by the deceased to a member of a religious sect. Wright J, in finding for the plaintiffs, said that there was no need to show a special relationship between deceased and defendant, because `*the defendant took possession, so to speak, of the whole life of the deceased, and the gifts were the effect of that influence and domination*'. [310]

In a more recent case of *CIBC Mortgages p/c v Pitt,* [311] the House of Lords treated this as a case involving actual undue influence. In this case, the defendant had been induced to agree to a second mortgage on the family home as security for a loan to finance share purchases. She had not wanted to go ahead with the scheme, but, had given in to a campaign of sustained pressure. The principal issue for decision, in this case, was whether her claim of undue influence could succeed without her being able to prove that the transaction was to her manifest disadvantage? The House of Lords held that in a (Class 1) case of actual undue influence, the transaction need not be one that is disadvantageous to the party affected.

The court, in the case of *Royal Bank of Scotland plc v Etridge (No 2),* [312] emphasizes the following characteristics of actual undue influence in the context of husband and wife relationships, namely:

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308 (1998) 4 ALL ER 707 (2002) UK HL 44 (2002) 2 AC 773.

309 *Morley v Loughman* (1893) 1 CH 730.

310 *Morley v Loughman* (1893) 1 CH 730.

311 (1994) 1 AC 200.

312 (2002) UKHL 44 (2002) 2 AC 773.

"Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements or conduct by a husband, which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances, should not, without more, be castigated as undue influence. Similarly, when a husband is forecasting the future of his business, and expressing his hopes or fears, a decree of hyperbole may be only natural. Courts should not too readily treat such exaggerations as misstatements. Inaccurate explanations of proposed transaction are a different matter." [313]

Presumed undue influence has been widely recognised in English law. Prior to the decision of *Royal Bank of Scotland plc v Etridge (No 2),* [314] what was required, by the courts, was for the complainant to show that the relationship between the parties fell within certain recognised relationships, or, on the facts, it was shown to be a relationship where one party placed trust and confidence in the other, before it would be presumed that undue influence existed. Examples of cases in which the courts have held that a relationship of trust and confidence existed include; the attorney and client relationship, doctor and patient relationship, religious relationship between the church and its members etc.

In so far as the attorney and client relationship is concerned, in the case of *Wright v Carter* [315] the plaintiff executed a deed of trust whereby the whole of his property (present and future) was held on trust, for his two children and his solicitor, in equal shares! The court had no hesitation in finding that a presumption of undue influence arose and had not been rebutted by the solicitor.

The best known example of the relationship between the church and its members is that of *Allcard v Skinner*. [316] In this case Miss Allcard, a wealthy young woman, consented to become a professed member of the order. She bound herself to observe the rules of the order, including poverty, which required members to give up all their property; seclusion, which prevented members seeking outside advice without permission; and obedience, which told members to regard the voice of the Mother Superior as the voice of God. Miss Allcard transferred large sums of money and stocks to the Mother Superior, but later left the order and sought to set the gifts aside. The Court of Appeal held that the presumption of undue influence arose (although Miss Allcard's claim was barred by her delay in bringing it).

The court concluded:

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313 *Royal Bank of Scotland plc v Etridge (No 2)* (2002) UKHL 44 (2002) 2 AC 773 32-33.

314 (2002) UK HL 44 (2002) 2 AC 773, 32-33.

315 (1903).

316 (1887) 36 CHD 145, CA.

"It is plain that equity will not allow a person who exercise or enjoys a dominant religious influence over another to benefit, directly or indirectly by the gifts which the donor makes under or in consequence of such influence." [317]

There are relationships which the law regards as special, incorporating elements of trust and confidence, so that influence can be automatically assumed. Examples thereof include a relationship between solicitor and client, doctor and patient, parent and child, banker and customer. [318] Applying the principle laid down in *Royal Bank of Scotland plc v Etridge (No 2),* [319] where the relationship falls within the category of protected relationship, the presumption of influence is now automatic and indisputable, but, notwithstanding, [320] if evidence suggests that the influence was `*undue*' or is suspicious, the presumption will arise and it will be up to the party alleged to have exercised the undue influence, to show that no undue influence was, in fact, exercised. He can do this by showing, for example, that independent advice was received. [321]

A further requirement, laid down by the courts, in a presumed influence case is that there must be something about the transaction which `*calls for an explanation*' or the so called `*suspicious transaction*' case. The original test was defined in *Allcard v Skinner*: [322]

"The mere existence of such influence is not enough in such a case but if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act, the burden is on the donee to support the gift." [323]

Later cases changed the wording of this requirement by shifting the language used to a `*manifestly disadvantageous transaction*'. [324] The presumption of undue influence is then derived from the reasoning that a party, making an unfettered decision, would not freely

317 *Allcard v Skinner* (1887) 36 CHD 145 AC.

318 *National Westminister Bank Ltd v Morgan* (1985) AC 686; *Lloyds Bank Ltd v Bundy* (1975) QB 326.

319 *Royal Bank of Scotland plc v Etridge (No 2)* (1998) 4 ALL ER 705 (2002) UKHL 44 (2002) 2 AC 773.

320 *Royal Bank of Scotland plc v Etridge (No 2)* (1998) 4 ALL ER 705 (2002) UKHC 44 (2002) 2 AC 773.

321 *Royal Bank of Scotland plc v Etridge (No 2)* (2002) UKHL 44 (2002) 2 AC 773.

322 (1887) 36 CHD 145 AC.

323 *Allcard v Skinner* (1887) 36 CHD 145 AC.

324 *National Westminister Bank v Morgan* (1985) AC 686.

choose to enter into a manifestly disadvantageous contract. This requirement was questioned by a number of decisions, [325] until its position in establishing undue influence was reaffirmed in the case of *Royal Bank of Scotland plc v Etridge (No 2)*. [326] In this case, Stuart-Smith LJ made the point that evidence of manifest disadvantage is `*a powerful evidential factor*'. This reasoning was also followed by the House of Lords, in which Lord Nicholas confirmed that manifest disadvantage to the claimant would be evidence that the influence exercised was `*undue*' or at least raised suspicion.

Once it has been established that the presumption of undue influence has arisen, the presumption can be rebutted by showing that the complainant was not, in fact, induced to enter the contract through the defendant's improper influence, but rather, that he did so quite freely and fully aware of the situation. What will also assist is to show that independent advice was obtained. [327]

The effect of undue influence, if established, is that the contract is voidable, not void. The claimant may, thus, elect whether to continue with the contract or seek rescission thereof. [328] Restitutionary relief can also be sought in association with rescission of the contract. [329]

Illegality

Illegality, in the English case law, impacts on the law of contract in many different ways. The impact of illegality was summed up two and a half centuries ago, by Lord Mansfield, in the case of *Holman v Johnson* [330] as follows:

"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act, if from the plaintiff's own stating or otherwise. The cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon this ground that the court goes not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." [331]

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325 *CIBC Mortgages plc v Pitt* (1994) 1 AC 200; *Barclays Bank plc v Coleman* (2000) 3 WLR 405.

326 (1998) 4 ALL ER 705 (2002) UKHL 44 (2002) 2 AC 773.

327 *Royal Bank of Scotland plc v Etridge (No 2)* 2002 UKHL 44 (2002) 2 AC 773; *Inche Noriah v Shaik Allie Bin Amar* (1929). In this case the court laid down the test for rebuttal in general terms namely: *"that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence of the donee and with the full appreciation of what he was doing."*

328 *Allcard v Skinner* (1887) LR 36 CHD 145.

329 *Dunbar Bank plc v Nademen* (1998) 3 ALL ER 876.

330 (1775) 1 Cowp. 34.

331 *Holman v Johnson* (1775) 1 Cowp. 34.

The English courts, throughout the centuries, have had difficulty in classifying the separate heads of illegality. From a study of the case law, it appears that the English courts treat the illegality of contracts in two main streams. In the first main stream, illegality covers all contracts which are considered to be contrary to public policy. In the second main stream, illegality covers contracts which are affected by statutory prohibition.

Returning to the first main stream, contracts which the courts will not enforce because they are contrary to public policy are, generally, agreements to commit a crime, agreements to commit a civil wrong or fraud or agreements to defraud the revenue.

As long ago as 1866, in the case of *Pearce v Brooks,* [332] the court considered whether an agreement to provide a prostitute with goods for use in her trade was illegal and unenforceable. The facts of the case included the following:

The defendant, a prostitute, hired a decorative brougham, from the plaintiff coach builders, as part of her display to attract men. The plaintiffs alleged that the defendant returned the brougham in a damaged condition and that she had failed to pay the instalments on the hire of the brougham. The plaintiffs brought an action to recover the instalment of 15 Guineas, which had not been paid and to recover in respect of the damage done to the brougham.

Pollock CB, in delivering the judgement, set out the law applicable in the following terms:

"I have always considered it as settled law, that any person who contributes to the performance or an illegal act by supplying a thing with the knowledge that it is going to be used for that purposes, cannot recover the price of the thing so supplied."

The court continues:

"Nor can any distinction be made between an illegal and an immoral purpose, the rule which is applicable to the matter is, ex turpi causa non oritur actio and whether it is immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of the maxim, and the effect is the same: no cause of action can arise out of either the one or the other ..... If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiff can derive no cause of action from the bargain." [333]

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332 (1866) LR 1 Ex 213; See also *Benyon v Nettleford* (1850) 3 MAC and G 94 where a man undertakes to pay monies to a woman if she becomes his mistress.

333 *Pearce v Brooks* (1866) LR 1 Ex 213.

The court consequently held that the agreement was illegal and unenforceable.

Another case, which clearly illustrates the legal principles applicable to illegal contracts, is that of *St John Shipping Corporation v Joseph Rank Ltd*. [334] In this case, a ship, registered in Panama, carried grain from a US port to the UK. The ship was overloaded, so that its `*load line*' was submerged, contrary to the provisions of the *Merchant Shipping Safety and Load Line Conventions Act* 1932. Although the overloading enabled the ship to earn an extra $2,295 in freight, the maximum statutory fine (which was levied in this case) was only $1,200, with the result that the statute was ineffective in removing the incentive to overload. The defendants, who were owners of some of the cargo, withheld $2,000 of the freight due under the contract and another cargo owner withheld $295. The plaintiff ship-owners sued to recover the withheld freight. The defendants argued that, as the ship-owners had performed the contract in an illegal manner, they were not entitled to recover any part of the freight due.
Devlin J set out the legal position as follows:

"There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent at the time the contract was made, to break the law, if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or not the overload was deliberate when it was done, there is no proof that it was contemplated when the contract of carriage was made. The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is, if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not as significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the stature prohibits, but what contracts it prohibits, but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable." [335]

The court, consequently, held that the agreement entered into was enforceable, as the right to claim freight from the defendants was not brought into existence by crime.

In a subsequent case concerning the illegality of a contract and the effect thereof, the Queen's Bench, in the case of *Archibold's (Freightage) Ltd v S Spanglett Ltd* [336] also dealt with the freight loss of whisky. The facts included: The defendants, who were furniture

334 (1957) 1 QB 267.

335 *St John Shipping Corporation v Joseph Bank Ltd* (1957) 1 QB 267.

336 (1961) 1 QB 374, Court of Appeal.

manufacturers in London, owned vehicles with "C" licences, which permitted them to carry their own goods, but not the goods of others. The plaintiffs were carriers with offices in London and Leeds, whose vehicles carried "A" licences, enabling them to carry the goods of others, as well as their own goods. One of the plaintiffs' employees, in their London office, arranged with a person from the defendant's office, for the defendants to carry some goods, for the plaintiffs, to the plaintiff's Leeds office. The plaintiff believed that the defendants had "A" licences for their vehicles and were not aware of the fact that the defendants' vehicles had only "C" licences. Having made his deliveries in Leeds, the defendant's driver, Mr Randall, told Mr Field, the plaintiffs' traffic manager in the Leeds office that he had just brought a load, for them, from London and wished to take another load back to London. The driver arranged with the traffic manager to carry a load of whisky to London. That load of whisky was stolen as a result of the driver's negligence. The plaintiffs brought an action for damages against the defendants. The defendants argued that the plaintiffs were not entitled to recover damages because the contract was illegal as a result of the fact that their vehicle did not have an "A" licence.
The trial judge found for the plaintiffs. The Court of Appeal dismissed the defendants' appeal and held that the plaintiffs were not prevented from suing for damages, as a result of the illegality, because they did not know the vehicle only had a "C" licence and, that being the case, the contract of carriage was not, itself, illegal under the relevant statute, nor was it *ex facie* illegal.

Pearce LJ, delivering the judgement, set out the legal position in the following terms:

"If a contract is expressly or by necessary implication forbidden by statute, or it is ex facie illegal, or if both parties know that through ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiff in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law."

Applying the facts *in casu* the court concluded:

"The plaintiffs were never in delicto since they did not know the vital fact that would make the performance of the contract illegal. In my view, therefore, public policy does not constrain us to refuse our aid to the plaintiffs and they are therefore entitled to succeed. I would dismiss the appeal." [337]

Contracts to commit crimes or civil wrongs, as previously stated, would be illegal. A good illustration thereof can be found in the case of *Parkinson v College of Ambulance*. [338] In this

337 *Archbolds (Freightage) Ltd v S Splanglett Ltd* (1961) 1 QB 374, Court of Appeal.

338 (1925) 2 KB 1.

case, an officer of the defendant charity promised to arrange for Parkinson to receive a knighthood if he made a substantial donation to the charity. Parkinson donated $3000 but received no knighthood, so he sued for the return of his money. Lush J decided the agreement was illegal and unenforceable and stated the position as follows:

"I cannot feel any doubt that a contract to guarantee or undertake that an honour will be conferred by the Sovereign if a certain contribution is made to a public charity or if some other service is rendered, is against public policy and, therefore, an unlawful contract to make. Apart from being derogatory to the dignity of the Sovereign who bestows the honour, it would produce, or might produce, the most mischievous consequence. No court could try such an action and allow such damages to be awarded with any propriety or decency." [339]

Other examples of contracts which fall into this main stream include those agreements injurious to the State, agreements which tend to injure good government, agreements which tend to prevent the course of justice, agreements which tend to abuse the legal process and agreements which affect marriages. For the purposes of this research and given the constraints, case law in respect of the above mentioned will not be entertained.

Consequently, the second main stream will be looked at and discussed very briefly. In this regard, agreements contrary to statutory prohibitions are illegal. What is looked at is the intention of the legislature. An example thereof occurred in the case of *RE Mahmoud and Ispahani* [340] in which the facts were:

The regulation applicable to the contract was the Seeds, Oils and Fats Order 1919, which provided that a person shall not buy or sell linseed oil `*except under and in accordance with the terms of a licence*'. The plaintiffs, who had a licence, asked the defendant if he had a licence. The defendant replied that he did when, in fact, he did not. The plaintiffs sold linseed oil to the defendant but the defendant refused to accept delivery. When sued for damages for non-acceptance, the defendant took the point that the contract was illegal on account of the fact that he did not have a licence to purchase the linseed oil. The Court of Appeal held that the plaintiffs were not entitled to bring their action for damages. Atkin LJ stated:

"When the court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it may have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case one has to examine very carefully the precise terms of the statute imposing the penalty upon the individual. One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a

339 *Parkinson v College of Ambulance* (1925) 2 KB 1.

340 (1921) 2 K.R. 716.

party who is innocent of the offence which is created by the statute." [341]

On the facts, the Court of Appeal concluded that the intention was to prohibit the making of the contract, whether or not the party seeking to enforce the contract was responsible for the violation of the requirements of the system. Consequently, the contract could not be enforced.

The consequences of illegality are that the courts will neither enforce an illegal contract nor will they permit the recovery of the value of benefits, conferred on another party, in the performance of an illegal contract.

These two general rules are expressed in the maxims *ex turpi causa non oritue actio* (no action can be based on a disreputable cause) and *in delicto potior est conditio defendentis* (where both parties are equally at fault, the position of the defendant is stronger).

But, the said general rules are not without exception. For that reason, in some cases, the courts adopt a very severe attitude and refuse to assist a person implicated in the illegality, in any way whatsoever. The courts' attitude, in general, is no better expressed than by Lord Goff in the case of *Tinsley v Milligan* [342] when he stated:

"The principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other." [343]

The effect thereof is that the defence of illegality does not exist for the benefit of the defendant, but for the benefit of society as a whole.

