

**THE REINTRODUCTION OF THE
EXCEPTIO DOLI GENERALIS
BY CONSUMER PROTECTION LEGISLATION
IN SOUTH AFRICA**

by

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ABSTRACT

The *exceptio doli generalis* was used as defence to ensure contractual fairness in Roman law whereby a defendant raises the defence that the plaintiff has not acted in good faith. The defence was often applied by South African courts to import abstract values of fairness and equity into the South African substantive law. Uncertainty surrounded the doctrine of the *exceptio doli generalis* for a number of years. Lamentably the court in the case of *Bank of Lisbon and South Africa Ltd v Ornelas and Another* decided that the *exceptio doli generalis* had never been received into Roman Dutch law, and did not accept it as a defence that could be utilised and applied in South African law. After the demise of the *exceptio* in the *Bank of Lisbon* case there has been uncertainty on whether the *exceptio doli generalis* can and should still be applied in South African law or whether another route to contractual equity through legislative intervention has to be devised and a concern in legal writers regarding the void that the decision left in our law.

The conclusion on the abolishment of the *exceptio doli generalis* meant that Roman - Dutch law have lost the feature which enabled it to survive in the modern world, its flexibility to react to new challenges and to accommodate new problems and its openness to considerations of public policy. An investigation on whether the *exceptio doli generalis* might answer all the contractual equity questions or whether legislation is requirement was investigated by the Law Commission which recommended legislation. Due to the failure of the common law, victims of unconscionable contracts were relieved through the enactment of the Consumer Protection Act. Some of the rights embodied in the Consumer Protection have its origin in human rights which echoes to the Universal Declaration of Human Rights. All laws derive from the Constitution hence; Van der Merwe correctly contends that "simple justice between man and man" in the parties' individual capacities cannot alone determine the fairness, more guidance is required. Due to this uncertainty, statutory descriptions could assist in providing guidelines and boundaries to assist in the determination of what public policy specifically entails.

Although the courts have abolished the *exceptio doli generalis*, it appears that it has been regenerated by the CPA through the abstract terms such as unfairness, unreasonableness, unconscionable conduct, values of public policy and good faith. The South African legislature replied to a call by legal writers to put an effective measure for dealing with unfair terms and to put clarity on the defence of the *exceptio doli generalis*. This is also in line with the values that inspire our constitution and Ubuntu.

The CPA has introduced several terms and principles that are of foreign origin to the South African legal system. Since foreign and international law can be utilised by our courts to interpret these abstract terms in terms of CPA, a comparative study became of outmost importance to provide solutions in interpreting some of the abstract terms provided by the CPA. The extent to which comparative legal systems accept responsibility to ensure justice by means of the principles and rules which apply to specific areas relating to contractual fairness may vary considerably. Other countries approach focus on specific remedies, extension of undue influence and duress and thereby provide relief from unfair contractual terms, also on the grounds and requirements for which can be developed in accordance with changing convictions of what is just and fair as Roman law afforded one such remedy, namely the *exceptio doli generalis*.

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DECLARATION OF ORIGINALITY

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2.6.1 Theory of unconscionability.....	47
2.7 Public policy and Constitutional values	48
2.7.1 The impact of constitutional values on public policy.....	49
2.8 Conclusion	50
CHAPTER 3.....	52
REGULATION OF CONSUMER AFFAIRS PRIOR TO THE.....	52
CONSUMER PROTECTION ACT	52
3.1 Introduction	52
3.2 A call for Consumer Protection in South Africa	52
3.3 Older Legislative Interventions for Consumer Protection	54
3.3.1 General	54
3.3.2 The Consumer Affairs (Unfair Business Terms) Act	54
3.3.3 The Sales and Services Matters Act	55
3.3.4 The Trade Practices Act.....	55
3.3.5 The Price Control Act	56
3.3.6 The Business Names Act	57
3.4 Impact of the Decision in the <i>Bank of Lisbon</i> Case on legislative intervention ..	58
3.5 Submissions made for and against consumer legislation	59
3.6 Conclusion	60
CHAPTER 4.....	61
THE CONSUMER PROTECTION ACT AND THE <i>EXCEPTIO DOLI GENERALIS</i>.....	61
4. Introduction	61
4.1 Overview of the Consumer Protection Act	62
4.2 Scope of the CPA	63
4.3 Interrelations between Ethics and Duties Imposed by the CPA to Act Reasonably and Conscionably	66
4.4 Transformation of Consumer Contracts	69
4.5 The Consumer Protection Act and <i>the exceptio doli generalis</i>	71
4.5.1 The right to fair and honest dealing: unconscionable conduct	72
4.5.2 The right to fair, just and reasonable terms and conditions	73
4.6 Advantages of the CPA to consumers	78
4.7 Disadvantages of the new CPA	79
4.8 Conclusion	80
CHAPTER 5.....	82

SOME COMMENTS ON THE LEGISLATION IN OTHER COUNTRIES	81
5.1 Introduction	82
5.2 Background.....	83
5.3 Implications of South African Consumer Legislation for other Countries	84
5.4 Consumer Protection in the United Kingdom	85
5.4.1 Unfair and unconscionable Contractual Terms in the UK.....	86
5.4.1.1 UK Consumer Protection Act	86
5.4.1.2 The UK Unfair Contract Terms Act 1977.....	87
5.4.1.3 Unfair Terms in Consumer Contracts Regulations	89
5.4.2 Adjudication of Unfair Contracts terms in the UK under Directive	91
5.5 Consumer Protection in the United States of America	94
5.5.1 General Outline	94
5.5.2 The Uniform Commercial Code (UCC) Section 2-302.....	96
5.5.3 The Application of the Unconscionability doctrine in the US	98
5.5.4 Adjudication of Unconscionable contracts - US courts.....	101
5.6 Consumer Protection in Australia.....	105
5.6.1 Outline.....	105
5.6.2 Australian Consumer Law Act (ACL)	107
5.6.3 Unconscionable Contracts	111
5.6.4 Fairness in Australian Context	114
5.7 Consumer Protection in India.....	117
5.7.1 Outline.....	117
5.7.2 Consumer Protection Act of 1986	119
5.7.3 The Role of Good Faith in India	120
5.7.4 Unconscionable Contracts in India.....	120
5.7.4.1 Indian Contract Law	120
5.7.5 Adjudication of unfair contractual terms in India.....	124
5.8 Conclusion	125
CHAPTER 6: CONCLUSION	126
BIBLIOGRAPHY	132
1. LEGISLATION:	132
2. BOOKS.....	133
3. JOURNALS:.....	137
4. CASE LAW:	145

5. GOVERNMENT GAZETTES	1509
6. OTHER SOURCES.....	150

CHAPTER 1

INTRODUCTION

1.1 Principal Research Aim

The principal aim of this research is to examine the reintroduction of a general defence against contractual liability based on unconscionable conduct and unfairness into our law of contract, and the granting of a power of review to the courts. This work includes a brief comparative study of the law relating to similar defences and court review in the United Kingdom, the United States, Australia and India.

It happens daily that individuals enter into contracts with one another or with financial institutions, suppliers, wholesalers or retailers in the expectation that the contracts will satisfy their needs and expectations, only to find subsequently that, in practical application, the contract as whole or some of their terms are unjust or the conduct of the other party to the contract was unconscionable.

Common examples of such situations abound, but a few examples will suffice: the head of a homeless family urgently in need of a roof over their heads, signs a lease which gives the lessor the right to raise the rent unilaterally and at will, and the lessor doubles the rent within six months; an uneducated man signs a contract of loan in which he agrees to the jurisdiction of a High Court, to find out later upon bringing or defending a claim, that a lower court also has jurisdiction over the matter and that the case could have been adjudicated at a much lower cost; a man from a rural area purchases furniture from a city store on standard, pre-prepared hire-purchase terms of adhesion, only to find out that he has waived all his rights relating to latent defects in the goods sold; an illiterate and unemployed bricklayer agrees to act as subcontractor for a building contractor on the basis that he must at his own expense procure an assistant, and so forth.

One should ask whether the courts should be able to give relief to the unfortunate debtors in these circumstances, by either setting aside the contract or modifying its terms.¹ The concern is that any tampering with the binding force or sanctity of contracts on the basis of a vague and generalized defence will destroy legal and commercial certainty, because contracting parties will not know whether or not the agreement will be modified to the detriment of one or the other. The courts will be saddled with thousands of 'hard luck' cases. The consequences of giving such power to the courts will be counter-productive in regard to the interest of those whom society wishes to protect, viz the weak, the uneducated, the inexperienced or the economically disadvantaged. Banks, building societies, financial institutions, landlords and employers and other individuals will simply not deal with them.

It is also argued that such a power is unnecessary: our law protects such persons sufficiently by applying the common law legal principles governing justifiable mistake, duress, undue influence, by fraudulent, negligent and innocent misrepresentations and by the provisions of the laws relating to usury, credit agreements and so forth. If a further remedy is needed, some argue that it should be found in the domain of preventative administrative action, which is a better way of dealing with unfair and unconscionable terms. 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.

The principle of certainty and the counter-principle of fairness and justice in individual cases must be balanced. Good faith and the unconscionable conduct approach to this issue lead to the same results. In view of the historical background to our law, the unconscionability approach similar to the Roman law defence of the *exceptio doli generalis* would probably be advisable, also taking into account the general use of that approach by other legal systems similar to our own, on which some of them this study focuses. This dissertation will also focus on a comparative study of the law in United Kingdom, United States of America, Australia and India that can inform our new consumer protection law and disputes pertaining to consumer rights regarding fair, just, reasonable contract terms and unconscionable conduct.