But, the English courts have been prepared to deviate from the general rule when the circumstances so dictate.

The case of *Archbold's (Freightage) Ltd v S Spanglett Ltd* [344] demonstrates that an innocent

341 *Re Mahmoud and Ispahane* (1921) 2 K.B. 716.

342 (1994) 1 A.C. 340.

343 *Tinsley v Milligan* (1894) 1 A.C. 340 at 355; For the long standing decision in which it was held that illegal contracts are unenforceable see *Holman v Johnson* (1775) 1 Cowp. 34.

344 *Archbolds (Freightage) Ltd v S Spanglett Ltd* (1961) 1 QB 374.

party, who is unaware of an illegal act committed by the defendant in the course of performance of the contract, may be entitled to enforce the contract, notwithstanding the illegality.

The court may also conclude, as a matter of construction, that the effect of a statutory provision is to impose a punishment on a party who breaches the statute, but, not to render unenforceable a contract, the performance of which involves a breach of the statute.

The exception to the general rule has been recognized by the English courts in circumstances which *"would not amount to an affront to the public conscience to afford the plaintiff the relief he sought."* [345] Recovery may, depending on the innocence of the one contracting party, be afforded such a party. [346] Restriction may also be available where one party withdraws before the illegal purpose is carried into effect. [347]

9.2.2.3 Legal Opinion

The *caveat subscriptor* rule is very much part of the English law of contract. People, who put their signature to contracts without reading or understanding them, are treated with very little sympathy. For that reason, the signatory must beware as he/she will be taken to have noticed and be bound by, all the provisions he/she has signed, whether the contract has been read or not. This includes contracting parties who had been careless in signing or signed in haste. [348]

Therefore, as a general rule, in the absence of a valid defence, a person is bound by his/her signature to a document, whether he/she reads it or understands it, or not. [349]

The defences or exceptions to the *caveat subscriptor* rule include misrepresentation,

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345 *St John Shipping Corporation v Joseph Bank Ltd* (1957) 1 QB 267.

346 *Howard v Shirlstar Container Transport Ltd* (1990) 3 ALL ER 366. See also *Thackwell v Barclays Bank PLC* (1986) 1 ALL ER 676; *Shanskal v Al-Kistaine* (2001) 2 ALL ER (COMM) 60.

347 *Tribe v Tribe* (1996) CH 106.

348 For legal writings see Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 302; McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Treitel *The Law of Contract* (2003) 329; Beatson *Anson's Law of Contract* (2002) 335. For case law see *L'Estrange v Graucob* (1934) 2 KB 394; *United Dominions Trust Ltd v Western* (1976) QB 513 at 543.

349 For legal writings see Koffman and MacDonald *The Law of Contract* (2004) 337; McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 302; Beatson *Anson's Law of Contract* (2002) 335. For case law see *L'Estrange v Graucob* (1934) 2 KB 394; *United Dominions Trust Ltd v Western* (1976) QB 513 at 543.

mistake, duress, undue influence, illegality and fraud. [350]

Misrepresentation, in English law, may manifest itself through a positive act, for example, an experienced salesman makes a representation which turns out to be false, [351] or it may manifest through an omission, where a person is obliged to disclose certain facts but wilfully shuts his/her eyes to them or where a special relationship exists, for example, a professional relationship or a commercial relationship from which a duty of disclosure arises and one of the contracting parties fails to disclose the true facts. [352] Before a party can successfully rely on misrepresentation as a defence to an action, it must be shown, firstly, that the statement made before the conclusion was one of fact, not an opinion of law [353] nor a mere puff; [354] secondly, the representation held a real inducement which is a question of fact; [355] thirdly, the party, to whom the misrepresentation was made, relied thereupon

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350 For legal writings see Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 302; McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Treitel *The Law of Contract* (2003) 329; Beatson *Anson's Law of Contract* (2002) 335. For case law see *Smith v Hughes* (1871) LR 6 QB 597 recognizing misrepresentation; *Bell v Lever Bros Ltd* (1932) A.C. 161 recognizing mistake; *Skeate v Beale* (1841) 11 AD and ER 893; *Barton v Armstrong* (1976) 1 AC 104; *Dimskall Shipping SA v International Worker's Federation (The Evia Luck)* (1951) 4 ALL ER 871. *Camillion Construction Ltd v Felix (UK) Ltd* (2001) 312 - recognising duress as a defence; *Smith v Kay* (1893) 1 CH 736; *CIBC Mortgages PLC v Pitt* (1994) 1 AC 200; *Royal Bank of Scotland PLC v Etridge (No 2)* - recognizing undue influence as a defence; *Holman v Johnson* (1775) 1 Cowp. 34; *Pearce v Brooks* (1866) LR 1 Ex 213; *St John Shipping Corporation v Joseph Bank Ltd* (1957) 1 QB 267; *Archbolds (Freitage) Ltd v S Spanglett Ltd* (1961) 1 QB 374 - Court of Appeal recognizing illegality as a defence.

351 For legal writings see Beatson *Anson's Law of Contract* (2002) 243ff; Koffman and MacDonald *The Law of Contract* (2004) 356ff; Stone *Principles of Contract Law* (1998) 177ff; Stone *The Modern Law of Contract* (2004) 266ff; McKendrick *Contract Law Text, Cases and Materials* (2004) 310ff; Treitel *The Law of Contract* (2003) 343; O'Sullivan and Hilliard *The Law of Contract* (2004) 310ff; For case law see *Hedley Burne and Co Ltd v Heller and Partners Ltd* (1964) A.C. 465; *Esso Petroleum Co Ltd v Marden* (1976) QB 801.

352 For legal writings see Koffman and MacDonald The Law of Contract (2004) 340; Beatson Anson's Law of Contract (2002) 337-338; McKendrick Contract Law Text, Cases and Materials (2005) 657-661; Treitel The Law of Contract (2003) 330; Stone Principles of Contract Law (1998) 174-177; Stone The Modern Law of Contract (2004) 262-265; O'Sullivan and Hilliard The Law of Contract (2004) 296-298, For case law see Blackburn, Low and Co v Vigors (1887) 12 App Cas 531; Economides Commercial Union Assurance Co PLS (1998) QB 587; Hedley Byrne and Co Ltd v Heller and Partners Ltd (1964) A.C. 465; Esso Petroleum Co Ltd v Marden (1976) QB 801.

353 For legal writings see Treitel The Law of Contract (2003) 370; Koffman and MacDonald The Law of Contract (2004) 343; O'Sullivan and Hilliard The Law of Contract (2004) 300; Beatson Anson's Law of Contract (2002) 337; McKendrick Contract Law Text, Cases and Materials (2005) 659-660; Stone Principles of Contract Law (1998) 174; Stone The Modern Law of Contract (2003) 261; For case law see Bisset v Wilkinson (1927) AC 177.

354 For legal writings see Treitel *The Law of Contract* (2003) 370; Koffman and MacDonald *The Law of Contract* (2004) 343; O'Sullivan and Hilliard *The Law of Contract* (2004) 300; Beatson *Anson's Law of Contract* (2002) 337; McKendrick *Contract Law Text, Cases and Materials* (2005) 653-660; Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 268; For case law see *De Marook v Hallett* (1866) L.R. 2 EH App 21; *Lambert v Lewis* (1982) A.C. 225.

355 For legal writings see Koffman and MacDonald *The Law of Contract* (2004) 340-351; Beatson *Anson's Law of Contract* (2002) 241-243; McKendrick *Contract Law Text, Cases and Materials* (2005) 661; Treitel *The Law of*

and acted thereupon to conclude the agreement. [356]

English law recognizes three different categories of misrepresentation, depending upon the frame of mind of the party making the misstatement, misrepresentation could take the form of fraud, negligence or innocence. [357]

The remedies available are founded in common law, in respect of which the party who has been caught by this misrepresentation may seek affirmation of the contract and pursue a damages claim for deceit, alternatively seek rescission of the contract and sue for damages [358] or to sue for damages in terms of the *Misrepresentation Act* 1967. [359]

In so far as the exclusion of liability for misrepresentation is concerned, the English courts, relying upon the *Unfair Contract Act*, 1977 and the *Unfair Terms in Consumer Contracts Regulations* 1989, have held that exemption clauses are *prima facie* invalid, unless the courts find that the term is fair and reasonable. [360] But the courts have been very strict on clauses purporting to exclude liability for fraud. They are invalid. [361]

Contract (2003) 338; Stone *Principles of Contract Law* (1998) 115-177; Stone *The Modern Law of Contract* (2004) 264-265; O'Sullivan and Hilliard *The Law of Contract* (2004) 338 who speak about `reliance' as the causation requirement instead of inducement which ought to be restricted to fraud. For case law see *Smith v Chadwick* (1884) 9 App. CAS 187; *Barton v County NatWest Ltd* (1999) Lloyds Rep 408.

356 For legal writings see Beatson *Anson's Law of Contract* (2002) 243-247, 251ff; Koffman and MacDonald *The Law of Contract* (2004) 351-358ff; Stone *Principles of Contract Law* (1998) 179-180ff; Stone *The Modern Law of Contract* (2004) 266-272ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 322ff; Treitel *The Law of Contract* (2003) 345; For case law see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1995) 2 A.L. 501; *Spice Girls v Aprilia World Service* (2002) EWCA 15 at 68-72; See *Derry v Peek* (1990) 14 App Cas 337 re fraudulent misrepresentation; *Hedley Byrne and Co Ltd v Heller and Partners Ltd* (1964) A.C. 465; *Redgrave v Hurd* (1881) 20 CH D.1 re innocent misrepresentation.

357 For legal writings see Beatson *Anson's Law of Contract* (2002) 243ff, 247-248; Koffman and MacDonald *The Law of Contract* (2004) 356, 360-380; Stone *Principles of Contract Law* (1998) 177-178; Stone *The Modern Law of Contract* (2004) 169, 266ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 310ff 322; Treitel *The Law of Contract* (2003) 343-345; For case law see *Long v Lloyd* (1958) 2 All ER 402; *Leaf v International Galleries* (1950) 2 KB 86 (1950) 1 All ER 693; *Derry v Peek* 14 App Cas 377; *Smith New Court Securities Ltd v Soimgeour Vickers (Asset Management) Ltd* (1997) AC 254.

358 For legal writings see Beatson *Anson's Law of Contract* (2002) 243ff, 247-248; Koffman and MacDonald *The Law of Contract* (2004) 356, 360-380; Stone *Principles of Contract Law* (1998) 177-178; Stone *The Modern Law of Contract* (2004) 169, 266ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 310ff 322; Treitel *The Law of Contract* (2003) 343-345; For case law see *Long v Lloyd* (1958) 2 All ER 402; *Leaf v International Galleries* (1950) 2 KB 86 (1950) 1 All ER 693; *Derry v Peek* 14 App Cas 377; *Smith New Court Securities Ltd v Soimgeour Vickers (Asset Management) Ltd* (1997) AC 254.

359 For the recognition of S2(1) of the Misrepresentation Act 1967 see *Howard Marine and Dredging Co Ltd v A Oeden and Sons (Excavations) Ltd* (1978) QB 574.

360 *Walker v Boyle* (1982) 1 W.L.R. 473; *McCullouch v Lane Fox and Partners* (1996) 49 Con. L.R. 124.

361 For legal writings see Beatson *Anson's Law of Contract* (2002) 261ff; Koffman and MacDonald *The Law of Contract* (2004) 378-379ff; Stone *Principles of Contract Law* (1998) 184ff; Stone *The Modern Law of Contract*

The English legal writers and the courts alike, although very much in favour of the freedom of contract and the sanctity of contract, do recognize mistake as a defence and an exception to the *caveat subscriptor* rule. This, nonetheless, remains very much an exception to the rule. [362]

The rationale for recognizing mistake as an exception to the *caveat subscriptor* rule is said to be based upon the intentions of the contracting parties, in respect of which, effect must be given. If therefore, either or both of the contracting parties have made a genuine mistake as to the nature of the agreement the enforcement of the contract would be contrary to their intentions. Intervention is therefore necessary, using mistake, even if it means destroying contractual obligations. To reason otherwise, it is argued, would be unjust. [363]

The effect of mistake in contract is that mistake negates consent and prevents the contracting parties from reaching agreement, for example, on different terms. [364] In other words, where mistake has been successfully invoked as a defence, the contract is rendered void *ab initio,* as if the contract had never existed. The contracting parties must also be placed in the same position they were in before the conclusion of the purported agreement. [365] English law writers and the courts recognise three particular types of mistake at

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(2004) 276-278ff; McKendrick *Contract Law Text, Cases and Materials* (2005) 712-713; O'Sullivan and Hilliard *The Law of Contract* (2004) 324ff; Treitel *The Law of Contract* (2003) 388-389; For case law see *Thomas Witter Ltd v TBS Industries* (1996) 2 ALL E.R. 573 at 598; *South West Water Services Ltd v International Computers Ltd* (1998) B.L.R. 420.

362 For legal writings see Beatson *Anson's Law of Contract* (2002) 261ff; Koffman and MacDonald *The Law of Contract* (2004) 378-379; Stone *Principles of Contract Law* (1998) 184ff; Stone *The Modern Law of Contract* (2004) 276-278ff; McKendrick *Contract Law Text, Cases and Materials* (2005) 712-713ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 234ff; Treitel *The Law of Contract* (2003) 388-389. For case law see *Bell v Lever Bros Ltd* (1932) A.C. 161.

363 For legal writings see Stone *Principles of Contract Law* (1998) 187; Stone *The Modern Law of Contract* (2003) 281; Treitel *The Law of Contract* (2003) 286; Beatson *Anson's Law of Contract* (2002) 309. For case law see *Bell v Lever Bros Ltd* (1932) A.C. 161.

364 For legal writings see Beatson *Anson's Law of Contract* (2002) 336; Koffman and MacDonald *The Law of Contract* (2004) 308; Stone *Principles of Contract Law* (1998) 192-193; Stone *The Modern Law of Contract* (2003) 289; McKendrick *Contract Law Text, Cases and Materials* (2005) 572; O'Sullivan and Hilliard *The Law of Contract* (2004) 451-452; Treitel *The Law of Contract* (2003) 286. For case law see *Cox v Prentice* (1815) Mand S. 344; *De Vaux v Connolly* (1849) 8 C.B. 640; *Bell v Lever Brothers Ltd* (1932) A.C. 161; *Cundy v Lindsay* (1878) 3 App CAS 459; *Shogun Finance Ltd v Hudson* (2001 EWCA Civ. 1000 (2002) QB 834.

365 For legal writings see Beatson *Anson's Law of Contract* (2002) 336; Koffman and MacDonald *The Law of Contract* (2004) 308; Stone *Principles of Contract Law* (1998) 192-193; Stone *The Modern Law of Contract* (2003) 289; McKendrick *Contract Law Text, Cases and Materials* (2005) 572; O'Sullivan and Hilliard *The Law of Contract* (2004) 451-452; Treitel *The Law of Contract* (2003) 286. For case law see *Cox v Prentice* (1815)

common law, namely: common mistake, [366] mutual mistake, [367] and unilateral mistake. [368]

For a contracting party to be successful in raising mistake as a defence, both the English writers and the English courts lay down certain requirements, namely: firstly, the mistake must be fundamental. In other words, it is an essential and integral part of the subject matter; secondly, the mistake must induce the conclusion of the contract. In other words, the one party to the contract induces the other contracting party to act on a representation to his/her detriment. [369]

English law also recognises the *non est factum* principle as an extension of mistakes, which is also recognized as an exception to the *caveat subscriptor* rule. The principle works on this basis, namely, where someone does not understand a document that he/she signs, but can show that he/she falls into the category of those with defective education, illness, or innate incapacity, the courts will come to such a contracting party's rescue and allow a plea of *non est factum* to stand. [370]

Mand. 344; *De Vaux v Connolly* (1849) 8 C.B. 640; *Bell v Lever Brothers Ltd* (1932) A.C.161; *Cundy v Lindsay* (1878) 3 App CAS. 459; *Shogun Finance Ltd v Hudson* (2001 EWCA Civ. 1000 (2002) QB 834.

366 For legal writings see Stone *Principles of Contract Law* (1998) 188; Stone *The Modern Law of Contract* (2003) 282; McKendrick *Contract Law Text, Cases and Materials* (2005) 521; Treitel *The Law of Contract* (2003) 286ff; Beatson *Anson's Law of Contract* (2002) 310; O'Sullivan and Hilliard *The Law of Contract* (2004) 449ff.

367 For legal writings see Stone *Principles of Contract Law* (1998) 188; Stone *The Modern Law of Contract* (2003) 302; Treitel *The Law of Contract* (2003) 298ff; Beatson *Anson's Law of Contract* (2002) 310-311; Koffman and MacDonald *The Law of Contract* (2004) 306.

368 For legal writings see Treitel *The Law of Contract* (2003) 298, 304-308; Stone *The Modern Law of Contract* (2003) 288; Beatson *Anson's Law of Contract* (2002) 319; McKendrick *Contract Law Text, Cases and Materials* (2005) 572. For case law see *Cundy v Lindsay* (1878) 3 App Cas 459; *Raffles v Wickerhouse* (1864) 2HandC 906; *Smith v Hughes* (1871) C.R. 6 QB 597; *Shogun Finance Ltd v Hudson* (2001) EWCA Civ. 1000 (2002) QB 634; *Phillips v Brooks Ltd* (1919) 2 K.B. 243; *Denrant v Skinner* (1948) 2 K.B. 164; *Lewis v Averay* (1972) 1 QB 198; *Whittaker v Campbell* (1984) QB 319; *Bell v Lever Brothers Ltd* (1932) A.C. 161.

369 For legal writings see Treitel *The Law of Contract* (2003) 298, 304-308; Stone *The Modern Law of Contract* (2003) 288; Beatson *Anson's Law of Contract* (2002) 319; McKendrick *Contract Law Text, Cases and Materials* (2005) 572. For case law see *Cundy v Lindsay* (1878) 3 App Cas 459; *Raffles v Wickerhouse* (1864) 2HandC 906; *Smith v Hughes* (1871) C.R. 6 QB 597; *Shogun Finance Ltd v Hudson* (2001) EWCA Civ. 1000 (2002) QB 634; *Phillips v Brooks Ltd* (1919) 2 K.B. 243; *Denrant v Skinner* (1948) 2 K.B. 164; *Lewis v Averay* (1972) 1 QB 198; *Whittaker v Campbell* (1984) QB 319; *Bell v Lever Brothers Ltd* (1932) A.C. 161.

370 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Treitel *The Law of Contract* (2003) 329; Koffman and MacDonald *The Law of Contract* (2004) 338; Stone *Principles of Contract Law* (1998) 202-203; Stone *The Modern Law of Contract* (2002) 302-303; Beatson *Anson's Law of Contract* (2002) 335. For case law see *Gaieie v Lee* (1969) 2 Ch 17 (1969) 1 ALL ER 1066 (1969) 2 WLR 901; *Saunders v Anglia Building Society* (1971) AC 1004; *Lloyds Bank PLC v Waterhouse* (1990) FAM LAW 23; *Thoroughgood v Cola* (1582) 1 129, 2 Co; *Foster v Mackinnon* (1869) LR 4 CP 704 at 711.

The recognition of duress and undue influence, as separate defences, by the English writers and the courts, is a further illustration of the general trend towards the emotion of contractual freedom and the sanctity of contract, whereas, the underlying idea surrounding the acceptance of duress as a defence, is said to be consistent with the "*will*" theory of contract, since, a contract induced by duress is not made with full intent, [371] the argument surrounding the recognition of undue influence as a defence is said to be based on striking the right balance between protecting the vulnerable from exploitation, without unduly patronizing them or restricting their freedom to contract. [372]

In so far as duress is concerned, English law recognises three forms of duress, namely: firstly, duress of one of the contracting parties which manifests itself by a threat of violence; [373] secondly, duress in respect of goods; [374] and thirdly, the latterly established form of duress, namely, economic duress. [375] Before one of the contracting parties can successfully rely on economic duress as a defence, both the legal writers and the courts, advocate that certain requirements must first be met. They include coercion of the will that vitiates consent; the pressure or threat must be illegitimate; the pressure or threat must be

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371 For legal writings see Peden *The Law of Unjust Contracts including the Contracts Act* 1980 (NSW) (1982) 10. For case law see *Skeate v Beale* (1841) 11 AD @ E 893; *Williams v Bayley* (1886) LR 1 HL 200; *Barton v Armstrong* (1976) 1 AC 104; *Occidental Worldwide Investment Corpn. v Skibs A/S Avanti* (1976) 1 Lloyds Rep 293; *North Ocean Shipping Co Ltd v Hyanday Construction Co Ltd* (1979) 3 WLR 419; *Pao On v Lau Yiu Long* (1979) 3 WLR 435; (1980) AC 614; *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1991) 4 ALL ER 871 (1992) 2 AL 152; *Universe Tankships Inc of Moncovia v International Transport Worker's Federation, The Universe Sentinel* (1983) 1 AC 366; *BandS Contracts and Design Ltd v Victor Green Publications Ltd* (1984) 1 CR 419; *Atlas Express Ltd v Kafco (Importers and Distributors Ltd* (1989) 1 ALL ER 641; *Camillion Construction Ltd v Felix (UK) Ltd* (2001) 312; *CTN Cash and Carry Ltd v Gallacker Ltd* (1994) 4 ALL ER 714; *GMAC Commercial Credit Ltd v Dearden* Unreported May 28 (2002).

372 For legal writings see O'Sullivan and Hilliard *The Law of Contract* (2004) 360. For case law see *Royal Bank of Scotland PLC v Etridge (No 2)* (2002) UKHL 44 (2002) 2 AC 773, *Allard v Skinner* (1887) 36 CHD 145, Ca.

373 For legal writings see O'Sullivan and Hilliard *The Law of Contract* (2004) 339; McKendrick *Contract Law Text, Cases and Materials* (2005) 714; Poole *Textbook on Contract Law* (2004) 352. For case law see *Barton v Armstrong* (1976) 1 A.C. 104.

374 For legal writings see Poole *Textbook on Contract Law* (2004) 352; O'Sullivan and Hilliard *The Law of Contract* (2004) 341; McKendrick *Contract Law Text, Cases and Materials* (2005) 724. For case law see *Occidental Worldwide Investment Corp v Skibs A/S Avanti* (1976) 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyanday Construction Co Ltd* (1979) 3 W.L.R. 419; *Pao On v Lau Yiu Long* (1979) 3 W.L.R. 435; *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1972) 2 AL 192.

375 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 724ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 341-342; Poole *Textbook on Contract Law* (2004) 353ff. For case law see *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1992) 2 AC 152; *Occidental Worldwide Investment Corporation v Skibs A/S Avante (The Siboen and the Siborth)* (1976) 1 Lloyd's Rep 293.

significant causing the claimant to enter into the contract against his/her will. [376]

The effect of duress being raised successfully as a defence is this, the contracting party who suffers such duress, including economic duress, may choose to recile from the contract, the contract being void-able at his/her instance. The contract may, thus, be set aside and restitution claimed. [377]

Undue influence may take two forms, firstly, actual undue influence, sometimes equated with the pressure exerted to establish duress, for example, improper pressure or coercion in the form of unlawful threats, [378] and secondly, a subtle level of influence is exerted arising from the relationship between the two parties, as a result of which, the vulnerable and dependant party suffers loss at the hands of the superior or stronger party. [379]

In these circumstances, what is required from the vulnerable and dependant party is to show that a relationship existed, which, arising from the relationship, led to the exercise of influence or dominion over the vulnerable party. What he/she also needs to show is the fostering of a suspicious transaction. [380] Once this is shown, in practise, a presumption arises that undue influence has taken place. An onus is then placed upon the defendant to rebut the presumption. Thus, he/she can show, for example, that there was a free exercise of independent will or that independent advice had been given to the vulnerable party. [381]

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376 For legal writings see Poole *Textbook on Contract Law* (2004) 354-358; O'Sullivan and Hilliard *The Law of Contract* (2004) 342-343; McKendrick *Contract Law Text, Cases and Materials* (2005) 715-718, 729. For case law *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1991) 4 ALL ER 871; *Occidental Worldwide Investment Corporation v Skibs A/S Avante (The Siboen and the Siborth)* (1976) 1 Lloyd's Rep 293; *B and S Contracts and Design Ltd v Victor Green Publications Ltd* (1984) ECR 419; *Pao v Lau Yiu Long* (1979) 3 WLR 435 (1980) A.C. 614; *Atlas Express Ltd v Rafco (Importers and Distributors) Ltd* (1989) 1 ALL ER 641; *DS DN Sub Sea Ltd v Petroleum Geo-Services ASA* (2000) BLR 530.

377 For case law see *Occidental Worldwide Investment Corpn v Skibs A/S Avanti* (1976) 1 Lloyds Rep 293; *North Ocean Shipping Co Ltd v Hyanday Construction Co Ltd* (1979) 3 WLR 419; *Pao On v Lau Yiu Long* (1980) AC 614; *Huyton SA v Peter Cremer GMBH and Co* (1999) 1 Lloyd's Rep 620; *DSDN Sub Sea Ltd v Petroleum Geo-Service ASA* (2000) BLR 530; *BandS Design Ltd v Victor Green Publications Ltd* (1984) 1 CR 419 CA: *Universe Tankships of Moncovia v International Transport Workers Federation (The Universe Sentinel)* (1983) 1 AC 366 HL.

378 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 753; Poole *Textbook on Contract Law* (2004) 360. For case law see *Royal Bank of Scotland PLC v Etridge (No 2)* (1998) 4 ALL ER 707 (2000) UK HC 44 (2002) 2 AC 773; *CIBC Mortgages PLC v Pitt* (1994) 1 AC 200.

379 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 755; O'Sullivan and Hilliard *The Law of Contract* (2004) 364ff; Poole *Textbook on Contract Law* (2004) 361. For case law see *Royal Bank of Scotland PLC v Etridge (No 2)* (2002) 4 UK HL 44 (2002) 2 AC 773; *Allcard v Skinner* (1887) 36 CHD 145, Ca; *National Westminister Bank Ltd v Morgan* (1985) AC 686; *Lloyds Bank Ltd v Bundy* (1975) QB 326.

380 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 755; O'Sullivan and Hilliard *The Law of Contract* (2004) 363ff; Poole *Textbook on Contract Law* (2004) 360. For case law see *National Westminister Bank Ltd v Morgan* (1985) AC 686; *Lloyds Bank Ltd v Bundy* (1975) QB 326; *Royal Bank of Scotland PLC v Etridge (No 2)* (1998) 4 ALL ER 707 (2000) UKHL 44 (2002) 2 AC 773.

381 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2002) 755ff; O'Sullivan and Hilliard

The effect of undue influence, if established, is that the contract is voidable at the instance of the claimant, who can elect to continue with the contract or seek rescission. In addition, restitution relief can also be sought in association with rescission of the contract. [382]
Illegality is also regarded, by English Law, as an exception to the *caveat subscriptor* rule and a fully fledged defence. The rationale for the recognition of this exception is founded in the principle that no person, whose cause of action is grounded upon an immoral or illegal act, should be assisted by the law. [383]

It further lies in the fact that, if the law were to stand back and not interfere with illegal contracts, they would harm the public and especially, public interest, in that the perception would arise amongst law-abiding workers of the community that the judicial system assists those who have defeated the law. [384]
The source of illegality, according to the English legal writers and the courts, may arise by statute or by virtue of the principles of common law. [385]

The effect of illegality of contracts, in the English law, amounts briefly to this. The general rule is that the courts will neither enforce an illegal contract nor will it permit the recovery

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The Law of Contract (2004) 363-368ff; Treitel *The Law of Contract* (2003) 419ff; For case law see *Royal Bank of Scotland PLC v Etridge (No 2)* UKHL 44 (2002) 2 AC 773; *Allcard v Skinner* (1887) 36 CHD 145 AC; *National Westminister Bank v Morgan* (1985) AC 686.

382 For legal writings see Poole *Textbook on Contract Law* (2004) 366ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 373. For case law see *Allcard v Skinner* (1887) LR 36 CHD 145; *Dunbar Bank plc v Nadermen* (1998) 3 ALL ER 876.

383 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2003) 348ff; Stone *The Modern Law of Contract* (2003) 343-344; Beatson *Anson's Law of Contract* (2002) 804-805; O'Sullivan and Hilliard *The Law of Contract* (2004) 413ff; Treitel *The Law of Contract* (2003) 439ff; Poole *Textbook on Contract Law* (2004) 379. For case law see *Hillman v Johnson* (1775) 1 Coup 34.

384 For legal writings see Stone *The Modern Law of Contract* (2003) 343-344 quoting Atiyah *An Introduction to the Law of Contract* (1995) 342-344; See also Treitel *The Law of Contract* (2003) 439 who suggests that the rationale for intervention by the courts lies in the fact that *"illegal contracts bring about a state of affairs of which the law disapproves as it harms the public".* For case law see *Pearce v Brooks* (1866) LR 1 EX 213; *Benson v Nettleford* (1850) 3 MAL and G 94; *St John Shipping Corporation v Joseph Rank Ltd* (1957) 1 QB 267.

385 For legal writings see Beatson *Anson's Law of Contract* (2002) 804-805; Stone *The Modern Law of Contract* (2003) 343; Poole *Textbook on Contract Law* (2004) 379; O'Sullivan and Hilliard *The Law of Contract* (2004) 413ff; Treitel *The Law of Contract* (2003) 429ff. For case law contra to public policy see *Pearce v Brooks* (1866) LR 1 EX 213; *Benyson v Nettleford* (1850) 3 MAL and G 94; *St John Shipping Corporation v Joseph Rank Ltd* (1957) 1 QB 267; *Archbolds (Freightage) Ltd v S Spanglett Ltd* (1961) 1 QB 374; Court of Appeal; *Parkinson v College of Ambulance* (1925) 2 KB 1; *Alexander v Rayson* (1936) 1 KB 169. For case law contrary to statute see *Re Mahmoud and IS Pa Hani* (1921) 2 KB 716; *Mohamed v Alala and Co (a firm)* (2000) 1 WLR 1815.

of any benefit arising from the performance of an illegal contract. This is founded in the common law maxims of *ex turpi cause non oritur actio* (no action can be based on a disreputable cause) and *in pari delicto potior est conditio defendentis* (where both parties are equally at fault, the position of the defendant is stronger). [386]

English Law does, however, recognise exceptions to the general rule. The reasoning thereof is to protect the innocent party, who may want to enforce the contract. So, in this way, part of the contract may be enforced but the part which includes the illegality, may not. But, courts will not enforce any part of a contract where damages may be claimed by the aggrieved party. [387]

9.2.3 UNITED STATES OF AMERICA

9.2.3.1 Legal Writings

In American law the *caveat subscriptor* rule is widely used. The rule, in general, amounts to this, one who signs a contract cannot avoid it on the ground that he or she did not attend to its terms, or did not read it. [388]

The position has also been stated, namely, in the absence of fraud or misrepresentation, a party to a contract is legally bound by its terms, whether or not he or she has read them. For that reason, in the absence of fraud or deception, one who signs a contract, which he or she has had an opportunity to read and understand, is chargeable, in law, with knowledge of the terms of the contract which they sign. They can, therefore, not be heard to say that he or she did not read the contract or know its contents. [389]

Furthermore, where a party signs a contract without reading it, notwithstanding the fact that he or she can read and had the opportunity to read the document he or she signs, he or she cannot avoid the effect of his or her signature merely because he or she was not

386 For legal writings see Beatson *Anson's Law of Contract* (2002) 845-847; O'Sullivan and Hilliard *The Law of Contract* (2004) 433ff; Stone *The Modern Law of Contract* (2003) 351-357; Stone *Principles of Contract Law* (1998) 253; McKendrick *Contract Law Text, Cases and Materials* (2003) 395ff. For case law see *Holman v Johnson* (1775) 1 Cowp. 34; *Tinsley v Milligan* (1984) 1 AC 340.

387 For legal writings see Beatson *Anson's Law of Contract* (2002) 845-847; O'Sullivan and Hilliard *The Law of Contract* (2004) 413ff; Poole *Textbook on Contract Law* (2000) 387-389; Stone *Principles of Contract Law* (1998) 351-357; Stone *The Modern Law of Contract* (2003) 343-344; McKendrick *Contract Law Text, Cases and Materials* (2003) 375ff. For case law see *Archbolds (Freightage) Ltd v S Sanglett Ltd* (1961) 1 QB 374.