¹Extract from the Report on The South African Law Review Commission Project 47 "Unreasonable stipulations in contracts and the rectification of contracts" Paper 65 1998 (3)7; hereinafter 'Project 47'.

1.2 Purpose of Study

This research analyses the reintroduction of a defence similar to the general Roman law defence known as the *exceptio doli generalis* into our law of contract through the enactment of the Consumer Protection Act.² The *exceptio doli generalis* can translate as an exception or defence whereby a defendant can raise the defence that the plaintiff has not acted in good faith.³ Such would be the case, for example, if a person were to sue upon a transaction which he had obtained from the defendant by intimidation.⁴ The *exceptio doli generalis* constituted a substantive defence, based on the sense of justice of the community.⁵

In South African legal parlance, the concept of *bona fides* or good faith has acquired a meaning wider than mere honesty or the absence of subjective bad faith. According to this extended meaning, it has an objective content which includes other abstract values such as justice, reasonableness, fairness and equity.⁶ These abstract values have finally been legislated by the Consumer Protection Act.⁷

² Ch 2 Part A – H of the Consumer Protection Act 68 of 2008 (hereinafter the 'CPA').

³ Christie RH Bradfield GB 'Christie's' The law of contract in South Africa' 2011 12 (hereinafter 'Christie').

⁴ Above 13.

⁵ As such it is closely related to the defences based on public policy (public interest) or *boni mores* (cf *Ismail v Ismail*) conceivably to contractual relationships. See the viewpoint of Hutchison D "Good faith in the South African law of contract" in Brownsword R *Good Faith in Contract, Concept and Context* (1999) 236; *Rand Bank v Rubenstein* 1981 (2) SA 207 (W).

⁶ As highlighted by Brand F D "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution" *SALJ* 2009 (126) 71.

⁷ s40 CPA.

One of the main instruments employed by the courts to transport abstract values of fairness and equity into our substantive contract law was the Roman law defence of bad faith, the *exceptio doli*.⁸ In this way the *exceptio doli* served the purposes of an exception. Roman jurisprudence did not stop there, as an *exceptio* was declared to be available not only where the plaintiff when taking legal action is considered to be malicious, but also wherever the raising of the action objectively constituted a breach of good faith.⁹

The insertion of the *exceptio doli* in the formula was considered to empower the judge to take into account every single circumstance which would render the condemnation of the defendant substantially unjust.¹⁰ This was confirmed in the *Zuurbekom* case, where Tindall JA held that ‘the plaintiff Company agreed in advance to a condition which is hard and onerous, and it seems to me that unless it can be shown that it would indeed, in the circumstances of this case, be fraudulent, or unconscionable, or a manifestation of bad faith to rely on this condition, effect should be given to it’. This defence had generally been assumed to be the means to attempt to find a balance between law and equity in the law of contract.¹¹

In *Rand Bank Ltd v Rubenstein*¹² Botha J confirmed that the application of broad considerations of fairness and justice is almost a consistent practice in a court of law. Furthermore, that judges in their exercise of judicial function, often find themselves in areas of relative uncertainty which requires the formation of moral judgment. The court in this case actually applied the *exceptio doli generalis* to a set of facts where the contract in question was not unfair, but the attempt to apply it to a situation which arose subsequently was regarded as unfair.¹³

⁸ *Ibid.*

⁹ *Bank of Lisbon & South Africa Ltd V Ornelas and Another* 1988 (3) SA 58 (A) 613 D.

¹⁰ See Rudolf S ‘The Institutes of Roman Law’ 203; as confirmed by Tindall JA in the judgment in *Zuurbekom Ltd v Union Corporation, Ltd* 1947 (1) SA 514 (A) 537.

¹¹ *Sasfin v Beukes* 1989 (3) SA 773 (A) 782-783.

¹² 1979 (2) SA 848 (W).

¹³ At 234-235.

The rise of consumer protection awareness in the early seventies prompted a study by the South African Law Review Commission regarding the viability of legislative action against contractual unconscionability and the courts' concomitant power of review.¹⁴ The scope and extent of such power was considered as well as whether the 'unconscionability' or the 'good faith' approach should be followed. When considering the historical background of the South African law, and taking into account the general use of the unconscionability approach by the legal systems similar to our own, the unconscionability criterion was extensively considered by the South African Law Review Commission.¹⁵

This study preceded the eventual introduction of specific consumer protection legislation in the form of the Consumer Protection Act which was eventually fully enacted in 2011. Internationally, the doctrine that courts will interfere to strike down unconscionable clauses was recognized as early as the 18th century, when the English court in *Evans v Llewellyn*¹⁶ held that if a party is in a situation in which he is not a free agent and is not equal in protecting himself, the court will protect him. The objective of this research is therefore based on the uncertainty argument. This argument is a straightforward one: the main aim of a contract is to regulate the future relationship between the parties in a specific transaction. The very foundation of the contract is to create certainty, to protect the expectations of the parties and to secure to each other the bargain made. That is why the idea of contract, based on autonomy of the will and freedom of contract, is the very basis of all commercial and financial dealings and practices, from the simple supermarket purchase to the most intricate building contract.

¹⁴ Project 47 at 42.

¹⁵ Project 47 at 32-58.

¹⁶ (1787) 29 ER 1191.

The mere fact that both parties agreed upon the terms of their contract does not mean that all its clauses are absolutely enforceable in all circumstances.¹⁷ In South African law, an alleged contract can be declared as unenforceable in circumstances where, for example, it would be contrary to public policy to enforce it.¹⁸ The major problem lies not in the existence of the '*exceptio doli generalis*'. It is the question of whether our courts are in a position to apply it to administer justice as effectively as Roman courts could in classical times and systems. This defence was applied over centuries, from Justinian's time, by the Dutch courts in Roman-Dutch times and lastly by the South African courts before the decision in the *Bank of Lisbon*. Before the *Bank of Lisbon* case, the *exceptio doli* was used by courts as a substantive defence based on equity.

However Joubert JA decided in his majority judgment in *Bank of Lisbon* case to end the application of the *exceptio doli* in South African law. In his judgment he declared that 'All things considered, the time has now arrived, in my judgment, once and for all to bury the *exceptio doli generalis* as a superfluous, defunct anachronism.'¹⁹ This judgment has been subject to severe criticism in subsequent years, as it had generally been assumed that the *exceptio doli generalis* had provided an effective remedy against the enforcement of unfair contracts in unfair circumstances.²⁰

¹⁶ As confirmed by the court in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) par.15.

¹⁷ *Evans v Llewellyn* 1797 29 ER 1191.

¹⁸ *Supra* fn 11.

¹⁹ *Bank of Lisbon case* 607B.

²⁰ Forsyth CF and Pretorius JF "Recent developments in the law of suretyship" *SAMLJ* 1993 (5)183; see also the discussion of this application in the judgment of *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA).

Now with the enactment of the CPA, the defence appears to have been brought back through the inclusion of rather vague terms to describe causes why a contract can be set aside, such as 'unfair', 'unreasonable' and 'unconscionable' conduct.²¹ The Minister of the Department of Trade and Industry is empowered to issue regulations relating to unfair contract terms.²² In terms of the CPA, a court has the discretion to make any order it considers just and reasonable in the circumstances where an issue in this regard is brought before it.

One may ask whether the court in *Bank of Lisbon* wrongly decided to abolish the possibility and need of raising this type of defence in South African law. When this decision was given, the Appellate Division was the highest court in South Africa yet could depart from its own previous decisions.²³ After the Constitutional Court's judgment in the *Barkhuizen* case,²⁴ the answer to this question appears to be in the affirmative. Yet before one gives that answer with confidence, one has to still ensure that the courts may acknowledge the possibility that changes in circumstances after contracts are entered into, entitle them to make decisions that take into account the circumstances that exist at the time the action is brought.²⁵

The defendants in *Bank of Lisbon* case relied on the common law remedy of the *exceptio doli generalis*. In theory, this was a defence available to a defendant, who, though liable according to the letter of a contract and in strict law, could show that implementation of the contract would be unconscionable or inequitable. This remedy was, however, not rigorously applied by our courts prior to the hearing of this case.

²¹ s40 CPA.

²² s120(1)(d) CPA.

²³ *Arprint Ltd Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (AD); *Bothwell v Union Government (Minister of Lands)* 1917 AD 262; *Hassan Khan v Immigration Officer* 1915 CPD 655.

²⁶ *Supra* fn16.

²⁵ Kerr AJ "The defence of unfair conduct on the part of the plaintiff at the time action is brought: The *exceptio doli generalis* and the *replicatio doli* in modern law" *SALJ* 2008 (125) 245; Glover G "Lazarus in the Constitutional Court: An Exhumation of the *Exceptio doli generalis*?" *SALJ* 2007 (124) 454.

Yet one could have hoped that a general doctrine of relief against unconscionable claims could have been recognized and founded on this exception. In this case the majority of the appellate division bench decided to bury the *exceptio doli generalis* as a 'superfluous, defunct anachronism'.²⁶ The court also held that equity could not override a clear rule of law; neither could the application of good faith do so.²⁷ A clear rule of law, presumably, was the rule that contracts must be performed according to their terms.

According to the court in *Bank of Lisbon* case the *exceptio* did not operate to change the substantive law or to alter unfair terms of an otherwise validly concluded contract.²⁸ The *exceptio*, if reintroduced within the sphere of contract, may thus also serve to preclude reliance on a contractual term in circumstances which make it unconscionable to do so, in view of subsequent events or subsequent conduct of a contracting after conclusion of contract.²⁹

Van der Merwe *et al* point out that 'There are already clear indications that courts will in the near future decide on issues such as the reintroduction of the *exceptio doli generalis* and will no doubt, be called upon to fashion an equitable remedy'.³⁰ It has further been argued that the correct way of protecting consumers against unconscionable contracts or clauses is to provide for appropriate mechanisms in consumer legislation, e.g. a cooling-off period, a prohibition against fine print in standard form contracts, an accessible usury Act capable of being understood by the layman or provisions outlawing or limiting certain types of clauses, e.g. consent to jurisdiction, exemption and *voetstoots* clauses, waiver of defences clauses, etc. If this is done, so it was argued, the courts do not need a general review power.³¹ This was attempted by the promulgation of the CPA into our law.

²⁶ Supra fn 9.

²⁷ Supra 607 A-B.

²⁸ As was previously held in *Paddock Motors v Igesund (Pty) Ltd* 1976 (3) SA 16(A) 28E- F.

²⁹ *Ibid.*

³⁰ Van Der Merwe, Van Huyssteen, Reinecke, Lubbe 'General Principles of Contract' Preface: *Bank of Lisbon & South Africa Ltd V Ornelas and Another* 1988(3) SA 58(A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 347 (A); *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC).

If a court is given a review power, it means in practical terms that the court could re-make the contract, relieve one party of his or her obligations, wholly or in part - and to that extent frustrate the legitimate expectations of the other party. One would not know, when concluding a contract, whether or not that contract was going to be rewritten by a court, using as its yardstick vague terms such as good faith, fairness, unconscionability, and so forth.

1.3 Brief Overview of Consumer Rights

The Bill of Rights in The Constitution of the Republic of South Africa 1996 (hereinafter the 'Constitution') enshrines the rights of all South Africans – including basic consumer rights.³² Our courts have only recently begun to engage in developing the law of contract in accordance with the spirit, purport and object of the Bill of Rights.³³

The CPA outlines key consumer rights, of which all South African consumers should be made aware.³⁴ These include the right to fair and honest dealing. The right to fair and honest dealing, to an ordinary consumer, means the right to protection from and against the other party's unconscionable conduct.³⁵ The powers of review by the courts, however, extend to all types of contracts, to non-consumer transactions, international agreements, standard term contracts and the like. According to the South African Law Review Commission, no exceptions should be made to the provisions relating to good faith. Any agreement or contractual term purporting to exclude the provisions of any Act or to limit its application should be void.³⁶ This principle was also subsequently introduced into the CPA.

³² Ch 2 of the Constitution.

³³ Supra; see specifically in this regard the judgments in the cases of *Barkhuizen* and *Bredenkamp*.

³⁴ CPA chap 2.

³⁵ CPA s40-52.

³⁶ Project 47 at 5.

1.4 The Role of Private Law and Common Law

The role of private law in consumer protection has diminished over time, as public law has steadily encroached on it. This has been alluded to by Moseneke JA as he explained the complex relationship between a bank and its customers.³⁷ Although there is a symbiosis between common private law and evolving statute law, private law may prove to be an inadequate tool for consumer protection, yet still be an indispensable part of the legal framework of the consumer market.

In terms of section 39(3) of the Constitution, the common law is recognized only to the extent that it is consistent with the Bill of Rights. Section 173 of the Constitution confirms the inherent right of the courts to develop the common law, taking into account the interests of justice. The common law embodies the private law and thus the laws of delict and contract, the parts of the private law that are of immediate relevance to the consumer protection.

The role of the law of contract is directly relevant to the special nature of consumer contracts and to the role of standard form contracts in modern society. Legislation to protect consumers against unfair contract terms has clearly long been overdue in South Africa.³⁸ This has been addressed by Parts A-G of Chapter 2 of the CPA that deals with fundamental consumer rights to fair, reasonable and just terms.

³⁷ *Standard Bank of SA v Absa Bank* 1995 (2) SA (T) 746G - 747E.

³⁸ Naudé T "The Consumer's right to 'fair, reasonable and just terms' under the new Consumer Protection Act : A comparative perspective" *SALJ* 2009 (126) 515.

By modifying, extending or supplementing the common law principles, the courts have sought to keep the law in tune with changing social needs and values.³⁹ By its very nature, however, the system does not lend itself to radical change. It has an inherent restraint, in that judges who take steps forward in interpreting and applying new principles do so in the knowledge that they are not only deciding the cases before them, but that they are laying down the ground rules for decisions in tomorrow's cases as well. The result is that changes by the courts are implemented incrementally and as far as possible within the framework of existing legal principles.⁴⁰

1.5 Philosophical Underpinnings of the Law of Contract

One of the most striking (South African) illustrations of the link between a preference for rules and a preference for individualism as well as of the political preference is to be found in the judgment of Joubert, JA in the abovementioned watershed case of *Bank of Lisbon*.

Concepts of freedom of contract, individual autonomy and the question of fairness and related issues in the common law of contract are concerned more with policy and values than with hard law. In order to better understand the approaches of commentators and judges to these issues and the resultant development of the common law, it is enlightening and indeed essential to briefly examine the philosophical underpinnings or 'political morality' that informs this law. Van der Merwe *et al* have characterized the approach of the majority in this case as 'positivist-historical'.⁴¹

³⁹ Brand F D "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution" *SALJ* 2009 (126) 71.

⁴⁰ *Supra* 73.

⁴¹ Van der Merwe, SW, Lubbe, GF and Van Huyssteen LF "The *exceptio doli deneralis*: Requiescat in Pace-Aequitas Vivat" *SALJ* 1989 (106) 235 at 238.

The authors point out that the court approached the historical sources in such a formalistic and clinical manner that the *exceptio* got lost in a historical methodology which does not appear to be sensitive to the problems of the time and which fails to deal with policy considerations.⁴² Lewis points out that the majority decision appears to be 'fixated' on the *exceptio* itself rather than to focus on the principle which underlies it.⁴³

1.6 Rules based approach versus the Standard based approach

1.6.1 Rules based approach

Writing in 1992, Cockrell argued persuasively that the traditional manner in which standard South African textbooks presented contract law was in the form of rules, as opposed to standards: 'A seamless web of rules which possesses a determinative rationality of its own, such that answers to any disputes will be thrown up by the inexorable logic that is internal to the system itself'.⁴⁴

⁴² Barnard AJ "A Critical Legal Argument for Contractual Justice" (unpublished 2005 LLD thesis at the University of Pretoria) 94.

⁴³ Lewis J "Fairness in South African Contract Law" *SALJ* 2003 (120) 334.

⁴⁴ Cockrell A "Substance and Form in the South African Law of Contract" *SALJ* 1992 (109) 40.

This rules-based form depicts contract law as a set of determinative rules that can be applied by judges to facts in a mechanical way.⁴⁵ The role of the courts is limited to the ‘application of rules to proven facts in a non-creative manner’ whilst this rules-based interpretation is perhaps a deliberate exaggeration of the actual position. This classical model and its underlying assumptions of individual autonomy and liberty to consent are presented in traditional South African contract law as clear universal truths, expressed as unwavering rules of the common law of contract.⁴⁶

The courts are thus free to concern themselves primarily with the enforcement of contracts rather than with their substantive fairness, and judicial discretion is limited. The result is that parties can contract within a framework of certainty and efficiency, achieving a high degree of faith in contract law.⁴⁷

1.6.2 Standard based approach

Cockrell argues that this widely-accepted classical model produces a distorted picture of modern South African law of contract, which is in fact shot through with normative commitments.⁴⁸ Contrary to this the rules-based form is a preference for expressing contract law doctrines in the form of open-ended standards that state normative propositions at a high level of abstraction. The latter is not easily reduced to specific rules that allow for purposive adjudication by the courts.⁴⁹

⁴⁵ As per the opinion held by Cockrell 43.

⁴⁶ See for a more detailed discussion Bhana and Pieterse “Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley and Afrox* Revisited” *SALJ* 2006 (122) 868.

⁴⁷ *Ibid.*

⁴⁸ Cockrell 41.

⁴⁹ Cockrell 43. Cockrell’s discussion draws heavily on an earlier article by Kennedy D “Form and Substance in Private Law Adjudication” *Harvard Law Review* 1976 (89)1685.

This is what is envisaged by the application of general open-ended unconscionability criteria. Just legal outcomes are promoted at the expense of certainty, accommodating competing social and normative considerations like fairness, dignity and social equality.⁵⁰ This standards-based approach embraces a healthy measure of legal paternalism.⁵¹ The law attempts to establish 'forms of acceptable relationships' informed by ethical idea of the appropriate kinds of contractual relations in modern society, one based on trust.⁵² Contracts form part of the greater fabric of society, and so society should employ some control over contracts, so as to ensure social justice and equality.⁵³

⁵⁰ Van der Merwe, SW, Lubbe, GF and Van Huyssteen LF "The *exceptio doli generalis:Requiescat in Pace-Aequitas Viva!*" SALJ 1989 (106) 238.

⁵¹ Bhana D and Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley and Afrox Revisited*" SALJ 2006 (122) 868.

⁵² Lubbe G and Murray C 'Farlam & Hathaway Contract: Cases, Materials, Commentary' 3rd ed (1988) 242.

⁵³ Bhana D and Pieterse M 868.