388 Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410.

389 Calamari and Perillo (1977) 67; Calamari and Perillo (1987) 410.

informed of the contents of the instrument, or through the fact that he or she took the word of some person as to what it contained. [390]

When dealing with pre-printed forms, for example, adhesion contracts where the contract terms appear in small print on the back of the contract, the facts of which must, consequently, be examined, to determine whether the person who signed the contract should have, as a reasonable person, understood the contained terms on the reverse side. [391] Where a party signs in haste, due to the fact that he or she is busy, the fact that the execution of signing is done hurriedly does not excuse him or her for his or her failure to read the contract terms. [392]

The American legal writers, generally, hold the view that one is under a duty to learn the contents of a contract before signing it. If therefore, in the absence of fraud, duress, undue influence and the like, he or she fails to do so, he or she is presumed to know the contents, and signs at his or her own peril. If it turns out afterwards to be to the disadvantage of one of the contracting parties who so acts, he or she must suffer the consequences of his or her negligence. He/she cannot be excused and deny his or her obligation under the contract. [393]

For that reason, he or she cannot be heard to say that the contract signed does not express the real contract, or that the provisions are contrary to his or her intentions or understanding, or that he or she did not understand the terms used. [394]

Illiteracy is, *per se, is* not an absolute defence, in that; the illiteracy of a contractual party will not excuse him or her from the duty of learning the contents of a written contract. There are, however, instances in which illiteracy may, when considered in the light of other facts, such as fraud or overreaching, afford a sufficient basis for invalidating an illiterate's contract. [395]

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390 Calamari and Perillo (1977) 69; Calamari and Perillo (1987) 410.

391 Calamari and Perillo (1977) 68.

392 Calamari and Perillo (1977) 69.

393 Calamari and Perillo (1977) 69.

394 Calamari and Perillo (1977) 70.

395 Calamari and Perillo (1977) 73.

A party's mere ignorance occasioned by his or her limited intelligence and understanding of the language and of the contents of the contract which he or she voluntarily executes, is not, in the absence of fraud, a ground for avoiding it. [396]

According to the American legal writers, there is a duty on an illiterate person to procure some person to read and explain the contents of the instrument to him or her. Where such a contracting party fails to procure a party to assist him or her to read and explain the contents, his or her negligence precludes him or her from afterwards pleading that he or she did not understand the contents, or that he or she did not assent to its provisions. [397]

The rationale for enforcing the principle of the *caveat subscriptor* rule is said to be to give stability to written agreements. [398]

But, the American legal writers do acknowledge that, in modern times, the true assent of contracting parties has come more and more under the spotlight. Under this view, true assent does not exist unless there is a genuine opportunity to read the clause in question and the impact is explained by the dominant party and understood by the other party, who has a reasonable choice to accept or reject the clause. This is especially the case in pre-printed forms or standardized agreements, where the reasonable man would not have expected to find such a clause, often being oppressive, unfair, indecent or unconscionable. [399]

The *caveat subscriptor* rule is, therefore, also subject to the exception that such failure to read and to acquaint oneself of the contents of a contract before signing it may be excused where there are special circumstances or an emergency exists.

Furthermore, if a party's failure to read and understand the terms of the contract, before signing it, results from the procedurally unconscionable behaviour of a party in a stronger bargaining position, the party's duty to read and understand the contract before signing it is obviated. [400]

Other defences to the *caveat subscriptor* rule include mistake, misrepresentation, undue

396 Calamari and Perillo (1977) 73.

397 Calamari and Perillo (1977) 73.

398 Calamari and Perillo (1977) 69.

399 Calamari and Perillo (1987) 427.

400 Calamari and Perillo (1977) 72.

influence, duress and illegality.

Consequently, each of the exceptions to the *caveat subscriptor* rule will be discussed briefly.

Misrepresentation

Misrepresentation is recognized by the America legal writers as one of the exceptions to the *caveat subscriptor* rule. It is acknowledged as a fully fledged defence where a contractant relies upon deceit to recile from a contract. [401]

Misrepresentation and fraud are often regarded, by the American legal writers, as synonymous, especially where deceit is present, nonetheless, the legal writers do distinguish between intentional and unintentional misrepresentation. [402] Unintentional misrepresentation, in this context, is made up of negligent and innocent misrepresentation. [403]

Whenever a party relies upon fraudulent misrepresentation as a defence, the American legal writers and the courts alike, expect certain requirements to be met before a contracting party may successfully avoid the transaction by resiling from the contract.

The first requirement to be met is the presence of a representation. This may be deduced from the conduct of the party concerned, for example, one of the contractants makes a statement regarding a subject matter concerning the transaction. [404] What is, however, required in so far as the representation is concerned, the misrepresentation made, must be of fact and not merely on erroneous statement of opinion. For that reason, language used in furtherance of typical trade talk or a mere puff, for example, *"best buys"* or "*finest quality*" etc, is not, according to the American legal writers, a misrepresentation and ought to be dismissed by the legal system. [405]

In certain instances, where the representation is not accompanied by disclosure of all the facts or there is partial disclosure of the facts (a half truth), this may constitute a misrepresentation. This is applicable, especially, due to the nature of certain transactions, for example, contracts of surety-ship and insurance. It may also be dependant on the

401 Calamari and Perillo (1987) Para 9-14.

402 Calamari and Perillo (1987) Para 9-14.

403 Calamari and Perillo (1987) Para 9-14.

404 Calamari and Perillo (1987) Para 9-17.

405 Calamari and Perillo (1987) Para 9-17.

relationship between the parties. Where the parties stand in a fiduciary relationship, there is a duty of disclosure of material facts. In the law of medical malpractice, for example, a rule of *"informed consent"* has evolved in recent years, in which the patient has to be apprised of the procedures to be adopted during treatment, or during surgery and all risks must be disclosed by the physician. [406]

The second requirement for fraudulent misrepresentation concerns the knowledge of the falsity. What is required to be shown is that the representation was made, with the knowledge of its falsity, with intent to deceive and that it would be acted upon in a certain way. [407]

Moreover, with fraudulent misrepresentation, unlike in unintentional misrepresentation, the fact misrepresented does not have to be material to rely upon avoidance. [408]
The third requirement focuses upon the element of deception and reliance. Before relief for misrepresentation may be given, the contracting party relying on it must show that a causal connection existed between the representation and the conclusion of the agreement. The party relying upon the defence must also show that he/she was deceived by the misrepresentation upon which he/she relied on concluding the contract. [409]

The fourth requirement concerns the aspect of injury or prejudice. Injury or prejudice takes the form that the defrauded party either obtains something less than he/she bargained for, or, something substantially different from what he was led to expect. [410]

The affect of fraudulent misrepresentation is to render the said transaction void. [411]

American legal writers also hold the view that in some instances, especially property transactions, the affect is that the transaction is void i.e. *non est factum*. Where a defrauded party elects to stand on the transaction, he/she may keep what they received

406 Calamari and Perillo (1987) Para 9-10.

407 Calamari and Perillo (1987) Para 9-14.

408 Calamari and Perillo (1987) Para 9-14.

409 Calamari and Perillo (1987) Para 9-15.

410 Calamari and Perillo (1987) Para 9-16.

411 Calamari and Perillo (1987) Para 9-22.

and sue for damages, alternatively, avoid the transaction and claim restitution. [412]

Mistake

Mistake is also regarded, by the American legal writers, as an exception to the *caveat subscriptor* rule. [413] Mistake, in the law of contracts, has often been stated as an unintentional act or omission arising from ignorance, surprises, or misplaced confidence. [414]

Mistake, in the law of contract in America, may take two forms, namely, unilateral mistake in which only one of the contractants makes a mistake and mutual mistake, where both of the contracting parties share the mistake. In other words, each of the contracting parties labours under the same misconception. [415]

The mistake may apply to the nature of the contract, the identity of the person with whom it is made or the identity or existence of the subject matter. [416]

The position with regards to unilateral mistake, according to the legal writers, appears to be the following, namely: those courts should grant relief from a unilateral mistake provided:

"(1) Enforcement of the contract against the mistaken party would be oppressive or unconscionable;

(2) If the mistake relates to an essential, material aspect of the contract and the mistaken party exercises ordinary care." [417]

The relief afforded a contracting party relying on unilateral mistake, may include avoidance through rescission, if he/she so elects. [418]

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412 Calamari and Perillo (1987) Para 9-23.

413 Calamari and Perillo (1987) Para 9-25; Corpus Juris Secundum Volume 17 (1999) 74; Hunter (1999-2000) Para 19.2; Jaeger Vol 13 (1970) 8.

414 Corpus Juris Secundum Volume 17 (1999); Hunter (1999-2000) Para 19.2; Calamari and Perillo (1987) Para 9-26; Jaeger Vol 13 (1970) 8.

415 Corpus Juris Secundum Volume 17 (1999) 60; Hunter (1999-2000) Para 19.2; Calamari and Perillo (1987) Para 9.26.

416 Corpus Juris Secundum Volume 17A (1999) 60; Hunter (1999-2000) Para 19.3; Calamari and Perillo (1987) Para 9.26.

417 Calamari and Perillo (1987) Para 9-27; Hunter (1999-2000) Para 19.3; Corpus Juris Secundum Volume 17A (1999) 75.

418 Calamari and Perillo (1987) Para 9-27.

The position with regard to mutual mistake is viewed as follows by the American legal writers, namely; where both parties share a common assumption about a vital, existing fact upon which they conclude their agreement and it turns out that the assumption is false, the transaction may be avoided. This is said to apply where the parties are operating under different mistakes about the same vital fact. [419] There are many examples where the contracting parties may be mistaken which include, but are not limited to, the existence, ownership, or identity of the subject matter, the quality of the subject matter, the acreage of land etc. [420]

The effect of mutual mistake on material facts or matters in a contract will justify the granting of the necessary relief to the party against whom it is sought to be enforced. In order to avoid the contract, the party relying upon the relief, must show that the mistake relates to a fact which constitutes, or goes to, the very essence, or basis, of the contract and is material. [421] The usual remedies for mutual mistake are rescission or reformation of the contract. [422]

Duress

Duress is also recognized in the American Law of Contract as one of the exceptions to the *caveat subscriptor* rule. In the broad sense it is often referred to as those cases where a party to a contract was "*deprived of freedom of will".* [423]

American contract law recognizes three main streams of duress, namely, threat of physical threat, economic pressure, and any other threat. [424]

The scope of duress, in its traditional sense, is said to relate to personal violence or a threat thereof, or imprisonment or threat of imprisonment, [425] threats of physical injury or

419 Calamari and Perillo (1987) Para 9.26; Jaeger Vol 13 (1970) 3.

420 Calamari and Perillo (1987) Para 9.26; Hunter (1999-2000) Para 19.3 Corpus Juris Secundum Vol. 17A (1999) 60.

421 Corpus Juris Secundum Volume 17A (1999) 60.

422 Corpus Juris Secundum Volume 17A (1999) 79; Calamari and Perillo (1987) Par 9.26.

423 Jaeger (1970) 659.

424 Calamari and Perillo (1987) 337.

425 Jaeger (1970) 660, 663-685.

wrongful imprisonment or prosecution of a family member or other close relative, [426] threats of wrongfully destroying or withholding something; [427] any other wrongful act that compels a person to manifest apparent assent to a transaction, precluding him from exercising free will and judgement in entering into a transaction. [428] During the twentieth century, economic or business duress was added [429] to the list of traditional patterns. In this regard there are circumstances, in American law, under which economic pressure may invalidate an otherwise enforceable contract. [430]

Before a party may, however, successfully rely on duress as a defence, certain requirements must first be met. The requirements include:

(1) It must appear that the consent of the party seeking to avoid the transaction was coerced. What must be shown is that the contracting party was actually induced by the duress to give consent which would otherwise not have been forthcoming.[431]

(2) The threat need not be of such a nature that it will move brave men. Any unlawful threat which does, in fact, overcome the will of the person threatened, and induces him/her to an act which he/she would not otherwise have done, constitute duress. [432]

(3) The pressure must be wrongful. [433] There are no *numerus clausus* of examples illustrating when acts are deemed to be wrongful. For the purpose of this research it is not necessary to enter into discussions regarding these various examples.

(4) Where the parties stand in a special relationship, giving one a pre-dominating

426 Jaeger (1970) 661, 686-693.

427 Jaeger (1970) 663, 697 ff.

428 Jaeger (1970) 660-663.

429 Jaeger (1970) 664 ff.

430 Jaeger (1970) 664.

431 Jaeger (1970) 666.

432 Jaeger (1970) 669.

433 Jaeger (1970) 669.

leverage over the other, advice or persuasion, depending on the circumstances, may be found to be coercing the will of the person addressed. [434]

(5) Whether the party exercising the coercion has been unjustly enriched or the transaction brought about results unfair to the victim. [435]

But, it is especially, economic or business duress which has been added to the growing evolution and development of duress. The legal conception of economic duress is said to lay in the fact that a person is forced to act against his own will, leaving that person no option or choice as to whether he will do the thing or perform the act. [436]

Economic duress as a defence occurs quite frequently in, for example, foreclosure of mortgage where one of the parties, wrongful, with knowledge of the falsity of the claim, attempts to foreclose on a mortgage. [437]

A threat of the breach of the contract would constitute duress if the breach would, if carried out; result in irreparable injury because of the absence of an adequate legal or equitable remedy. [438]
The effect of duress in American Law is this, like fraud and mistake, which may completely prevent the mutual assent necessary for the formation of a contract or a bargain is executed, because the expression of mutual assent thereto was improperly obtained, the transaction is void. [439]

In certain instances, contracts entered into under duress may be considered voidable and are capable of being ratified after the duress is removed. [440]

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434 Jaeger (1970) 682.

435 Calamari and Perillo (1987) 338-340.

436 Jaeger (1970) 718.

437 Jaeger (1970) 719.

438 Calamari and Perillo (1987) 338.

439 Jaeger (1970) 772-773; Calamari and Perillo (1987) 349.

440 Jaeger (1970) 775-776.

The transaction is voidable at the election of the coerced party. [441]

Undue Influence

A further exception to the *caveat subscriptor* rule, which is recognised by the American legal writers and the courts alike, is that of undue influence. It serves as a defence if the transaction sought to be enforced was the product of unfair persuasion. [442]

The American legal writers recognise two broad categories of undue influence cases. In the first instance, one of the contracting parties uses his/her dominant psychological position in an unfair manner, to induce the subsequent party, to consent to an agreement to which he would not, otherwise, have consented.

In the second instance, a contracting party uses his/her position of trust and confidence, rather than dominance, to unfairly persuade the other contracting party to enter into the transaction. [443]

These types of cases are usually decided by assessing direct evidence. This often takes the form of proof of the existence of a confidential relationship, based on trust and of a transaction benefitting the person in whom trust and confidence rest.

The position in American Law is this, once the aforementioned is proved, a burden of proof is placed upon the party benefitting to show that the transaction was not procured by undue influence. [444] American legal writers also recognise that circumstantial evidence may very well tip the scale in proving the presence of undue influence. *Calamari and Perillo* [445] identify the following indicators, which, if present, may well show, circumstantially, that undue influence was present. Firstly, the mental and physical weakness and psychological dependency of one of the contracting parties will show the susceptibility of the party influenced. Secondly, the existence of a confidential relationship, such as: trustee-beneficiary, attorney-client, physician-patient, and pastor-parishioner, provides evidence of the opportunity to exercise undue influence. Thirdly, there must be evidence of a disposition

441 Calamari and Perillo (1987) 347.

442 Calamari and Perillo (1987) Para 9.12.

443 Calamari and Perillo (1989) Para 9-10.

444 Calamari and Perillo (1987) Para 9-10.

445 *The Law of Contracts* (1987) Para 9-10.

to exercise undue influence, for example, the influentional party took the initiative in the transaction. Fourthly, where, evidence shows the unnatural nature of the transaction.