1.7 Conclusion

The open and democratic society envisaged by our Constitution could not allow people to feel diminished as human beings because of arcane, lawyer-made and highly technical laws, and by unconscionable practices of ruthless suppliers, service providers and competitors. Ubuntu has played its most prominent role in public law yet the time has come to implement it also in private law relationships.⁵⁴ Not only did the Interim Constitution provide the foundation for a new South African society in 1993, but it was also the first official document to use an African term.⁵⁵

South Africa, through legislative intervention⁵⁶ has joined the ranks of many industrialised countries that have acknowledged the importance of appropriately balanced state regulation to the protection of consumers. The judgment of Jansen JA in the *Bank of Lisbon* case reveals a clear consciousness of the change in values and convictions of equity which is part and parcel of the development of a society over time.⁵⁷ The question is, however, whether regulation in this context has not gone full circle, to reintroduce defences that were previously abolished as too uncertain, such as one similar to the *exceptio doli generalis*.

⁵⁴ *S v Makwanyane* 1995(6) BCCR 665 (CC) par 224, *Brisley v Drotosky* par.95; *Barkhuizen* case 306; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) pars 23 and 50.

⁵⁵ An African term which translates to humanity and value of public policy; Bennett TW “Ubuntu: an African equity” *PER* 2011 (14:4) 261.

⁵⁶ The enactment of the CPA.

⁵⁷ *Bank of Lisbon* case 616 H-J.

CHAPTER 2

THE HISTORICAL DEVELOPMENT OF THE *EXCEPTIO DOLI GENERALIS*

2.1 Introduction

This chapter is concerned with the historical development of the *exceptio doli generalis* and its application in disputes based on consumer contracts. Some uncertainty existed in our law around its scope of its application. In Roman law and our common law, a contract could be set aside based on the improper conduct of one of the parties to the contract. This conduct was limited to misrepresentation, duress, undue influence and economic bribery. Case law has provided us with requirements for each of these factors and has also delineated their extent.⁵⁸ In South Africa the new CPA⁵⁹ has introduced new terms for setting aside or voiding a contract, such as ‘unconscionable conduct’, ‘coercion’; ‘pressure’; ‘harassment’; and ‘unfair tactics’.⁶⁰ The exact meaning of these terms has not yet been clarified in our law.

The CPA has furthermore awarded powers to the courts to strike down ‘unfair’ contracts concluded in circumstances where consumers are unable to protect their interest because of ‘disability, illiteracy, ignorance, inability to understand language or other similar factor’, as well as conduct that is unethical or improper to a degree that it would ‘shock the conscience of the reasonable person’. Although new in our law, these are all similar to the principles underpinning the *exceptio doli*. It is therefore necessary to investigate the origin, development, scope and applicability of the *exceptio* to determine whether the introduction of these terms is not in essence a revival of the old defence. The general doctrines of unconscionability, duress and good faith will also be discussed with reference to constitutional considerations.

⁵⁸ See in this regard Hutchison D & Pretorius CJ (eds) ‘The Law of Contract in South Africa’ (2012) 2nd ed chap 4.

⁵⁹ s40-52 CPA.

⁶⁰ Terminology in the CPA that is foreign to our common law of contract and that for now remains uncertain is presented in the text in inverted commas.

2.1.1 Roman Law

The *exceptio doli* was introduced under Roman law in 66BC and even today is viewed as being one of the important legal phenomena of its time.⁶¹ The *exceptio doli* brought the requirements of good faith into the *stipulatio*.⁶² Thus, the *exceptio doli* was of paramount importance in its general application.⁶³

In Roman law good faith played no role provided that the correct form had been observed; the contract was binding even if induced by fraud.⁶⁴ Older Roman law did not recognize fraud liability. Under the *ius civile* a strict liability law for fraud was unknown. Liability under *negotia iuris* (negotiable law) could also not be opposed on the ground of fraud.

These shortcomings of the *ius civile* were ameliorated and remedied by the praetorian law⁶⁵ provided for in *edictum praetoris*.⁶⁶ Remedies introduced by these edicts included the *actio doli*⁶⁷ and the *exceptio doli mali*. In the *Corpus Iuris Civilis* they were usually referred to merely as the *exceptio doli* and the *exceptio doli generalis*.⁶⁸ In achievement of equity, the *exceptio doli generalis* was pleaded as a defence to a plaintiff's claim.⁶⁹ Joubert JA correctly pointed out that the *exceptio doli generalis* was only a plea.⁷⁰

⁶¹ Hawthorne L and Thomas PHJ "Bank of Lisbon and South Africa Ltd v De Ornelas 1988 (2) SA 580 (A): the *exceptio doli*" *De Jure* 1989 145.

⁶² *Stipulatio* was the basic form of contract in Roman law, which was made in the format of a question and answer.

⁶³ Thomas PHJ "Bona fides, Roman Values and Legal Science" *Fundamina* 2004 195.

⁶⁴ Hutchison D & Pretorius CJ 27.

⁶⁵ An annually elected magistrate of the ancient Roman Republic.

⁶⁶ Roman law was initially created by an annual declaration of principles made by the *Praetor urbanus*.

⁶⁷ Similar to those found in s40- 52 CPA.

⁶⁸ *Bank of Lisbon* case 394.

⁶⁹ Hawthorne L and Thomas 154.

⁷⁰ *Bank of Lisbon* case 606J - 607A.

In Roman law a distinction was made between *negotia stricti juris* and *negotia bonae fidei* as well as actions and defences that arose from them, namely the *exceptio doli specialis* and the *exceptio doli generalis*.⁷¹ In *negotia stricti juris* agreements, the parties to the agreement were bound to perform exactly what they had undertaken to execute.⁷² The *exceptio doli generalis* was available in circumstances where the very act of bringing the action constituted an act of bad faith. The effect of this innovation by the praetor was to allow the judge an equitable discretion to decide the matter before him in accordance with fairness and reasonableness.⁷³

Our focus in this study centres on the *exceptio doli generalis* which became the most important of all contractual exceptions in Roman law as a defence where the institution of an action by a plaintiff was improper and in bad faith.⁷⁴ Although good faith was never a requirement for the conclusion of a valid contract, the concept of good faith or *bona fides* has, however, as basis for a defence, played a significant role in the development of the Roman law of contract and helped breathe an equitable spirit into the body of civil law.⁷⁵

The *exceptio* was invoked in the following manner: A defendant could raise the *exceptio doli* before the *praetor* as a defence first for the purpose of obtaining a written formula. If the defendant wanted to rely on a defence other than a bare denial of the plaintiff's claim, it was his duty to disclose the nature of his defence by way of an *exceptio*. An *exceptio* was unnecessary if the defendant intended a direct denial of the claim; it was utilized when he admitted the existence of the claim but wished to adduce further points which would preclude enforcement of the claim. In the parlance of English pleading, an *exceptio* was needed when the defendant wished to 'confess and avoid'.⁷⁶

⁷¹ Aronstam PJ "Unconscionable contracts: the South African solution" *THRHR* 1979 29.

⁷² Viljoen F "The *exceptio doli* : its origin and application in South African law" *De Rebus* 1981 173.

⁷³ Hutchison D and Pretorius CJ 'The Law of Contract' 2009 28.

⁷⁴ Aronstam P 'Consumer Protection, Freedom of contract and the law' 1979 423.

⁷⁵ Hutchison D and Pretorius CJ 27.

⁷⁶ Thomas J 'The Institutes of Justinian' 1975 316.

The plaintiff could meet the *exceptio* by the insertion in the formula of a replication based on countervailing facts.⁷⁷ The condemnation was the final clause of the formula, instructing the *iudex* (a judge in their case) to condemn the defendant if the conditions thereof were satisfied, and if not, to absolve him. The *exceptio* was placed between the intention and condemnation. The entire formula, including the *exceptio*, required the *praetor's* approval. The next step was the appointment of *iudex* and for the *praetor* to reduce the formula in writing. Upon completion of the formula the proceedings in *iure* before the *praetor* terminated, and thus *litis contestatio*⁷⁸ was reached.

2.1.2 Post-classical Roman Law

The *exceptio doli generalis* in post-classical Roman law ceased to function as a praetorian procedural remedy. This was a result of the change in the system of civil procedure that incorporated the principles of *bona fides*. The judge was required to decide disputes arising out of such contracts in accordance with the dictates of good faith therefore there was no need for the *exceptio doli*. However, the idea of good faith as an informing principle of the law of contract continued. The parties to a contract were required to conduct themselves in a manner consistent to good faith.⁷⁹

⁷⁷ Gaius IV 1296.

⁷⁸ A civil proceeding in which controversial issues are established and submitted before a magistrate for examination of fact and judgment.

⁷⁹ Hutchison D and Pretorius CJ 28.

2.1.3 Roman-Dutch Law

The South African courts had over many years used the *exceptio doli* to introduce various equitable doctrines, mostly originating from English law, but unknown to Roman Dutch law such as fictional fulfilment of conditions, rectification, and estoppel into our contract law.⁸⁰ It was only in the eighteenth century that the Roman-Dutch writers clearly stated for the first time that all contracts were now based on consent and were therefore *bonae fidei* in character.⁸¹

The question regarding the reception of the *exceptio doli generalis* into the South African law of contract has been contentious. The question is complicated by the fact that all contracts became *negotia bona fidei* in Roman-Dutch Law. Aronstam argues that the *exceptio doli generalis* became part of the Roman-Dutch law in that it was implied by good faith. The *exceptio doli generalis* surfaced in the law reports in the late nineteenth century when it was used to import a number of equitable doctrines from English law as stated above.⁸²

The *exceptio* therefore functioned to curb the abuse of rights in appropriate circumstances and became the instrument with which more equitable principles were introduced in the law of contract by the Praetorian law.⁸³ In *Bredenkamp & Others v Standard Bank of South Africa Ltd*⁸⁴, though the appellants did not seek to rely on a revival of the *exceptio doli generalis*, the court held that the *exceptio* was merely part of the Roman law procedure and was never a substantive rule, and was used only to alleviate the strictness of contracts that were not based on *bona fides*.

⁸⁰ Viljoen 173.

⁸¹ *Ibid.*

⁸² Hutchison D and Pretorius CJ 28.

⁸³ Lewis C "The demise of the *exceptio doli*: Another route to contractual equity" SALJ 1990 (107) 26.

⁸⁴ 2010 (4) SA 468 (SCA).

In *Preller v Jordaan*⁸⁵ the majority of the Court extended the meaning of *dolus*, to enable an equitable remedy on the ground of undue influence to be adopted in our law where the existing authorities did not go far. The court held however that undue influence was not a good ground for setting aside the transaction in Roman-Dutch law.

It has emerged during the post-classical period and thereafter that the doctrine of freedom of contract is seen not to be unlimited. This position has been recognized where the contracting parties stand in an unequal bargaining position and the consequences flowing from their actions in concluding an agreement, would lead to unfair and often harsh results.⁸⁶ Certain factors have been identified as vitiating real consent and therefore, interfering with the doctrine of freedom of contract and sanctity of contract. The common law is not only relatively easily satisfied that parties have made an agreement, but also maintains the principle that, except insofar as certain narrowly circumscribed factors such as fraud, duress or undue influence apply, it will not readily dissolve an agreement.⁸⁷

2.1.4 Reception of the *exceptio doli generalis* into the South African law

Wessels, in his work on the law of contract published in the 1930's, stated twice that all contracts are *bona fidei*, which is to mean 'that there is to be no fraud and deceit, but the execution of the contract must be in accordance with the real intention of the parties as revealed by the terms of contract'.⁸⁸ This led to the rather dynamic situation where the *exceptio doli* was retained in modern South African law to fill the void.⁸⁹

⁸⁵ *Preller v Jordaan* 1956 (1) SA 483 (A).

⁸⁶ Barnard 552.

⁸⁷ Van Eeden E 'A Guide to the Consumer Protection Act' 2009 82.

⁸⁸ Wessels JW 'The law of contract in SA' 1951 Vol II 579.

⁸⁹ As referred to by Thomas J "The Roman Law tradition" *De Jure* 2003 113 par 1.

*Sonday v Surrey Estate Modern Meat Market (Pty) Ltd*⁹⁰ found it to be clear that the *exceptio doli generalis* 'has been accepted as part of our law and applied as such for a considerable period of time, both by Provincial Divisions as well as the Appellate Division'.⁹¹ In the subsequent case of *Van der Merwe v Meades*⁹² the Appellate Division held that the *replicatio doli* still formed part of our law. The defence was allowed where the enforcement of a contract in the specific circumstances was unfair or unconscionable where a restraint of trade was subjected to a reasonableness enquiry.⁹³ The court found that the *replicatio doli* did form part of the South African law of contract and could be applied.⁹⁴

If, as Kerr correctly points out, the *replicatio doli* on the later decision of the court survived the reception, and the same court linked the *replicatio* with the *exceptio* and has not departed from that position, then the only conclusion that can follow is that the *exceptio doli generalis* must have survived the reception.⁹⁵

Thus prior to the decision in *Bank of Lisbon and South Africa Ltd v De Ornelas*, the *exceptio doli generalis* had generally been assumed to be substantive equitable remedy against the enforcement of an unfair contract, or the enforcement of a contract in unfair circumstances.⁹⁶ Christie said that it would not be desirable to bring the *exceptio* back to life again, 'because the half-life of the *exceptio* from 1925 to 1988 showed it to be so entangled in its history that it was not satisfactory instrument for modern courts to use'.⁹⁷ The result was the loss of another mechanism to alleviate the harshness of unfair contracts or contract terms and to attain more equitable results in appropriate circumstances, and the law had to look to other mechanisms in order to do so.⁹⁸

⁹⁰ 1983 (2) SA 521(C).

⁹¹ 523 par C.

⁹² (1991) 2 SA 12F-3A.

⁹³ Hutchison D "Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*" SALJ 2007 (124) 449.

⁹⁴ *Ibid* 583.

⁹⁵ Kerr AJ "The *Replicatio Doli* Reaffirmed: the *exceptio doli* available in our Law" SALJ 1991 (108) 583.

⁹⁶ *Bank of Lisbon* case 617 G-H.

⁹⁷ Christie RH 18.

⁹⁸ See the discussion on good faith 2.2 and public policy 2.7 for examples of other mechanisms.

Although the *exceptio doli* was a defence to an action for specific performance, it was a good example of a legal standard that cannot be reduced to the form of a determinative value and clearly the resultant open-ended discretion with which courts were vested.⁹⁹ The decision was predicated upon an extreme individualism which seeks to deny that the law may legitimately superimpose an overriding duty to act in good faith upon the voluntary arrangements of consenting adults.¹⁰⁰ The judgment was widely criticized in a similar vein for its positivist-historical approach¹⁰¹ and absence of an in-depth discussion of general policy considerations or the responsibility of a court to ensure justice.¹⁰²

The chorus of disapproval was indicative of a key trend: the classical *laissez-faire* theory of contract, fortified by the majority in the Bank of Lisbon case which was increasingly being uncovered as a failure.¹⁰³ After a comprehensive review of the old and modern authorities, the majority (per Joubert JA) concluded that the *exceptio* is not part of our law, since it had never been received into Roman-Dutch law, or into South African law. Joubert JA rejected the *exceptio* and went on to state that all forms of equity remained subject to the principle of law and could not override a 'clear rule of law'.¹⁰⁴ For Joubert JA, the *exceptio* could have no validity unless it appears in modern law in the same form it took in Roman law, because for a hard positivist, a proposition can only count as being legally valid if it has the right pedigree, if it can be identified by a rule of recognition.¹⁰⁵

⁹⁹ Cockrell A 1992 SALJ 333.

¹⁰⁰ Christie 52.

¹⁰¹ Van der Merwe 1989 238.

¹⁰² Christie 12.

¹⁰³ Glover GB "The Doctrine of Duress in the Law of Contract and Unjustified Enrichment in South Africa" (unpublished PhD thesis, Rhodes University) 2003 129.

¹⁰⁴ *Bank of Lisbon* 609 F.

¹⁰⁵ Lewis J "Fairness in South African Contract Law" SALJ 2003 (120) 332.

Regarding the question whether the *Bank of Lisbon* judgment in doing away with the *exceptio doli* did away with the power to declare a contract or a provision thereof as void or enforceable on the basis of good faith, Olivier JA argued strongly in his famous (perhaps notorious) minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* that *Bank of Lisbon* case did not and could not have done away with this power.¹⁰⁶

Olivier JA argued that the reception of all contracts as *iudicia bona fidei* into South African law of contract made the *exceptio doli generalis* (as a technical remedy that had to be pleaded), superfluous in that it was implied in the idea of *iudicia bona fidei* that a court would have discretion to examine and pronounce on the *bona fides*.¹⁰⁷

The brief statement in *Brisley v Drotzky*¹⁰⁸ regarding the attempt to resurrect the *exceptio doli generalis* dismisses this controversy by pretending that the *exceptio* is in fact dead and buried.¹⁰⁹ This statement in *Brisley* can of course be seen as implicitly overriding the court's Van der Merwe decision, but the court explicitly stated in a footnote that the question regarding the reconsideration of the *exceptio* did not arise in *Brisley*.¹¹⁰

¹⁰⁶ *Eerste Nasionale Bank v Saayman* 1997 (4) SA 302 (SCA) 318-331.

¹⁰⁷ Barnard-Naude AJ "Oh what a tangled web we weave...hegemony, freedom of contract. Good faith and transformation-toward a politics of friendship in the politics of contract" *Constitutional Court Review* 2008 180.

¹⁰⁸ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) par 72.

¹⁰⁹ At par 72.

¹¹⁰ *Brisley* par 17.

This left uncertainty as to the position in our law regarding the status of the *exceptio*.¹¹¹ The common law derives its force from the Constitution and is only valid¹¹² to the extent that it complies with the Constitution. Every rule has to pass constitutional muster. Public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values.¹¹³ In *Barkhuizen v Napier*¹¹⁴ the insured relied directly on section 34 of the Constitution which provides that: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. In the Supreme Court of Appeal, Cameron JA allowed a narrow field of application for review of contractual provisions. He stated that that these values do not provide a 'general all-embracing touchstone for invalidating a contract'.¹¹⁵

Cameron JA accepted the broad correctness of the general premise expressed in the court *a quo* that contractual terms are subject to constitutional rights.¹¹⁶ He indicated that judges have to take care not to impose their conceptions of fairness and justice on arrangements that were apparently concluded voluntarily. Constitutional values had to be employed only to strike down the 'unacceptable excesses of freedom of contract'.¹¹⁷

¹¹¹ *Brisley* par 20.

¹¹² Own emphasis.

¹¹³ *Bredenkamp and others v Standard Bank of South Africa* 2010 (4) SA 468 (SCA).

¹¹⁴ *Barkhuizen v Napier* CC 2007 (5) SA 323 (SCA).

¹¹⁵ *Barkhuizen* case par 11.

¹¹⁶ *Ibid* par 6.

¹¹⁷ Sutherland PJ "Ensuring Contractual Fairness in Consumer Contracts After *Barkhuizen v Napier* 2007 (5) SA 323 (CC): Part 2" *Stellenbosch Law Review* 2009 (20) 51.