Once the above is shown, there is a *prima facie* case of undue influence. It is then open to the influencer to show by rebuttal evidence that the transaction was fair. [446]

The remedy available for the party who wishes to rely on undue influence to avoid the contract is to seek cancellation and restoration of the *status quo*. [447]

Illegality

The illegality of a contract, from the very nature of the wording, influences the validity in the American Law of Contract.

The illegality of contracts or contractual terms, therefore, has certain legal affects in the American Law of Contract. In the American textbooks the term illegality is covered under *"illegal bargains"*.

In terms of the First Restatement of contracts, illegal bargains are found to be `*illegal*' if, either its formation or its performance is criminal, tortuous or otherwise opposed to public policy. [448]

The Second Restatement, however, avoids the term `illegal' and deals with all such unenforceable bargains under the concept *"public policy"*. In this regard, a contract that violates the criminal law is not necessarily against public policy. The Second Restatement, in this regard, is said to bring about great judicial flexibility in considering the effect of the parties against public policy. [449]

In that regard, public policy is used as a rationale for striking down contracts or contract clauses on grounds of immorality, unprofessional conduct, criminal conduct etc. In the latter instance, the contamination of a contract or contract clauses resulting from the violation of

446 Calamari and Perillo (1987) Para 9-10.

447 Calamari and Perillo (1987) Para 9-10.

448 Calamari and Perillo (1987) 345.

449 Calamari and Perillo (1987) 887.

the law of crimes or torts may be set aside due to public policy. [450]

The *in pari delicto potier est conditio defendentis* maxim is still very much part of the American contract law, in that the law protects those from loss through unlawful acts. As a general rule, illegal bargains are therefore unenforceable and often void. [451] This occurs in cases of hard core illegality, for example, a promise to buy, in exchange for a promise to commit, say, murder. [452]

The following are examples where the American courts have held generally, that these type of contracts are void due to their illegality, namely, bargains with alien enemies or in aid of enemies, [453] agreements involving the violation of settled public policy of a foreign state, [454] agreements to indemnify for illegal acts. [455]

Any attempt to exempt a contractant from liability for a future intentional tort, or for a future wilful act, or one of gross negligence, is void. [456] It has also been held that a promise not to sue for future damages caused by simple negligence, may be valid, however, such bargains are not favoured, and such bargains are usually construed not to confer this immunity. [457] A purported exemption from statutory liability, however, is void even though the cause is simple negligence. [458]

Unconscionable agreements, under the *Uniform Commercial Code,* [459] have also been identified as illegal, where abuse relates; firstly, to procedural deficiencies in the formation of the contract, taking the form of deception or inducement, without giving the contracting

450 Calamari and Perillo (1987) 887.

451 Calamari and Perillo (1987) 888.

452 Calamari and Perillo (1987) 888.

453 Jaeger (1970) 112-115.

454 Jaeger (1970) 120-126.

455 Jaeger (1970) 126-131.

456 Jaeger (1970) 131-140.

457 Jaeger (1970) 141-142.

458 Jaeger (1970) 144-145.

459 S2-302 of the *Uniform Commercial Code.*

part prejudiced, sufficient opportunity to bargain. Secondly, the abuse involves the substantive contract terms which may include violations of public interests, unexpectedly harsh terms, and the use of fine-print clauses, including the absence of reasonable expectations. [460]

Under the said code, a court may exercise the following powers, namely, refuse to enforce the agreement, enforce the remainder of the contract excluding the unconscionable clause, and limit the unconscionable clause so as to avoid an unconscionable result. [461]

Fraud

Fraud, according to the American legal writers, deprives a contract of legal validity or even prevents an agreement from having legal force. [462]

Before the defrauded party will be successful in being granted the appropriate relief, the following elements of fraud must be present, namely:

(1) A false representation, actual or implied, or the concealment of a matter of fact, material to the transaction, made falsely.
(2) Knowledge of the falsity or statements made with such utter disregard and recklessness that knowledge is inferred.
(3) Intent to mislead another into relying on the representation.
(4) Injury as a consequence of that reliance.
(5) Reliance - with a right to rely. [463]

According to *Jaeger* [464] all the above mentioned elements must be present, simultaneously, before a proper finding of fraud can be made.

What is also significant, according to *Jaegar,* [465] is the existence of mistake of the defrauded party as to a material fact, wrongfully induced by the other, in order that it might

460 Jaeger (1970) 214-215 FF; Calamari and Perillo (1987) 337.

461 Jaeger (1970) 215.

462 Jaeger Volume 12 (1970) 321.

463 Jaeger Volume 12 (1970) 330.

464 *A Treatise on the Law of Contracts* Volume 12 (1970) 330.

465 *A Treatise on the Law of Contracts* Volume 12 (1970) 324-325.

be acted upon, or, in cases where there is a duty of disclosure, to take advantage of, with knowledge of its falsity, without disclosing same [466] even when making an innocent misrepresentation, the contracting party thereafter discovers the truth, but, silently allows another to act on the misrepresentation, the party so defrauding is guilty of fraud. [467]

The act of the fraudulent party, who induces a person to assent to do something which he would not otherwise have done, is void. The innocent party, in effect, states that this is not his/her contract, in fact, it is not a contract at all [468] where the defrauded party had performed before fraud is discovered, and he/she may apply for rescission and the return of the performance.

9.2.3.2 Case Law

The recognition and rationale for the existence of the *caveat subscriptor* rule is formulated as follows in the leading American case of *Hoshaw v Cosgriff*: [469]

"The courts are unanimous in holding that a person, having the capacity and opportunity to read a contract, cannot avoid the contract on the ground of mistake, if he signs it without reading, where there are no special circumstances excusing his failure to read it. It is the duty of every contracting party to learn and know the contents of a contract before he signs and delivers it."

The court continues:

"To permit a party to admit that he signed it, but deny that it expresses the agreement he made would absolutely destroy the value of all contracts." [470]

The effect of a contracting party not reading the contents of a contract or familiarizing himself/herself of the terms of the agreement is stated as follows, in the case of *Upton v Tribilock*: [471]

"It will not do for a man to enter into a contract and when called upon to respond to its obligations, say that he did

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466 Jaeger Volume 12 (1970) 377-380.

467 Jaeger Volume 12 (1970) 333.

468 Jaeger Volume 12 (1970) 402.

469 247 F 22 (CCA8).

470 *Hoshaw v Cosgriff* 247 F22 (CCA8). See also *Hettrick Mfg. Co v Waxahachie Cotton Mills* 1 F2d 913 (CCA 6); *Columbian Nat. L. Ins Co v Black* 35 F2d 571 (CCA 10) 71 ALR 128; *Ford Motor Co v Pearson* 40 F2d 858 (CCA 9).

471 91 US 45, 23 L. Ed 203.

not read it when he signed it, or did not know what it contained." [472]

The rule, although harsh in application, is said to be founded upon the fundamental principle of the security of business transactions and the integrity of contracts demands that it be rigidly enforced by the courts. [473]

The same rule is said to apply even without a signature. Where a party, therefore, accepts a document, for example, a Bill of Lading, Passenger Tickets, Insurance policies, Warehouse receipts and accepts the said documents without reading the contents or familiarized himself/herself with the contents, his/her conduct constitutes acceptance and a contract comes into being upon the provisions contained therein. [474]

But the American courts do make exceptions to the general rule. One of the widely recognized exceptions is that of fraud, even though a contracting party has, carelessly, failed to read the contract which he signed. The condition however, is that the other party knew of his/her ignorance and fraudulently induced it or took advantage of it. [475] The above principle is well illustrated in an Arkansas case of *Belew v Griffis,* [476] in which the court held:

"There is a well-recognized exception to the rule that a party is bound to know the contents of a paper which he signs; and that is where one party procures another to sign a writing by fraudulently representing that it contains the stipulations agreed upon, when, in fact, it does not, and where the party signing relies on the faith of these representations, and is thereby induced to omit the reading of the writing which he signs. It is well settled that a written contract which one party induced another to execute by false representations as to its contents is not enforceable, and the party so defrauded is not precluded from contesting the validity of the contract, by the fact that he failed to read it before attaching his signature." [477]

In so far as contracts of adhesion are concerned, it appears that the American courts tend to treat contracts of adhesion, or standard form contracts, differently from other contracts. In this regard, even if assent to the contract may be inferred and even in the absence of fraud, where the terms of the contract, or the contract, contravene public policy or are

472 *Upton v Tribilock* 91 US 45, 23 L. Ed 203; See also *Rossi v Douglas* 203 MD 190, 192, 100 A.2d 3, 7 (1953).

473 *United States v Castillo* 120 F. Supp 522 (DC D NM); *Rossi v Douglas* 203 MD 190, 192, 100 A.2d 3, 7 (1953).

474 *Regan v Custom Craft Homes, Inc* 170 Colo 562, 565, 463 P.2d 463, 464 (1970).

475 *United States v Castillo* 120 F.Supp 522 (DC D NM).

476 249 Ark. 589, 46 S.W. 2d 80 (1970); See also *Estes v Republic National Bank of Dallas* 462 S.W. 2d 273 (Tex 1970).

477 *Belew v Griffis* 249 Ark 589, 460 S.W. 2d 80 (1970).

unconscionable, the contract is invalid and unenforceable. Perhaps one of the most significant cases to have emerged in this regard is the case of *Weaver v American Oil Co*. [478] The court was tasked to consider a lease by an oil company to an individual. The lease, signed without reading the lease, under which he agreed, *inter alia*, to indemnify the lessor as a result of damages caused by the lessor's negligence. The majority opinion first read that the *"duty to read"* rule had no application to the case because *"the clause was in fine print and contained no title heading."*

This conclusion would have ended the matter under traditional rules, but the court seemed anxious to break new ground, for it hastened to add:

> *"When a party show(s) that the contract, which is to be enforced, was an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy. The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting."* [479]

The same approach was employed by the court in the much quoted case of *Henningsen v Bloomfield Motors Inc*. [480]

In this case Henningsen, a consumer, brought an action for personal injuries against both the vendor and manufacturer of his automobile. Relying upon a provision in the contract of sale that an express warranty contained therein was in lieu of all other warranties, express or implied, the defendants argued that the plaintiff's action should be limited to a claim for defective parts. The court, in referring to legislation, held:

> *"True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends to the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising there from is so inimical to the public good as to compel an adjudication of its invalidity."* [481]

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478 257 Ind. 458, 276 NE 2d 144 (1971).

479 *Weaver v American Oil Co* 257 Ind. 458, 276 NE 2d 144 (1971) at 147-148.

480 32 N.J. 358, 161 A.2d 67 (1960).

481 *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 67 (1960).

The exception to the traditional duty to read principle was also stated as follows in the leading case of *Williams v Walker-Thomas Furniture Co*. [482] In this matter there was an instalment sales agreement which provided and resulted in, *"a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated."* As a result, in the event of a default on any one item, all items could be repossessed. The court, in concluding that the fairness of the clause needed to be tested at trial, stated:

"Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld." [483]

Misrepresentation

Misrepresentation is one of the exceptions to the *caveat subscriptor* rule and is a defence which vitiates and avoids a transaction brought about by a contract. It is widely recognized by the American courts all over the United States of America.

The difference between misrepresentation and fraud is said to amount to this, *"if the mistake of one party is not induced by the other, with, neither knowledge of the error, nor, wilful indifference in regard to it, there is misrepresentation but not fraud"*. [484]

In the case of *Pasko v Trela*, [485] "misrepresentation", said the court, *"means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts"*. [486]

This was illustrated in the case of *Manhattan Credit Co v Burns*. [487] In this case, the facts briefly stated, amounted to this. The appellants bought a new car and were assured by the respondent that he would insure the car for the full amount of the unpaid balance. Later, when the automobile was destroyed, it turned out that the insurance coverage did not

482 350 F.2d 445 (D.C. Cir 1965).

483 *Williams v Walker-Thomas Furniture Co* 350 F.2d 445 (D.C. CIR 1965) at 449-50.

484 *Pasko v Trela* 153 NEB 759, 46 NW 2d 139; See also *Halsell v First National Bank of Muskogie* 48 Okla 535, 150 489.

485 153 NEB 759, 46 NW 2d 139.

486 *Pasko v Trela* 153 NEB 759, 46 NW 2d 139; See also *Halsell v First National Bank of Muskogie* 48 Okla 535, 150 489.

487 230 Ark 418, 323 SW 2d 206.

materialise. The court, on appeal, confirmed the approach by the court a quo, when it stated: *"Burns' version of the matter is strongly corroborated by the recital in the contract, namely, that the insurance was to be not less than the total amount owed on the note. We think this proof sufficient to establish the fact that the contract was obtained by misrepresentation ....."* [488]

Before, however, misrepresentation may be proved to be present, certain requirements first have to be met. This, in turn, depends upon whether the misrepresentation is an innocent misrepresentation or one which is not innocent. Depending then on what type of misrepresentation a court is dealing with, so it will determine what requirements are to be met by a defrauded party to recile from an agreement or seek cancellation. For that reason, the existence of innocent misrepresentation and one which is not innocent, will determine whether the presence of materiality of misrepresentation has to be proved or not. [489] The position is summarized as follows in the case of *Rosenberger v Livingston*: [490]

> *"..... Materiality of the mistake induced by innocent misrepresentation is essential while materiality is not essential if a mistake induced by fraud produces the intended consequences. One who makes an innocent misrepresentation of an unimportant fact has no reason to suppose that his statement will cause action, but fraud is directed to that very end, or is expected to achieve it, and if the result if achieved the fraudulent person cannot be allowed to insist on this bargain."* [491]

The effect of fraudulent misrepresentation where *non est factum* is present, the purported transaction is regarded as void. This is founded on the basis of the absence of that degree of mutual assent which is a prerequisite to the formation of the binding contract, i.e., the absence of the proverbial *"meeting of the minds"*. [492] Where the misrepresentation is made innocently, the American courts have allowed relief in the form of rescission. It is therefore not necessary that the party making the misrepresentation should have known that it was false. [493] The rationale for the relief is said to be founded on the principle that it would be

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488 *Manhatten Credit Co v Burns* 270 Ark 418, 323 SW 2d 206; See also *Hilderbrand v Craves* 169 Ark 210, 275 S.W. 524; *Green v Bush* 203 Ark 883, 159 S.W. 2d 458.

489 *Jordan v Guerra* 23 Cal 2d 469, 144 P2d 349.

490 166 Kan 259, 200 P2d 329.

491 *Rosenberger v Livingston* 166 Kan 259, 200 P2d 329; See also *Clark v Kirsner* 196 MD 52, 74 A 2d 830; *Weiss v Gumbert* 191 OR 119, 227 P2d 812.

492 *New Jersey Mortgage and Investment Co v Dorsey*, 60 NJ Super 299, 158 A 2d 712 Affd 33 NJ 448, 165 A 2d 297; *Bank Credit Inc v Bethed* 68 NJ Super 62, 172 2d 10.

493 *Herman v Mutual Life Ins Co* 108 F 2d 678 (CCA3); *Sellars v Grant* 196 F 2d 677 (CA5). Relief was granted in these cases where there was an erroneous assumption that a certain state of fact existed. In *Giendale Corp v Crawford* 207 MD 148, 114 A 2d 33 the court held a material misrepresentation even though innocently made,

unjust and inequitable to permit a person who has made a false representation, even innocently, to retain the fruits of the bargain induced by such representation. [494]

Mistake

The American courts do recognize mistake, as with misrepresentation, undue influence, duress etc, as a fully fledged defence and which may be used as a ground for rescinding a contract. [495]

Mistake has been defined in many different ways; the emphasis, often, on the one end of the scale, focusing on the mental attitude of the contract party or parties, [496] on the other end of the scale, the focus is placed on the acts leading to the legal consequences. [497]

A comprehensive definition is also given in the case of *Moffett, Hodgkins and Clarke Co v City of Rochester,* [498] in which the court formulates the definition in the following detailed language, namely:

"But where the mistake is of so fundamental a character, that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension; and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming reasons ..... Equity will interfere, in its discretion, in order to prevent intolerable injustice."

The courts also recognize that mistake takes two forms, namely, unilateral mistake and mutual mistake.

The rationale for recognizing unilateral mistake as a ground for rescission is recognized by the courts as, *"there was never a meeting of the minds of the parties which could give rise to the contract ....."* [499]

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may be sufficient to warrant rescission.