He justified his support for this proposition with reference to his concurring judgment in *Brisley v Drotzky*. There he had confirmed that the law in general and the law of contract in particular are subject to the Bill of Rights and that fundamental constitutional values had to be taken into account in developing contract law.¹¹⁸

A concurring judgment by Cameron JA highlighted that all law is subject to constitutional control, and all law inconsistent with the Constitution is invalid, that includes the common law of contract, also held that the Constitution could only apply to contracts indirectly and in terms of section 39(2).¹¹⁹ Less time should be devoted to arcane technical arguments regarding the mechanics for applying the Constitution in private relations.¹²⁰ Commentators and courts struggle to find common ground because there appears to be no universal meanings of the expressions direct and indirect application.

Cameron JA stated that the law of contract is subject to the Constitution and that this means that courts are obliged to take fundamental constitutional values into account. Ngcobo J in the Constitutional court case of *Barkhuizen case v Napier* confirmed that sections 8(2) and 8(3) are the central provisions which determine direct application of the Constitution to the relationship between private parties.¹²¹

The right to have disputes resolved by a court is guaranteed in section 34 of the Constitution. Courts have accepted that unconscionable, unduly harsh or oppressive provisions could be struck down purely for being against public policy.¹²²

¹¹⁸ Barnard-Naude (2008) 155.

¹¹⁹ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) par 72.

¹²⁰ Pg 29 par 72.

¹²¹ *Barkhuizen v Napier* par 23-25.

¹²² *Ibid* 411.

2.2 Good Faith in Contracts

It has been stated that the legislature and the judiciary have indirectly employed the principle of good faith in contracts in order to bring about fairness in contractual terms. It is especially where unfair terms and conduct have been prevalent in contracts, excluding liability of the stronger party, that the courts have used their discretion in accordance with these specific statutes to declare these clauses ineffective on the grounds of unfairness.¹²³

According to Olivier JA, the South African law of contract has long considered all contracts as acts of good faith.¹²⁴ Van der Merwe elaborates that this is the case because we inherited substantial parts of the Roman-Dutch law of contract in which contracts were considered *iudicia bona fidei*.¹²⁵ The notion that consensus is the basis of contract is the idea that consensus necessarily implies that all contracts are entered into in good faith, which position was consistently adopted in Roman-Dutch law.¹²⁶ However in *Brisley v Drotsky*¹²⁷ the court accepted in principle that the unfair enforcement of a contract could be contrary to public policy and therefore affect the enforcement of the contract on this basis.

In this case the lessee's case fell far short of the requirement of exceptional fairness and therefore affected the enforcement of the contract. In this case the lessee's case fell far short of the requirement of exceptional fairness and the constitution requires that its values be employed to achieve a careful balance between the unacceptable excess of contractual freedom, and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity. The issues did not imperil that balance.¹²⁸

¹²³ See the opinion of the following authors in an article dealing with medical negligence: Steinman H.A and Jobson M.R "Multiple Organ Failure-Death of Consumer Protection?" SAMJ 2010 (100) 497.

¹²⁴ *Eerste Nasionale Bank v Saayman* 1997(4) SA 302 (SCA) 331.

¹²⁵ Van Der Merwe *et al* 319.

¹²⁶ Christie chap7.

¹²⁷ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

¹²⁸ *Brisley* 36.

Conversely, the value of good faith requires parties to honour their agreements, and it is asserted that the presence of consensus, together with the value of good faith, renders our law of contract inherently equitable, the concept of good faith is said to have infused the law of contract with an equitable spirit.¹²⁹

This interpretation of good faith seems to contradict the possibility of the absence of good faith being used as a defence to render an unfair contract unenforceable. In terms of this type of *exceptio* a contractant who was faced with an action on the contract would be allowed to raise in defence facts, which could not be entertained in terms of the strict civil law.¹³⁰ The *exceptio doli generalis* as discussed above was such a defence which eventually became the instrument for ameliorating the strictness of the civil law by introducing more equitable principles through Roman praetorian law.¹³¹ Initially the South African courts seemed prepared to accept that this remedy, as an instrument of equity, had been brought into our law by way of Roman-Dutch law.

The South African legal system has expressly been said to be equitable, and contracts have repeatedly been said to be acts involving good faith. It does not follow of necessity that contracts will be inherently just and fair merely because they accord with the existing rules and principles of the law including the provisions of the Constitution, and that there is no additional need to ensure their fairness.¹³² The motto of modern contract thus became this: 'A man is obliged in conscience to perform a contract which he has entered into freely, although it be a hard one'. Hahlo so aptly described it as follows: 'Darwinian survival of the fittest, the law of nature, also became the law of the marketplace'.¹³³

¹²⁹ Bhana D and Pieterse M 2006 "Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited" *SALJ* 2006 (122) 867-868.

¹³⁰ Van der Merwe *et al* 317.

¹³¹ Van der Merwe *et al* 318.

¹³² *Barkhuizen v Napier* par 23-25.

¹³³ Barnard 63.

The law merely fixes the boundaries of individual freedom by defining and enforcing rights. In the context of the law of contract, individualism believes that the parties create their own law through agreement which is itself a manifestation of the individual's autonomy.¹³⁴ In this regard, the point that has repeatedly been made by our own courts in the recent past is that good faith, reasonableness and fairness, although subjacent to, or underpinning the law of contract, can only be used in the resolution of contractual disputes to the extent that they have become embodied in so-called crystallized rules of the law of contract.¹³⁵

Consequently as we shall see, *the Bank of Lisbon* decision forms the focal point when it comes to the marginalization of good faith as the ethical element of contract in South Africa.¹³⁶ An important question here is whether the notion of good faith as a factor governing the contractual content provides a foundation for a doctrine of substantive unconscionability which could control unfair contracts directly. The problems in this regard are complex. It is not clear how such control could be enforced, for instance. A contract may be so unfair, may infringe against *bona fides* to such an extent, that it, or part of it, is contrary to public policy and hence void for illegality.

Another possibility is that a judicial power to modify unconscionable contracts may be based on the norm of good faith and may be exercised through the process of contractual interpretation.¹³⁷ There appears to be a close link between this notion and individual autonomy, the traditionally dominant contractual philosophy in South Africa.¹³⁸ The principle of good faith has not had a prominent role in South African contract law, because a less individualistic approach would have been necessary in order for fairness and the interests of others to be given higher priority.¹³⁹

¹³⁴ Barnard-Naude (2008) 164.

¹³⁵ *Ibid.*

¹³⁶ Par.95.

¹³⁷ Lubbe G and Murray C 255.

¹³⁸ Christie chap 7.

¹³⁹ Glover 134.

Freedom of contract still had an explicit and intricate connection with principles of morality such as fairness, conscience and justice. The principle of fairness is a concept which found favour with the English courts as far back as 1770. In the eighteenth century, the adoption of the principle of 'fairness' was based upon public interest, as the courts believed it was their duty to protect the weaker contracting parties from exploitation by the stronger parties to the contract.¹⁴⁰

In this understanding freedom to contract was still regarded as the imperative of good faith in contracts.¹⁴¹ As Atiyah points out, this meant that : 'the Courts were, at that time, still more interested in seeing that parties to a contract made a fair exchange, than they were in enforcing bare promises'. On this approach, contracts were not enforced meticulously. Instead, they were meticulously subjected to enquiries into the fairness of the exchange. In *Bredenkamp v Standard Bank* the court held that contracts that are prima facie unconstitutional are unenforceable. Furthermore, contracts that limit constitutional values should not be enforced where the limitation is unjustifiable or unfair and unreasonable.

¹⁴⁰ Bhana D and Pieterse M 864.

¹⁴¹ Barnard-Naude (2008) 162.

2.2.1 Theories of Good Faith

Before proceeding to discuss the further development of South African law in regard to good faith, it will be helpful to briefly consider three potential models for the operation of the principle of good faith.¹⁴² The approach adopted in South Africa that all contracts are *bona fidei* accords most closely with the model that Brownsword calls 'a good faith requirement'.¹⁴³

In terms of this interpretation good faith acts as a controlling principle that requires parties to comply with the standards of fair dealing that are already recognised and accepted in a particular contracting context (e.g. a sale of land or an employment contract).

These standards accord with the reasonable, legitimate expectations of the contracting community in the particular market. The second model, called 'a good faith regime', acts on the standards of fair dealing that are dictated or prescribed by co-operative ground rules established by law. Its content is derived not from the common standards of the parties in a particular contracting community (as with the first model) but from a moral form of contractual justice imposed by the legal system which would seemingly allow widely recognised market practices to be overridden.¹⁴⁴ The courts, as arbiters of public morality, are required to decide whether or not a contract or the process of contracting is in good faith.

¹⁴² Brownsword R and Hird NJ 'Good Faith in Contract: Concept and Context' (1999) 115.

¹⁴³ Brownsword 116.

¹⁴⁴ *Ibid.*

The third model, which Bridge¹⁴⁵ calls 'visceral justice'¹⁴⁶ gives judges judicial license to make decisions based entirely on their subjective notions of fairness in each case before them, all done in the name of good faith.¹⁴⁷ Clearly, this approach is untenable in a legal system which by its very nature depends on rules, principles and precedent for the proper administration of justice.

The case of *Brisley v Drotsky*¹⁴⁸ is of critical importance, because it reflects the current judicial attitude towards fairness in contract law, and provides current authority in this regard.¹⁴⁹ The Supreme Court of Appeal held that a court cannot refuse to enforce a contractual provision simply on the basis of good faith. According to Cameron AJ good faith is not a 'free-floating' principle capable of independent application but instead is an underlying value that informs the various rules and principles of the law of contract including the rules regarding illegality.¹⁵⁰ Hawthorne submitted that what was necessary was for good faith to be given a concrete content in its application both to particular instances and to the operation of the contract.¹⁵¹

The Supreme Court of Appeal in the *Brisley* case was prepared to make what was intended to be a definitive pronouncement on the nature and role of good faith in South African contract law, which was something akin to Brownsword's good faith requirement. In short, the majority dismissed the views of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* as those of a single judge, and held that good faith cannot be accepted as an independent basis for setting aside contractual provisions. It was alleged that a non-variation clause in a lease agreement could not be enforced because it was unreasonable, unfair and in conflict with the principles of good faith.

¹⁴⁵ Brownsword 140.

¹⁴⁶ Brownsword 115.

¹⁴⁷ Brownsword 116.

¹⁴⁸ *Ibid.*

¹⁴⁹ Lewis J "Fairness in SA Contract Law" 330.

¹⁵⁰ *Brisley v Drotsky* 12G-19C.

¹⁵¹ Hawthorne L "The Principle of Equality in the Law of Contract" *THRHR* 1995 (58) 157-172.

The court rejected this argument on the basis that there was no general equitable discretion enabling a court to refuse to enforce any contractual provision merely on the grounds of it being unreasonable, unconscionable or against good faith. The court held that good faith is a foundational principle that underlies contract law and finds expression in the specific rules and principles of such law.

Good faith does not constitute ‘an independent, or free-floating’ basis for the setting aside or non-enforcement of contractual provisions.¹⁵² In *Afrox Healthcare Ltd v Strydom*¹⁵³ it was contended that an exemption clause was unenforceable for the reason that it was, *inter alia*, unreasonable, unfair and in conflict with the principles of *bona fides* or good faith. Brand JA (on behalf of all the members of the court) endorsed the preceding decision in *Brisley v Drotzky*, stating that abstract ideas such as good faith, reasonableness, fairness and justice provide the foundation and justification for the existence of legal rules, although they are not legal rules in themselves, and therefore have indirect application only. Good faith therefore governs the performance of contracts but is not considered a requirement for the enforceability of the contract.¹⁵⁴

Lubbe expresses it as follows: ‘Good faith does not, on the view adopted by the court, operate on the black-letter or doctrinal level as an open norm’ and entails no more than that the courts in the enunciation of legal doctrine should regard undifferentiated equitable considerations.¹⁵⁵ In both cases, however, the Supreme Court of Appeal recognised public policy as a legitimate basis for the setting aside of unfair contract provisions¹⁵⁶ although on the facts of the cases before the respective courts decided not to do so.

¹⁵³ *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA).

¹⁵⁴ *Brisley v Drotzky* 2002 (4) SA 1 15.

¹⁵⁵ Lubbe “Taking fundamental rights seriously: the bill of rights and its implications for the development of contract law” SALJ 2004 395.

¹⁵⁶ *Brisley v Drotzky* 34F and *Afrox Healthcare Ltd v Strydom* 37C–D.

A practical illustration of how the underlying abstract values of good faith and equity operate in South African law is to be found in the more recent judgment of the Supreme Court of Appeal in *South African Forestry Co Ltd v York Timbers Ltd*¹⁵⁷ In this case a dispute arose from long-term contracts for the supply of raw logs from the plantations of the South African Forestry Company (SAFCOL) to the York sawmills. Because the duration of the contracts was so long, they provided for a revision-of-price mechanism which required a certain amount of cooperation from York.

Through a series of clever manoeuvres, York succeeded, however, to avoid these revision procedures, which enabled it to sell its timber at prices 60 per cent lower than its competitors, who also obtained their saw logs from SAFCOL under similar contracts, but who had cooperated in price-revision proceedings. In the event SAFCOL sought to cancel the contracts, essentially on the basis that York's conduct was in conflict with the dictates of fairness, reasonableness and good faith.

In the High Court, York successfully resisted the cancellation, but this decision was set aside on appeal in the Supreme Court of Appeal. In the course of its judgment, the court confirmed the position it took in *Brisley and Afrox*, namely that abstract values do not constitute substantive rules that can be employed by the courts to intervene in contractual relationships, but that these values perform creative, informative and controlling functions through established rules of contract law. Two examples of how these values operate in practice appear from further statements in the judgment.

First with reference to terms implied by law, the so-called *naturalia* of the contract, the court said: Unlike tacit terms which are based on the inferred intention of the parties, implied terms are imported into contracts. Although a number of standard implied terms have evolved in the course of development of our contract law, the courts have the inherent power to develop new implied terms.

¹⁵⁷ 2005 (3) SA 323 (SCA).

The judge held that our court's approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly their powers of complementing or restricting the obligations of parties to a contract by implying that these should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith.¹⁵⁸

The question whether parties have complied with their contractual obligations depends on the terms of the contract as determined by proper interpretation. The court has no power to deviate from the intention of the parties, as determined through the interpretation of the contract, because it may be regarded as unfair to one of them however, in the interpretation process, the notions of fairness and good faith that underlie the law of contract again have a role to play.

While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different where a contract is ambiguous. In such a case the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.

In accordance with this approach to interpretation, the court eventually held that, although the terms of the contracts imposed no express duty on York to assist SAFCOL in the exercise of its right to seek a price increase, the underlying principle of fairness and good faith requires the importation of this duty either through the interpretation process or by incorporation of an implied term. And because York had failed to comply with this contractual obligation, SAFCOL was entitled to cancel the agreements.

¹⁵⁸ *Ibid* par. 31–2.

South African law furthermore recognises the following grounds for setting aside a contract: namely, misrepresentation, duress, undue influence and commercial bribery. Lack of good faith is not the only option available for setting aside of a contract. In terms of our common law consent that is improperly obtained by the factors discussed below, allows an injured party to void a contract.

2.3 Consensus obtained by improper means

The general consideration which underlies the voidability of a contract is the fact that consensus has been obtained in a manner which, in the eyes of the law, is improper. What the word 'improper' refers to, are special grounds for rescission which have been identified over the course of time.¹⁵⁹

The law acknowledges misrepresentation, duress, undue influence and economic bribery. There is often no clear division between the grounds for rescission - particularly duress and undue influence may overlap. In *Savvides v Savvides*¹⁶⁰, an applicant requested that a power of attorney which she had executed in favour of her husband be rescinded on the ground which she called 'duress'; her husband has threatened to leave the matrimonial home permanently.

According to the court the threat in question could as well have constituted undue influence. It is in keeping with the values protected by the Constitution and with good faith, and in the public interest that serious expressions of intent must be adhered to and be given their intended legal consequences.¹⁶¹

¹⁵⁹ Van Der Merwe *et al* 104.

¹⁶⁰ 1986(2)SA 325 (T).

¹⁶¹ Hawthorne L "The Principle of Equality in the Law of Contract" *THRHR* 1995 (58) 157-172.

Therefore a party to a contract could only avoid contractual liability based on the conduct of the other party in limited circumstances. Firstly he could rely on the fact that consensus was absent and the contract void due to the presence of a material and reasonable error in the minds of the parties. In the second instance, he could rely on the fact that consensus was improperly obtained due to the party's misrepresentation, undue influence, duress, or commercial bribery. In addition to the three well-known common law factors that were adopted from Roman law, namely misrepresentation, duress and undue influence, commercial bribery was only acknowledged by our courts as a factor as late as 1999 in the case of *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd*¹⁶²

The courts also used doctrines such as good faith and now even the statutory concept of 'unconscionability'¹⁶³ to rescind contracts tainted by procedural unfairness. The CPA recently introduced unconscionability as another factor for setting aside a contract based on the conduct of one of the contracting parties in section 40 of the Act.¹⁶⁴

¹⁶² 1999 (2) SA 719 (SCA) 720.

¹⁶³ CPA s1 and chap 2, part F, s40.

¹⁶⁴ Ch4 of the Act.

2.4 Misrepresentation

A party who has been induced to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into the contract. Misrepresentation is one of several vitiating factors that can affect the validity of a contract. A misrepresentation occurs when one party makes a false statement, inducing another party to contract. For an action to be successful, the following criteria must be met in order to prove a misrepresentation:

- A false statement of past or existing fact has been made,
- The statement was directed at the innocent party and
- The statement had acted to induce the innocent party to contract.¹⁶⁵

If a statement of fact is made but the representor fails to include information which would significantly alter the interpretation of this fact, then a misrepresentation may have occurred.¹⁶⁶ The victim of misrepresentation cannot be permitted to rescind the contract unless it can be proven that there was misrepresentation to enter into a contract.¹⁶⁷

A consumer seeking to establish a cause of action founded on misrepresentation – whether innocent, negligent or fraudulent – must fulfil the following criteria:

- There must have been a misrepresentation of fact made prior to conclusion of the contract; either by inaccurate statement or by positive act. In the limited circumstances in which a duty to disclose exists, non-disclosure may also amount to a misrepresentation. Statements of opinion, *verba jactantia* (e.g. invitations to treat or 'trade puffs') or statements of future intention will not suffice.
- The misrepresentation must have been made by the trader or by another party acting on behalf of the trader.¹⁶⁸

¹⁶⁵ Hutchison 124-125; *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397(A) 407-411.

¹⁶⁶ Christie 301-312.

¹⁶⁷ Christie 316.

¹⁶⁸ Kerr AJ 'The Principles of the Law of Contract' 2002 231.