494 *Smith v Richards* 13 Pet (US) 26 10 L Ed 42; See also *Lockwood v Christakos* 181 F 2d 805 (CA DC).

495 *Kennie v Westbrook* (ME) 254 A. 2d 39; *Hudson Structural Steel Co v Smith and Rumery Co* 110 ME 123, 85 A. 384; *Nodak Oil Co v Mobil Oil Corp* 391 F.Supp 276.

496 *Mercury Oil Refining Co v Oil Workers International Union Cio*, 187 F.2d 980 (CA10); *Stevens v Illinois Central R. Co* 234 F.2d 562 (CA5); *Baltimore Trust Co v Holland*, 32 DEL OH 307, 85 A 2d 367.

497 *Meek v Hurst* 223 MO 688, 122 S.W. 1022; *Wolz v Venard* 235 MO 67 S.W. 760.

498 178 U.S. 373, 44 L. Ed. 1108, 20 S.Ct 957 quoted with approval in a number of cases such as *Hearne v Marine Ins Co* 20 Wall 488, 22 L.Ed 395; *Kutsche v Ford*, 222 Mich 442, 192 N.W. 714; *Donaldson v Abrahams* 68 Wash 208, 122 1003.

499 *Moffett, Hodgkins and Clarke Co v City of Rochester* 178 US 373, 44 L.Ed 1108, 20 S.Ct 557.

This principle is deeply embedded in the American law of contract, as one of the golden rules of concluding a contract, in that, there must be the meeting of the minds of the contracting parties or, put differently, mutual assent. [500]
For that reason it was stated in the case of *Rexford v Phillippi*: [501]

"Where parties assume to contract, and there is a mistake with reference to any material part of the subject matter, there is no contract, because of the want of mutual assent necessary to create one; and, in this connection, it has been said that mistake does not so much affect the validity of a contract as it does to prevent its inception, and that mistake may be such as to prevent any real agreement from being formed, so that the apparent contract is void both in law and equity." [502]

But, the American courts have laid down strict criteria before a contracting party may be relieved from a unilateral mistake in his bid for rescission. The proper circumstances in which rescission will be granted include:

`*"(1) the mistake is of such consequence that enforcement would be unconscionable;*
(2) the mistake relates to substance of consideration;
(3) the mistake occurred despite exercise of ordinary care; and
(4) it is possible to place other party in status quo." [503]

The courts will not grant rescission of a contract on ground of mistake against a contracting party whose conduct did not contribute to, or induce mistake, and who will obtain no unconscionable advantage there-from. [504]

Besides unilateral mistake, the American courts also recognize mutual mistake as a means to avoid a contract. Mutual mistake has then been defined, by the American courts, as:

"A mutual mistake is one which is reciprocal and common to both parties, each alike labouring under the same

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500 *Martens and Co v City of Syracuse* 183 App. Div. 622; *City of Syracuse v Sarkisian Brothers Inc et al* 87 A.D. 2D 984; *Fields v Cornet et al* 70 S.W. 2d 954, 958.

501 *Rexford v Phillippi* 337, MO 389, 84 S.W. 2d 628; *Stone v Stone et al* 176 S.W. 2d 464, 468.

502 *Rexford v Phillippi* 337 MO 389, 84 S.W. 2d 628.

503 *McGough Company v Jane Lamb Memorial Hospital* 302 F.Supp 482; *City of Syracuse v Sarkisian Brothers Inc et al* 87 A.D. 2d 984. See also *Dvorak v Kuhn* 175 N.W. 2d 697 wherein the court found a mistake to comprise of: *"1. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or 2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed."* See further *Fields v Cornett et al* 70 S.W. 2d 954, 957.

504 *Bvorak v Kuhn* 175 N.W. 2d 697, 702; *Mcadoo White et al v Berrenda Mesa Water District of Kern County* 7 Cal App 3d 894.

misconception in respect to the terms of the written instrument." [505]

Whereas the relief available for a unilateral mistake is that of the rescission of the contract, with mutual mistake, the remedy sought is that of reformation. [506] The court must attempt to give effect to the intention of the contracting parties. In so doing the court acquires full knowledge of all the facts existing at the time. In other words, a court of equity will correct the mistakes and in so doing, carry into effect their intention. [507]

Duress

Duress is recognized as a fully fledged defence by the American courts. In addition, it is regarded as an exception to the *caveat subscriptor* rule. One of the reasons advanced therefore is the fact that, per definition, the exercise of a contracting party's will is waived due to a wrongful act or threat.

Duress has, then, been defined by the American courts as:

"..... a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will, and it may be conceded that a contract executed under duress is voidable." [508]

The scope of duress is not confined to situations involving threats of personal injury or imprisonment. It also includes any wrongful threat, which wrongfully puts a contractual party in such fear as to act against his will. [509]

The test for duress is stated as follows:

"..... Whether the threat has left the individual bereft of the quality of mind essential to the making of a

505 *Stevens v Illinois Central R. Co* 234 F2d 562 (CA5); *Coleman v Ill Life Ins Co* 82 S.W. 616, 26 Ky, Law Rep. 900; *Reiss v Wintersmith* 241 Ky. 470, 44 S.W. 2(d) 609, 613; *Fields v Cornett et al* 70 S.W. 2d 954.

506 *Fields v Cornett et al* 70 S.W. 2d 954; *Twin Forks Ranch Inc v Brooks* 120 N.M. 832, 907 P.2d 1013; *Drink, Inc v Martinez* 89 N.M. 662, 664, 556 P.2d 348, 350 (1976).

507 *Buckingham Savings Bank v Rafoul* 124, Vt. 427, 209, A 2d 738; *Stewart Oil Co v Sohie Petroleum Co* 202 F.Supp 952 (ED Ill).

508 *Shlensky v Shlensky* quoted with authority in *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 706. See also *Austin Instrument Inc v Loral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Wise v Midtown Motors Inc* 231 Minn. 46, 42 N.W. 2d 404; *The First Bank of Cincinnati v Pepper et al* 454 F.2d 626.

509 *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 706.

contract." [510]

In modern times, especially with the extension of commercial practise, the concept of economic, or business, duress has also evolved. [511]
The American courts, including the Supreme Court of the United States, recognize that there are circumstances under which economic pressure may invalidate an otherwise enforceable contract. The existence of economic duress is demonstrated by:

"..... proof that immediate possession of needful goods is threatened or by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand." [512]

Although it has been stated that the application of economic duress depends upon the circumstances of each individual case, [513] nonetheless, the courts have laid down certain criteria, which must be shown, before duress can been found to exist. The criteria include:

"(1) that one side involuntarily accepted the terms of another;
(2) that circumstances permitted no other alternative; and
(3) that the circumstances were the result of coercive acts of the opposite party." [514]

In the case of *The United States v Bethlehem Steel Corp.,* [515] the court emphasized that the status of the parties and the equality of the bargaining power of the parties, are factors influencing duress. In this case it was found that the imbalance of power of the United States Government over a single private corporation (The Respondent) resulted in duress being present.

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510 *Decker v Decker* 324 Ill 457, 155 N.E. 349; *Slade v Slade* 310 Ill App 77, 33 N.E. 2d 951 17A Am Jur.; *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 106 at 186.

511 *Austin Instrument, Inc v Coral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533. 324 N.Y.S. 2d 22; *Leeper et al v Beltrami* 54 Cal. 2d 195, 347 F.2d 12, 1 Cal Rptr. 12; *Bethlehem Steel Corporation et al v United States Shipping Board Merchant Fleet Corporation* 315 U.S. 289, 62 S.Ct 581; *First Data Resources Inc v Omaha Steaks International of Cincinnati v Pepper* 1 Cox et al 454 F.2d 626.

512 *Austin Instrument, Inc v Loral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Mercury Mach Importing Corp v City of New York*, 3 N.Y. 2d 418, 425, 165 N.Y.S. 2d 517, 520, 144 N.E. 2d 400; *Du Pont de Nemours and Co v J.L. Hass Co* 303 N.Y. 785, 103 NE 2d 896; *Gallagher Switchboard Corp v Heckler Elec Co* 36 Misc 2d 275, 232 N.Y.S. 2d 590.

513 *Morrill v Amoskeag Savings Bank* 90 N.H. 358, 9 A 2d 519.

514 *United States v Bethlehem Steel Corp* 315 U.S. 289, 301, 62 S.Ct. 581, 86 L.Ed 855; *French v Schoemaker* 74 Wall (U.S) 314, 332, 20 LED 852.

515 315 U.S.289, 301, 62 S.Ct. 581, 86 LED 855.

The effect of the presence of duress has been found to be, void, [516] or void-able, [517] depending on the circumstances.

Undue Influence

The American courts recognise undue influence as another exception to the *caveat subscriptor* rule in that it has been held, by the American courts, to be a proper defence at law. [518]

The nature and scope of undue influence was very aptly stated, by the Californian Appeal Division, in the case of *Odorizzi v Bloomfield School District,* [519] wherein Fleming J stated:

"In essence undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object. In combination, the elements of undue susceptibility in the servient person and excessive pressure by the dominating one make the dominant person's influence undue, for it results in the apparent will of the servient person being in fact the will of the dominant person." [520]

The American courts have remarked that an all embracing definition of undue influence is not that easy, nonetheless, a number of definitions have been given to the term, including:

"That dominion acquired by one person over the mind of another which prevents the latter from exercising his discretion, and which destroys his free agency." [521]

In terms of the *American Civil Code,* undue influence is defined as: [522]

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516 *United States v Bethlehem Steel Corp* 315, U.S. 289, 301, 62 S.Ct 581, 86 LED 855; *The First National Bank of Cincinnati v Pepper, Cox et al* 454 F.2d 620.

517 *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 706; *Austin Instrument Inc v Coral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *First Data Resources Inc v Omaha Stears International* 209 NEB 327, 307 N.W. 2d 790.

518 *Wells Fargo Bank and Union Trust Co v Brady*, 116 Cal App 2d 381, 254 F.2d 71; *Zeigler v Illinois Trust and Savings Bank* 245 Ill 180, 91 N.E. 1041, 28 NS 1112.

519 246 Cal. App 2d 123.

520 *Odorizzi v Bloomfield School District* 246 Cal App 2d 123, I31; *Trustee of Jesse Parker Williams Hospital v Nisbet* 191 Ga. 821, 14 SE 2d 64; *Merrit v Easterly* 226 IA 514, 284 N.W. 397.

521 *Re Estate of Telsrow* 237 IA 672, 22 N.W. 2d 792.

522 Civ. Code S1575 quoted with approval in the case of *Odorizzi v Bloomfield School District* 246 Cal App 2d 123 at 130.

"..... Taking an unfair advantage of another's weakness of mind, or taking a grossly oppressive and unfair advantage of another's necessities or distress." [523]

The existence of undue influence is often determined by the relationship between the two contracting parties, which relationship often takes the form of a confidential relationship or a fiduciary trust relationship. [524]
The reported cases, in these types of matters, usually involves elderly, sick, senile persons who are coerced, or persuaded, by lawyers who stand in a position of trust to them, or by others, who, because of their close friendship or position of trust, have an influence to bear over the weak, sick or elderly, to execute wills or deeds under pressure. [525]

Other instances in which the courts have held that a person had wrongly been persuaded to sign a document and that the signature had been secured by the use of undue influence, include, a patient who was confined to a hospital and given a release form to sign which contained the release of claims for personal injuries. The agent, who had persuaded her to sign, spent the better part of two hours persuading her to sign. The evidence led indicated that the patient was highly nervous at the time and in a hysterical condition and suffering great pain. She, consequently, signed the release in order to terminate the intervention. [526]

The rationale for the recognition of this defence has been stated before as amounting to: *"A valid contract can be entered into only when there is a meeting of minds of the parties under circumstances conducive to a free and voluntary execution of the agreement contemplated. It must be conceived in good faith and come into existence under circumstances that do not deprive the parties of the exercise of their own free will."* [527]

The effect of the court finding that a transaction was concluded due to undue influence is

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523 Section 13-311 RCM 1947.

524 *Raney v Raney* 216 Ala. 30, 34, 112 So. 313, 316; *McCullough v Rogers* 431 So. 2d 1246; *Schroeder v Ely and Ely* 161 N.E.B. 252, 73 N.W. 2d 165.

525 *Malone v Malone* 155 Cal. App 2d 161; *Stewart v Marven* 139 Cal. App 2d 769; *Odorizzi v Bloomfield School District* 246 Cal. App 2d 123; *McCollough v Rogers* 431 So. 2d 1246; *Schroeder v Ely and Ely* 161 N.E.B. 252, 73 N.W. 2d 165; *Blackmer v Blackmer* 165 Mont. 69 525 P.2d 559.

526 *Weger v Rocha* 138 Cal. App 109, 32 P.2d 417.

527 *Fyan v McNutt* (1934) 266 Mich. 406 294 N.W. 146.

this; the court based on equity will not hesitate to set the contract aside. [528]

Illegality

The illegality of contracts or contractual terms in the American law of contract, as was previously stated, may arise during the formation stage, or where the performance of the contracts is criminal, tortuous or otherwise opposed to public policy.

Examples of contracts which were found to be illegal, as the contract was found to be against public policy and void, may, briefly, be highlighted as follows:

In the case of *Stone et al v William Steiner MFC Co,* [529] the court of New Jersey had to decide whether an employment contract, to aid a manufacturer in securing contracts with the Navy Department, was void as against public policy, if the arrangement involved, or promoted sinister or corrupt means to accomplish its end and tended to bring influence to bear on representatives of the Navy Department, to act other than to the sole advantage of the department, and it was unnecessary that the parties to the employment contract, themselves, contemplated corrupt means or that representatives of Government should act, otherwise than for advancement of the Government?
The defence raised is that the agreement is illegal because it is against public policy, or to state it more properly, that the consideration for the agreement in question is, in part illegal, as against public policy.

Consequently the court with regard to the legal principles surrounding illegal contracts held:
"The general principle involved is that contracts which tend to injure the public service of the Government are against public policy and void, particularly when they influence executive or administrative action, and especially contracts which provide for a contingent compensation."

The court held the contract sued on, and the consideration on which it was based, was void as against public policy.

The American courts have also held that contracts entered into, which would have the effect of aiding an enemy, or of diminishing the national power, were effectively illegal. [530]

528 *Schroeder v Ely and Ely* 161 N.E.B. 252, 72 N.W. 2d 165.

529 N.J. Misc 353, 39 A. 2d 241.

530 *Clements v Ytunbia* 81 N.Y. 285; *Bowman v Coffroth* 55 PA 15.

Likewise, agreements involving the violation of foreign laws would be against public policy. [531]

Any agreements which tend to promote illegal activity have been held to be opposed to public policy and void, by the American courts. This position was firmly established in the case of *Smith v McCullough et al*. [532] This case involved the lease of land from the Quapain Indian Settlers for a period longer than the maximum permissible period of 10 years. The relief sought by the plaintiffs was full recognition of their lease, despite a statutory act, at the time, prohibiting an extension.

The plaintiff's contention was that the defendant's lease was void, given the nature of the lease and the term exceeding 10 years. The court found the lease to be void and stated:

"We think that conclusion overlooks the nature and purpose of the restrictions in the acts of 1895 and 1897. The purpose of the restrictions was to give the needed protection, and they should be construed in keeping with that purpose."

The court, consequently, held the lease agreement to be illegal and therefore invalid.

There are numerous cases involving policies taken out on the insured's own life, payable to himself, his executors, administrators and which are silent on the subject of suicide. The insured thereafter, whilst in a sane state, takes his own life when he is able to comprehend the wrongfulness of his act. One of these cases is that of *Ritter v Mutual Life Ins. Co of New York*. [533]
The court rules against the executors and put the position as follows:

"If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted."

Referring to other matters in which it is stated:

"In support of the general proposition that the law will not enforce contracts and agreements that are against the public good, and therefore are forbidden by public policy, reference is often made to the case of Society v Boland, 4 Bligh (N.S.) 194, 211, known as `Fauntleroy's Case'."

531 225 F.2d 248 (CAZ).

532 270 U.S. 456, 46 S.Ct. 338.

533 169 U.S. 139, 18 S.Ct. 300.

Referring to academic writings, the court embraces the principle that militates against upholding the insurance policies where suicide is committed and declared:

"It would render those natural affections which make every man desirous of providing for his family an inducement to crime; for the case may well be supposed of a person insuring his life for that purpose, with the intention of committing suicide. For a policy, moreover, to remain in force when death arose from any such cause, would be a fraud upon the insurers; for a man's estate would thereby benefit by his own felonious act." [534]

The court consequently held that death by suicide was not a risk intended to be covered as it is against public policy.

The American courts have also intervened in contracts involving public service. In this regard, a contract exempting the public utility from its duties has been held to be illegal and, as such, invalid as against public policy.

In the case of *Chicago and N.W. Ry Co v Davenport et al,* [535] the vexed issue to be decided was whether the railway company, which had been found to have acted as a common carrier in transporting a circus train, could validly contract with the circus to indemnify the rail road for liability incurred in moving the circus train?

The court subsequently held:

"If the appellant Railroad occupied the status of a common carrier subject to the provisions of the Interstate Commerce Act, then it is patent that the spirit and prohibitions of that Act would avoid the provisions of this contract insofar as it provides indemnity for injuries to the Railroad's own employees. Indeed appellant Railroad does not, and reasonably cannot, contend that in its capacity as a common carrier it can require a shipper to indemnify against injuries to his employees." [536]

The court, consequently, held the indemnity signed was an illegality and against public policy.

In another matter involving an elevator company in the matter of *Otis Elevator Co v Maryland Casualty Co,* [537] the elevator company was employed to inspect and repair a

534 *Ritter v Mutual Life Ins. Co of New York* 169 U.S. 139, 18 S.Ct. 300; *Bloom et al v Franklen Life Insurance Company* 1884 WL 5727 (Ind.).

535 205 F.2d 589. For a case in which similar principles were enunciated *New York Cent. R. Co v Mohney* 252 U.S. 152, 40 S.Ct. 289.

536 *Chicago and N.W. Ry Co v Davenport et al* 205 F.2d 589.

537 95 Colo. 99, 33 F.2d 974.

passenger elevator. It impliedly agreed to exercise due care.

Before commencing its activities, the elevator company entered into an agreement, including an indemnity agreement in which it undertook, *inter alia,* not to be liable for any damages caused for any accident, injury, breakage or damage.

The court, when looking at the validity of the exemption clause, found:

"The public had the right to expect and demand that the elevator as a carrier of the public would be kept safe for its use. It was the business of Otis Company, contracted for consideration, to inspect and repair the said elevator, with that safety for the public in view, and the law will not permit it to escape liability for its negligence therein, by a contract which is against public policy, such as is the one relied on here." [538]

Fraud

Fraud, according to the American courts, vitiates and avoids all human transactions, including private contracts. [539] It is generally regarded as odious and fatal in a court of law. The definition, often received with approval by the American courts, is this:

"Acts, omissions, or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another." [540]

Before a defrauded party may successfully sue the fraudulent party for damages in an action of deceit, or to enable the defrauded party to rescind the transaction, the American courts require the defrauded party to show the presence of essential elements which include:

"(1) the misrepresentation of a material fact, falls within the knowledge of the party making it;
(2) made with the intent to deceive; and
(3) which in fact does deceive the other party to his injury." [541]

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538 *Otis Elevator Co v Maryland Casualty Co* 99 Colo. 99, 33 F.2d 974.

539 *Weil Clothing Co, Inc v Glasser* 213 F.2d 296 (CA5); *William Whitman Co v Universal Oil Products Co* 125 F Supp 137 (D DEL); *Berry v Robotka* 9 Ariz. App 461 453 P2d 372; *Smith v Whitman* 39 N.J. 337, 189 A 2d 15; *Mackenzie v Prudential Insurance Co* 411 F2d 781 (CA6); *Occidental Life Insurance Co v Bob le Roy's Inc* 413 F2d 819 (CA5); *Kleiner v Walker* 256 A 2d 779 (DC CA).

540 *New York Life Insurance Co v Nashville Trust Co* 200 Tenn. 513, 292 SW 2d 749, 59 ALR 2d 1086 quoting *Smith v Morrison* 49 Tenn. 230 and I Bouvier, *Law Dictionary* P613; In the case of *Carruth v Allen* (Tex. Civ. App.) 368 S.W. 2d 672 fraud is defined by the court as *"a false statement of a material fact made to be acted on and actually believed and acted on with consequential injury to the person acting thereon."*

541 *Parker v Hensel* 242 NC 211, 87, SE 2d 201; *Rucker v Tietz* (OKLA.) 374 P2d 341; *Deyo v Hudson* 225 N.Y. 602, 612, 122 N.E. 635, 638; *Ochs v Woods* 221 N.Y. 335, 338, 117 N.E. 305, 306.

What is important, for a party who has been defrauded, is to show, especially, that the misrepresentation was material, before a court may take notice of it as a fraud. [542] The misrepresentation is said to be material *"where a misrepresentation would be likely to affect the conduct of a reasonable man with reference to a transaction with another person."* [543]

Whether it would be likely to influence a reasonable person to enter into a proposed contract formed the subject matter for decision making in the use of *Russel v City of Rogers*. [544] This was an action for damages, instituted by the City of Rogers, to recover judgement for a sum of money, under an oral contract, by which the appellant, Russel, agreed to pay the city at the rate of $2.00 a foot for 4337 feet of shield line, to be used, by the city, in an underdeveloped subdivision owned by Russell.

Russel admits that the line was laid by the city, but, his defence is that he was induced by misrepresentation to enter into the contract.

The appeal court held that Russel would, undoubtedly, have been influenced by the statement. The court held that had he known the true facts, there was no reason, whatever, for him to agree to make a cash payment as soon as the line was laid, for he could have obtained exactly the same benefits by paying, during a period of years, small instalments. The court consequently held that the misrepresentation was not merely an expression of opinion about what might happen in future, it amounted to a positive statement.

The remedies available to the defrauded party, depend upon whether the fraud constitutes the tort of deceit, or whether it is based upon a misrepresentation in contract in common law. In the first instance, the defrauded party may elect to keep the transaction intact, keep what he/she received, and sue for damages, [545] alternatively he/she may choose to void the

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542 *Mogar v Williams* 26 ALA 469; *Williams v McFadden*, 23 Fla 143, 1 S.618; *Ruff v Jarrett* 94 ILL 475; *Long v Woodman* 58 ME 49; *Hedden v Griffen* 136 Mass 229; *Kaplan v Scoher* 254 Mass 180, 150 NE 9, 42 ALR 1142; *Smith v Chadwick* 20 CH D 27.

543 *Pasko v Trela* 153 NEB 759, 46 N.W. 2d 139; See also *Eitran v Equitable Life Assurance Society of the United States*, 6 AD 2d 697, 174 NYS 2d 553 Affd 5 N.Y. 2d 1005, 185 NYS 2d 262 in which it was decided that misrepresentation as to the treatment for a heart disease, was material.

544 236 Ark 713, 368 S.W. 2d 89.

545 *Meige v Bachler* 762, F.2d 621; See also *Gordon v Burr* 506 F.2d 1080 (2d Cir. 1974).

transaction and claim restitution. [546] In the latter instance, the defrauded party may seek restitution. [547]

9.2.3.3 Legal Opinion

The *caveat subscriptor* rule is widely recognised by the American legal writers and the courts, and so, form an integral part of the American contract law. The general operation and affect of the rule amounts to this, any person who signs a contract without familiarizing himself/herself with the terms of the contract, by not reading the content of the contract, or not asking for clarity of certain terms not understood, cannot avoid the contract on the grounds that he/she did not read it nor familiarise himself/herself with the terms thereof. [548]

The American law is very clear, therefore, on a contracting party's duty to read, namely, any party to a contract is legally obliged, through a duty, to learn the contents of a contract before signing it. If therefore, in the absence of fraud, duress, undue influence and other like defences, the contractant fails to do so, he or she is presumed to know the contents and therefore signs at his or her own peril. If it turns out that the contents of the contract or the obligations that flow there from are not favourable to the signing party, he must therefore suffer the consequences of his negligence. He/she is thus not excused and cannot therefore deny his/her obligation under the contract. [549]

The rule is strictly enforced and includes in its web illiterate people, or those who are ignorant, or with limited intelligence and understanding. They will also, generally, not escape the consequences of their failure to read a contract, or to familiarise themselves with the contents of a contract. They are expected, therefore, to get someone to assist

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546 *Hamral v Skinner* 265 ALA 9, 89 So. 2d 70 (1956); *Jennings v Lee* 105 Arix 167, 461 P.2d 161 (1969).

547 *Johns Hopkins Univ. v Hutton* 488 F2d 912 (4th cir 1973); *Moore v Farm and Ranch Life Ins Co* 211 Kan. 10, 565 P.26 666 (1973).

548 For legal writings see Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410; Jaeger *A Treatise on the Law of Contracts* Vol 1 (1957) 97. For case law see *Hoshaw v Coxcraft* 247 F 22 (CAA) See also *Metrick Mfg. Co v Waxahackie Cotton Mills* 1 F2d 913 (CCA 6); *Columbian Nat. L. Ins Co v Black* 35 F2d 571 (CCA 10) 71 ALR 128; *Ford Motor Co v Pearson* 40 F2d 858 (CCA 9); *Upton v Trebilock* 91 US 45, 23 L ed 203; *Rossi v Douglas* 203 Md 190, 192, 100 A. 2d 3, 7 (1953).

549 For legal writings see Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410; Jaeger *A Treatise on the Law of Contracts* Vol 1 (1957) 97-98. For case law see *Upton v Trebilock* 91 US 45, 23 L Ed 203; *Rossi v Douglas* 203 Md. 190, 192, 100 A. 2d 3, 7 (1953); *United States v Castillo* 120 F Supp 522 (DCD NM); *Belew v Griffiths* 249 Ark 589, 460, S.W. 2d 80 (1970).

them. [550]

The rationale for the traditional rule is said to give stability to written agreements, or to enshrine an element of sacrosanct to writing. [551]

In modern times, especially, with the introduction and domination of contracts of adhesion or standard contracts, there is strong argument for the view that these types of contracts, which are not individually negotiated, do not bring the assent with them, if true assent exists at all. For that reason, the view is espoused that, especially in certain contracts, the impact of the contents, including the terms and conditions of the applicable contract, should be explained by the dominant party and understood by the other party, who then has a reasonable choice to accept or reject the contract or terms. The applicability thereof, is found, especially, where terms are oppressive, unfair, indecent or unconscionable. [552]

Misrepresentation is recognized by the American law as one of the exceptions to the *caveat subscriptor* rule. It is acknowledged as a fully fledged defence where a contractant relies upon deceit to recile from a contract. The defence has the affect to vitiate and void a transaction brought about by a contract. [553]

Misrepresentation comprises intentional misrepresentation and unintentional misrepresentation. Intentional misrepresentation, where deceit is present, is often referred to as fraudulent misrepresentation. On the other hand, unintentional misrepresentation is made up of negligent and innocent misrepresentation. [554]

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550 For legal writings see Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410; Jaeger *A Treatise on the Law of Contracts* Vol 1 (1957) 97-98. For case law see *Upton v Trebilock* 91 US 45, 23 L Ed 203; *Rossi v Douglas* 203 Md. 190, 192, 100 A. 2d 3, 7 (1953); *United States v Castillo* 120 F Supp 522 (DCD NM); *Belew v Griffiths* 249 Ark 589, 460, S.W. 2d 80 (1970).

551 For legal writings see Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410; Jaeger *A Treatise on the Law of Contracts* Vol 1 (1957) 97. For case law see *Smith v Standard Oil Co* 727 GA 268, 180 S.E. 2d 691 (1971); *Ellis v Mullen* 34 N.C. App 367, 238 S.E. 2d 187 (1977).

552 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) 427. For the effect of standardized contracts without reading the contents see *Regan v Custom Craft Homes, Inc* 170 Colo. 562, 565, and 463. But the courts have held that the duty to read rule succumbs to contracts even in the absence of fraud where public policy is contravened or the contract is unconscionable or the contract is invalid and unenforceable because of unfairness or unreasonableness. See *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2 144 (1971) at 147-148; *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A. 2d 67 (1960); *Williams v Walker-Thomas Furniture Co* 350 F.2d 445 (D.C. Cir 1965) at 449-50.

553 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-14; Jaeger *A Treatise on the Law of Contracts* Vol 12 (1970) 323 ff. For case law see *Pasko v Trela* 153 NEB 759, 46 N.W. 2d 139; See also *Halsel v First National Bank of Muskogee* 48 Okla. 535, 150 P4.

554 For legal writings see Calamari and Perillo *Contracts* (1987) Para 9-14; Jaeger *A Treatise on the Law of Contracts* Vol 12 (1970) 323 ff, 344 ff. For case law see *Jordan v Guerra* 27 Cal 2d 469, 144 P2d 349.

The rationale for this type of defence is based upon the principles that, firstly, through the representation, the contracting party making same, undertakes to carry out his/her promise. If done falsely, with the intent to deceive, the law will not stand back and allow someone to contract to his/her prejudice. It would therefore be unjust and inequitable to permit a person, who has made a false representation, to retain the fruits of the bargain induced by such representation. [555]

Secondly, it is founded on the principle that the formation of a binding contract is founded upon the mutual assent of the parties to the contract. Where there is an absence of the required degree of mutual assent, i.e. the absence of the proverbial `*meeting of the minds*', the purported contract is void. [556]

The second exception to the *caveat subscriptor* rule, recognized in the American law of contract, is mistake. The rationale for the exception to the rule is, as with misrepresentation, anchored in the mental attitude of the contracting parties. [557] Moreover, it happens in matters where the mistake is so fundamental in character that the minds of the parties never met, with the result that an unconscionable advantage would be gained if the purported agreement were be allowed to stand. [558]

The legal effect of the aforementioned circumstances are, generally, the contract is void [559] but, there are also views expressed that the effect of mistake as a defence, depending on the parties own desires, the seriousness of the mistake, the court's ability to straighten out

555 For legal writings see Calamari and Perillo *Contracts* (1987) Para 9-14. For case law see *Smith v Richards* 13 Pet (US) 26 10 L Ed 42. See also *Lockwood v Christakos* 181 F2d 805 (CA DC).

556 For legal writings see Calamari and Perillo *The Law of Contracts* 1987 Para 9-19. For case law see *New Jersey Mortgage and Investment Co v Dorsey*, 60 NJ Super 299, 158 A 2d 712 Affd. 33 NJ 448, 165 A 2d 297; *Bank Credit Inc v Rethea* 68 NJ Super 62, 172 F 2d 10.

557 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-25; Corpus Juris Secundum - *A Contemporary statement of American Law* Volume 17 (1999) 74; Hunter *Modern Law of Contracts* (1999-2000) Para 19.2; Jaeger *A Treatise on the Law of Contracts* Vol. 13 (1970) 8. For case law see *Kennie v Westbrook (ME)* 254 A.2d 39; *Hudson Structural Steel Co v Smith and Rumery Co* 110 ME 123, 85 A. 384; *Nodak Oil Co v Mobil Oil Corp* 391 F.Supp. 276.

558 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-27; Hunter *Modern Law of Contracts* (1999-2000) Para 19.2; Corpus Juris Secundum - *A Contemporary statement of American Law* Volume 17A (1999) 75. For case law see *Moffet, Hodgkins and Clarke Co v City of Rochester* 178 US 373, 44 L.Ed 1108 20 S.C.; *Martens and Co v City of Syracuse* 183 App. Div, 622; *City of Syracuse v Sarkisian Brothers Inc et al* 87 A.D. 2d 984; *Fields v Cornet et al* 70 S.W. 2d 954, 958.

559 For legal writings see Corpus Juris Secundum - *A Contemporary statement of American Law* Volume 17A (1999) 60. For case law see *Rexford v Phillippi* 337 MO 389, 84 S.W. 2d 628.

the problem, would be avoidance through rescission, or reformation of the contract. [560] The latter remedy is especially applicable where mutual mistake is shown, whereas the former is applicable where unilateral mistake is shown. [561]

Undue influence is a further exception to the *caveat subscriptor* rule, recognized by the American legal writers and the courts alike. It serves as a defence if the transaction, sought to be enforced, was the product of unfair persuasion. [562] American law of contract recognizes two forms of undue influence. In the first instance, a contracting party in a dominant psychological position may use his/her position, in an unfair manner, to induce the weaker contracting party to consent to an agreement he/she would, otherwise, not have consented to. In the second instance, where two parties stand in a trust and confidence position and the one contracting party, unfairly, persuades the other contracting party to enter into the transaction. [563]

These types of matters usually involve the elderly, the sick or senile persons, who are coerced or persuaded by lawyers in a confidential position, or position of trust to them, who persuade the vulnerable to enter into the transaction. [564]
The rationale of undue influence as a defence stems from the fact that, as with

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560 For legal writings see Corpus Juris Secundum - *A Contemporary statement of American Law* Volume 17A (1999) 60, 79; Calamari and Perillo *The Law of Contracts* (1987) Para 9.26; Hunter *Modern Law of Contract* (1999-2000) Para 19, 12. For case law see *McGough Company v Jane Lamb Memorial Hospital* 302 F.Supp. 488; *City of Syracuse v Sarkisian Brothers Inc et al* 87 A.D. 2d 984.See also *Dvorak v Kuhn* 175 N.W. 2d 697; *Reed v Landon* 166 Cal App 2d 476, 483, 333 P.2d 432, 437 quoted in *Walton v Bank of California National Association* 218 Cal App 2d 527, 32 Cal. Rapt. 856; *Mcadoo White et al v Berrenda Mesa Water District of Kern County* 7 Cal App 2 476, 483, 333 P2d 432, 437.

561 For case law see *Field v Cornett et al* 70 S.W. 2d 954; *Twin Forks Ranch Inc v Brooks* 120 N.M. 832 907 P.2d 1013; *Drink, Inc v Martinez* 89 N.M. 662, 556 P.2d 348, 350 (1976).

562 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9.12; Jaeger *A Treatise on the Law of Contracts* Vol 13 (1970) 776ff. For case law see *Wells Gargo Bank and Union Trust Co v Brady*, 116 Cal App 2d 381, 254 F.2d 71; *Zeigler v Illinois Trust and Savings Bank* 245 Ill 180, 91 N.E. 1041, 28 Ira N.S. 1112.

563 For legal writings see Calamari and Perillo *The Law of Contracts* (1989) Para 9-10; Jaeger *A Treatise on the Law of Contracts* Vol 13 (1970) 776ff. For case law see *Odorizz v Bloomfield Schools District* 246 Cal App 2d 123; *Trustee of Jesse Parker Williams Hospital v Nisbet* 191 Ga. 821, 14 SE 2d 64; *Merrit v Easterly* 226 IA 514, 284 N.W. 397; *Raney v Raney* 216 Ala. 30, 112 So, 313, 318; *McCollough v Rogers* 431 So 2d 1245; *Schroeder v Ely and Ely* 161 N.E.B. 252, 73 N.W. 2d 165.

564 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-10; Jaeger *A Treatise on the Law of Contracts* Vol 13 (1970) 784ff. For case law see *Malone v Malone* 155 Cal App 2d 161; *Steward v Marven* 139 Cal App 2d 769; *Odorizzi v Bloomfield School District* 246 Cal App 2d 123; *McCullough v Rogers* 431 So 2d 1246; *Schroeder v Ely and Ely* 161 N.E.B. 252, 73 N.W. 2d 165; *Blackmer v Blackmer* 165 Mont. 69 525 P.2d 559.

misrepresentation and mistake, there is no meeting of minds when the purported agreement is executed. [565]

The effect of the courts establishing that a transaction was concluded due to undue influence is this, the transaction is voidable. The party who wishes to rely on undue influence should he/she choose to avoid the contract, may seek cancellation and restoration of the status quo. [566]

Another exception to the *caveat subscriptor* rule is that of duress. The rationale for the acceptance of duress as a defence lies in the deprivation of one of the contracting party's freedom of will. [567]

The scope of duress is not restricted to situations involving threats of personal injury or imprisonment. It also includes any wrongful threat, which wrongfully puts a contractual party in such fear as to act against his/her will. This also includes economic pressure. [568] It is especially economic or business duress, which has been added to the growing evolution and development of duress. The nature of this type of duress lies in the fact, that a person is forced to act against his own will leaving that person no option or choice as to whether he will do the thing, or perform the act. [569]

The rationale for the recognition of the defence, as with all the other exceptions to the *caveat subscriptor* rule, is founded on the pressure that is borne on the contracting party who is compelled to assent to a transaction, notwithstanding the fact that he/she is

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565 See *Fyan v Monut* (1934) 266 Mich. 406 254 N.W. 146.

566 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-10; Jaeger *A Treatise on the Law of Contracts* Vol 13 (1970) 304ff. For case law see *Schroeder v Ely and Ely* 161 N.E.B. 252 72 N.W. 2d 165.

567 For legal writings see Jaeger *A Treatise on the Law of Contract* (1970) 659. For case law see *Shlensky v Shlensky* quoted with authority in *Kaplan v Kaplan* 25 III 2d 181, 182 N.E. 2d 708. See also *Austin Instrument Inc v Loral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Wise v Midtown Motors Inc* 231 Minn. 46, 42 N.W. 2d 404; *The First Bank of Cincinnati v Pepper et al* 454 F.2d 626.

568 For legal writing see Calamari and Perillo *The Law of Contracts* (1987) 337. For case law see *Kaplan v Kaplan* 25 III 2d 181, 182 N.E. 2d 706.

569 For legal writings see Jaeger *A Treatise on the Law of Contract* (1970) 718. For case law see *Austin Instrument Inc v Coral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Leeper et al v Beltrami* 54 Cal 2d 195, 347 F.2d 12, 1 Cal Rptr. 12; *Bethlehem Steel Corporation et al v United States Shipping Board Merchant Fleet Corporation* 315 U.S, 289, 62 Ct 581; *First Data Resources Inc v Omaha Steaks International of Cincinnati v Petter* 1 Cox et al 454 F.2d 626.

precluded from exercising free will and judgement. [570]
In America, the criteria for the presence of economic and business duress has crystallised. The status of the parties and the equality of the bargaining power of the contracting parties are factors influencing duress. [571]

The effect of the presence of duress has been found to be void, [572] or voidable, [573] depending on the circumstances.

Illegality is a further exception to the *caveat subscriptor* rule and widely recognised as a defence by the American legal writers, as well as the courts. In very broad terms, illegality manifests itself either in the formation of the purported agreement, or its performance is criminal, tortuous or opposed to public policy. [574]

In this regard, the *in pari delicto potier est conditio defendentis* maxim still plays a huge role in American contract law, in that the law protects those from loss through unlawful acts. The categories of unlawful acts are innumerable. For the purpose of this research, the examples given were restricted to those that are relevant to the topic under research. These include, generally, agreements which tend to promote illegal activity which is opposed to public policy, [575] for example, insurance policies taken out on an insured's life, where-after, the insured commits suicide to the benefit of the beneficiary, [576] or illegal abortions where no medical necessity is indicated for the abortion, [577] purported contracts, involving public

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570 For legal writings see Jaeger *A Treatise on the Law of Contract* (1970) 664ff. For case law see *Austin Instrument, Inc v Loral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Mercury Mach Importing Corp v City v New York*, 3 N.Y. 2d 418, 425, 165 N.Y.S. 2d 517, 520, 144 N.E. 2d 400; *Du Pont de Nemours and Co v J.L. Hass Co* 303 N.Y. 785, 103 N.E. 2d 896; *Gallagher Switchboard Corp v Heckler Elec. Co* 36 Misc 2d 275, 232 N.Y.S. 2d 590.

571 For case law see *United States v Bethlehem Steel Corp* 315 U.S. 289, 301, 62 S. Ct 581, 86 LED 855.

572 For legal writings see Jaeger *A Treatise on the Law of Contracts* (1970) 772-773; Calamari and Perillo *Contracts* (1987) 349. For case law see *United States v Bethlehem Steel Corp* 315, U.S. 289, 301, 62 S.Ct. 581, 88 LED 855; *The First National Bank of Cincinnati v Pepper, Cox et al* 454 F.2d 620.

573 For legal writings see Jaeger *A Treatise on the Law of Contracts* (1970) 775-776. For case law see *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 706; *Austin Instrument Inc v Coral Corporation* 29 N.Y. 2d 124, 272 N.E. 24 533, 324 N.Y.S. 2d 22; *First Data Resources Inc v Omaha Stears International* 209 NEB 327, 307 N.W. 28 790.

574 For legal writings see Calamari and Perillo *Contracts* (1987) 345. For case law see *Stone et al v William Steiner MFO Co* N.J. Misc 353, 39 A. 2d 241; *Noble v Mead-Morrison Manufacturing Co* 237 Mass. 5 129 N.E. 669.

575 For legal writings see Calamari and Perillo *Contracts* (1987) 888-890.

576 For legal writings see *Smith v McCullough et al* 270 U.S. 456, 46 S.Ct. 338.

service, containing an exemption clause, indemnifying the public utility from its duties. [578] The effect of the conclusion of such contracts is that these types of contracts are illegal, void and unenforceable. [579]

Unconscionable agreements, under the *Uniform Commercial Code,* [580] have also been identified as illegal where abuse relates, firstly, to procedural deficiencies in the formation of the contract, and secondly, the abuse involves the substantive contract terms which includes violation of public interest, unexpectedly harsh terms. [581]

Fraud proper, may for the purpose of this research, be regarded as a final exception to the *caveat subscriptor* rule. In this regard, both the American legal writers and the courts alike, held the view that fraud deprives a contract of its legal validity, or may even prevent an agreement from having legal force. [582]

The rationale for acknowledging fraud as an exception is found in the fact that, the party who is defrauded by the fraudulent party, is so induced to assent to do something which he/she would not otherwise have done. The effect of the presence of fraud in contract is said to be odious and fatal, void *ab initio*. [583]

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577 *Rutken v Reenfeld* 229 F.2d 248 (CAZ); *Bloom et al v Franklen Life Insurance Company* (1884) WL 57 27 (Ind.); *Wells v New England Mut. Life Ins Co. cf Boston*, Mass 191 Pa 207, 43 A.126.

578 For legal writings see Jaeger *A Treatise on the Law of Contracts* (1970) 148-149. For case law see *Chicago and N.W. Ry. Co v Davenport et al* 205 F.2d 589; *New York Cent. R. Co v Moltney* 252 U.S. 152, 40 S.Ct. 289; *Rowe v Colorado and S.R. Co* Tex Civil. App 205 S.W. 73; *Otis Elevator Co v Maryland Casualty Co* 95 Colo. 99, 33 F.2d 974; *Mohawk Drilling Company v McCullough Tool Company* 271 F.2d 627.

579 For legal writings see Calamari and Perillo *Contracts* (1987) 887-890; Jaeger *A Treatise on the Law of Contracts* (1970) 131-140. For case law see *Rutkin v Reenfeld* 229 F.2d 248 (CAZ); *Smith v McCollough et al* 270 U.S. 456, 46 S.Ct. 94; *Ritter v Mutual Life Ins Co of New York* 109 U.S. 139 18S.Ct 300; *Bloom et al v Franklen Life Insurance Company* (1884) WL 57 27 (Ind.); *Wells v New England Mut. Life Ins Co of Boston*, Mass 191 Pa 207, 43 A.126; *Chicago and N.W. Ry Co v Davenport et al* 205 F.2d 589; *New York Cent. R. Co v Moltney* 252 U.S. 152, 40 S.Ct. 289; *Rowe v Colorado and S.R. Co* Tex Cilvil. App 205 S.W. 73; *Otis Elevator Co v Maryland Casualty Co* 95 Colo. 99, 33 F.2d 974; *Mohawk Drilling Company v McCullough Tool Company* 271 F.2d 627.

580 S2-702 of the *Uniform Commercial Code.*

581 Jaeger *A Treatise on the Law of Contracts* (1970) 214-215ff; Calamari and Perillo *Contracts* (1987) 337.

582 For legal writings see Jaeger *A Treatise on the Law of Contract* Vol 12 (1970) 321. For case law see *Weil Clothing Co, Inc v Glasser* 213 F.2d 296 (CA5); *William Whitman Co v Universal Oil Products Co* 125 F Supp 137 (D DEL); *Berry v Robotka* 9 Ariz. App 461 453 P2d 372; *Smith v Whitman* 39 N.J. 337, 189 A2d 15; *McKenzie v Prudential Insurance Co* 411 F 2d 781 (CA6); *Occidental Life Insurance Co v Bob Le Roy's Inc* 413 F2d 819 (CA5); *Kleiner v Walker* 256 A 21 779 (DC CA).

583 For legal writings see Jaeger *A Treatise on the Law of Contracts* Volume 12 (1970) 402. For case law see *New York Life Insurance Co v Nashville Trust Co* 200 Tenn. 513, 292 SW 2d 749, 59 ALP 2d 1096; *Smith v Morrison*

But, where a defrauded party elects to keep the transaction intact, having previously performed, before detecting the fraud, he/she may sue for damages. But, if he/she chooses to avoid the transaction, the defrauding party may claim restitution. [584]

9.3 Summary and Conclusions

It is evident from the previous Chapter that the impact of freedom of contract, universally, is far-reaching and profound. What emerged as well is that, jurisprudence developed which caused acceptance, by the legal writers and the courts alike, that an individual is free to decide whether, with whom, and on what terms, to contract. Once a contract has been concluded, the wishes of the contracting parties must be adhered to, by the exact enforcement of the contractual obligations. One of the principles which flow from the doctrine of the freedom of contract and the sanctity of contract is the *caveat subscriptor* rule. The *caveat subscriptor* rule has the effect that once a contracting party concludes a written contract by signing the agreement, the contracting party is bound by the agreement, notwithstanding the subsequent cause and effect, alternatively, that the terms of the contract are not to his/her liking. It is generally accepted that the contracting party cannot complain as he/she has no-one to blame but himself. For that reason, the *caveat subscriptor* rule has crudely been translated as `*let the signer beware*'. The rationale for its continued recognition is said to lie in the fact that the *caveat subscriptor* rule brings about stability to written agreements. It is also said that it enshrines an element of sacrosanct to writing.

But, despite the profound influence of the *caveat subscriptor* rule, this Chapter highlights the exceptions to the *caveat subscriptor* rule, which also serve as total defences to the said rule. The exceptions include the defences of misrepresentation, mistake, undue influence, duress, illegality and fraud. The Chapter highlights the traits of each of these defences and what is required to prove each type of defence. This Chapter further highlights the remedies available to a contracting party who successfully relies on any of the particular defences available.

The rationale for the acceptance or recognition of the aforementioned exceptions to the rule, which also serve as total defences, are founded upon the "*will*" theory and true

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49 Tenn. 290; *Carruth v Allen* (Tex Civ. App.) 368 S.W. 2d 672.

584 *Meige v Baehler* 762 F.2d 621; See also *Gordon v Burr* 506 F.2d 1080 (2d Civ. 1974); *Hamral v Skinner* 265 ALA 9, 789 So. 2d 70 (1956); *Jennings v Lee* 105 Ariz. 167, 461 P.2d 161 (1969).

assent. This is especially relevant where the terms of the agreement, contained in the standard contract, are oppressive, unfair, indecent or unconscionable. In those circumstances, where a contracting party has not been afforded a genuine opportunity to read the clause containing the terms called to question, or may not understand the nature and effect of such terms, true assent could not have been forthcoming. From the discourse in this Chapter, it is certain, that there appears to be no uniformity in the different jurisdictions, whether agreements in those circumstances are unenforceable. It is especially in South Africa where the situation is far from satisfactory. With that in mind, in the next Chapter an investigative study is undertaken to determine what influence factors such as the principle of fairness, the doctrine of unconscionability and agreements contrary to public policy have on these types of terms or contractual provisions.

What does emerge from this Chapter is that misrepresentation, mistake, illegality, duress, undue influence and fraud are fully fledged defences in the law of contract. They are also regarded as exceptions to the *caveat subscriptor* rule. The recognition of these exceptions to contractual freedom and the doctrine of sanctity of contract are founded upon their being no *animus contrahendi. It is also founded upon* there being a lack of consensus between the contracting parties and the law will not allow a party from benefitting from illegal behaviour. Consent, if not been freely given when the transaction is entered into for example, agreements involving fraud are odious and there for, invalid.

Consequently, factors such as the principle of fairness, the doctrine of unconscionability, agreements contrary to public policy impacting on contractual freedom will be looked at.