- The misrepresentation must be shown to be material in the sense that it was a factor which would have induced a reasonable person to enter into the contract.
- The misrepresentation was a factor which actually induced the consumer to enter the contract; although it need not be the sole factor.

Where the above criteria are met, the misrepresentation is said to be operative and, in the absence of further averments, the ensuing contract may be challenged on the ground that it was induced by misrepresentation.

2.5 Duress

Duress is pressure exerted upon a person to coerce that person to perform an act that he or she ordinarily would not perform. In jurisprudence, duress or coercion refers to a situation whereby a person performs an act as a result of violence, threat or other pressure against the person. Other sources define duress as 'any unlawful threat or coercion used to induce another to act [or not act] in a certain manner'.¹⁶⁹ Duress has two aspects, one is that it negates the person's consent to an act or the entering into a contract; or, secondly, as a possible legal defence or justification to an otherwise unlawful act. A defendant utilizing the duress defence admits to breaking the law, but claims that he/she is not liable because, even though the act broke the law, it was only performed because of extreme unlawful pressure.¹⁷⁰

Duress in the context of contract law is a common law defence, and if one is successful in proving that the contract is vitiated by duress, the contract may be rescinded, since it is then voidable. Where a person seeks to set aside a contract, or resist the enforcement on ground of duress based on fear, the following elements must be established:-

- The fear must be a reasonable one.
- It must be caused by the threat of some considerable evil to the person concerned or his family.
- It must be the threat of an imminent evil or inevitable evil.

¹⁶⁹ Lubbe G and Murray C 356.

¹⁷⁰ Christie 345.

- The threat or intimidation must be unlawful or *contra bonos mores*.
- The moral pressure used must have caused damage.¹⁷¹

Duress in contract law falls into two broad categories: physical duress, and economic duress. The minority judgment by Olivier JA in *BOE Bank Bpk v Van Zyl*¹⁷² gave rise to uncertainty and controversy in the High courts about whether unreasonableness, unfairness and unconscionable can be used not to enforce an invalid restraint, alternatively where the restraint of trade was given under duress. The court re-affirmed that the party wishing to rely on duress in order to set aside a contract can do so. Held, it is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest¹⁷³

In South African law, an aggrieved party who has been coerced into entering a contract under duress may avoid the contract. The party alleging that the agreement has been concluded under duress will bear the onus of proving this fact, whether he or she litigates as plaintiff or defendant. In the formative period of South African law, there was, as was stated above, no certain or coherent formula for deciding cases involving duress. The first attempt to address this problem was made only in 1937, by Wessels. In his ground-breaking work 'The Law of Contract in South Africa', the erstwhile Chief Justice of South Africa conducted a careful analysis of the old authorities before identifying a set of five essential elements which, in his opinion, ought to be proven before a case of duress could be made out. These are actual violence or reasonable fear; the fear must be caused by the threat of some considerable evil to the party or his family; it must be a threat of imminent or inevitable evil. The threat or intimidation must be *contra bonos mores*; and the moral pressure used must have caused damage¹⁷⁴.

¹⁷¹ Lubbe G and Murray C 356.

¹⁷² *BOE Bank Bpk v Van Zyl* 2002 (5) SA165 (C)180.

¹⁷³ Par 36.

¹⁷⁴ Wessels 1167.

2.6 Unconscionability

The term 'unconscionable' is borrowed from moral philosophy and ethics. As close to a universal definition as we are likely to get is 'that which offend the sense of decency'.¹⁷⁵ If a contract or term therefore is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.¹⁷⁶

It is a long standing principle which can be traced as far back as the time of Nottingham¹⁷⁷ (allegedly the father of modern equity) that 'just as a Court of equity suffers no man to overreach another, so it helps no man who hath overreached himself without any practice or plan of his rival'.

The equitable jurisdiction to relieve a party from an unconscionable bargain is one of the well-established heads of equitable relief which applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interest and, the other party unconscientiously takes advantage of the opportunity thus placed in his hands.¹⁷⁸

The ideal that the law should be certain is often contrasted in relation to such an argument as adduced in *Preller and Others v Jordan*¹⁷⁹ against the acceptance of an extended meaning of *dolus* and the recognition of a remedy based on undue influence.

¹⁷⁵ *Bank of Lisbon* 12.

¹⁷⁶ Calamari JD and Perillo JM *Contracts* 1970 par 9-39.

¹⁷⁷ Hanbury HG "Field of Modern Equity" *LQR* 1929 (45) 196.

¹⁷⁸ *Ibid.*

¹⁷⁹ 1956 (1) SA 483 (A) 4.

2.6.1 Theory of unconscionability

In his journal article 'The Bargain Principle and Its Limits'¹⁸⁰ the author Eisenberg pleads the case for a doctrine of unfair persuasion within the principle of unconscionability. He proposes that strict enforcement of bargain promises should be limited in cases of unfair persuasion,¹⁸¹ which is a subset of cases within his examination of the principle of unconscionability, whose defining characteristic is the utilization of bargaining methods that produce a state of acquiescence. In this transitory state, the weakened party is incapable of acting in her normal deliberate manner.

Eisenberg advocates for a doctrine of unfair persuasion within the principle of unconscionability. He proposes a strict enforcement of Barnett's¹⁸² consent theory approach to contractual obligation, where the consent theory specifies that a *promisor* incurs a contractual obligation, the legal enforcement of which is morally justifiable by manifesting assent to legal enforcement and thereby invoking the institution of contract.¹⁸³

The consent theory represents a moral and realist refinement of the freedom of contract notion. Parties may bargain freely, however, the objective manifestations of their assent may require greater verification. True contract validity rests with the establishment of real or palpable assent. Thus, objective manifestations, such as a signature on a form, may not constitute the genuine assent necessary to justify enforcement.¹⁸⁴

¹⁸⁰ Eisenberg MA "The Bargain Principle and Its Limits" *Harvard Law Review* 1982 (95) 450.

¹⁸¹ Eisenberg 741.

¹⁸² Barnett RE "A consent theory of contract" *Columbia Law Review* 1986 (2) 269-321.

¹⁸³ *Supra*.

¹⁸⁴ Dimatteo LA "A consent theory of unconscionability: An empirical study of law in action" *Florida State University Law Review* 2006 (3) 1069.

In addition to understanding the nature of the disadvantage which brings equitable relief from an 'unconscionable bargain' into play, it is also fundamental to the doctrine that equitable fraud is made out, for it is the fraud that equity will not suffer. The 'special disadvantage' which is necessary for the doctrine to operate requires that there be a marked imbalance in power between the two parties, but it is the abuse of the opportunity that stems from this imbalance which is the key to the doctrine. The doctrine of unconscionable bargains involves a consideration of both procedural and substantive factors. The bargain will be found to be unconscionable where this imbalance between law and equity.¹⁸⁵

The CPA has now introduced the statutory concept of unconscionability into our law and has provided a description of the conduct that can be deemed to be unconscionable. This is discussed in detail further below in chapter 4. As a last resort under common law, a contract may be set aside because it is contrary to public policy to enforce it. Public policy considerations have over time adapted to the developing society as is discussed briefly below.

2.7 Public policy and Constitutional values

Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals.¹⁸⁶ Public policy is informed by the concept of Ubuntu. Ubuntu(-ism), which is central to age-old African custom and tradition however, abounds with values and ideas which have the potential of shaping not only current indigenous law institutions, but South African jurisprudence as a whole. Ubuntu can therefore become central to a new South African jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance.¹⁸⁷

¹⁸⁵ Dimatteo 1076.

¹⁸⁶ Kerr (2008) 248.

¹⁸⁷ Mokgoro Y "Ubuntu and the law in South Africa" *Potchefstroom Electronic Law Journal* 1989 93.

In the long run, a legal system that expressly places itself on the basis of constitutionality enshrined values can hardly avoid choosing a generalizing approach.¹⁸⁸ This would require accepting that good faith as a value or principle which underlies and informs the more technical rules of the law of contract, and which must be given concrete content when it is applied in particular instances, also applies in the operation of contracts.¹⁸⁹

In the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*¹⁹⁰ the application of leave to appeal required consideration of the circumstances in which the court should intervene to infuse the law of contract with constitutional values. In addition, it dealt with whether the principles of good faith and Ubuntu are to be imported into the law of contract.

The court held that it is generally desirable for the law of contract to be developed by infusion of such principles though the case for doing so in a particular situation must be properly pleaded.¹⁹¹ In this case the applicability of principles of good faith in contract law, *pacta sunt servanda*, and Ubuntu might have persuaded the court to entertain the appeal in this case.¹⁹²

Freedom of contract becomes internally defined by the right in section 22 of the Constitution and, for that matter, any other right in the Bill of Rights as well as its founding values and ideals. But such an approach is only possible once one accepts that section 22 is on an equal footing with freedom of contract.¹⁹³ To enforce grossly unreasonable contract may in the appropriate circumstances be considered as against public policy or *boni mores*.¹⁹⁴

2.7.1 The impact of constitutional values on public policy

¹⁸⁸ Calamari JD and Perillo JM 'Contracts' 2nd ed 1970 par 9-39.

¹⁸⁹ Van der Merwe *et al* 319.

¹⁹⁰ 2012 (1) SA 256 CC.

¹⁹¹ *Everfresh* 274E - 276A.

¹⁹² *Everfresh* 2761 - 277C.

¹⁹³ Barnard-Naude (2008) 172.

¹⁹⁴ Brand 71.

The strongly contrasting dissenting judgment of Jansen JA in the *Bank of Lisbon* case, in which he argues for the retention of the *exceptio*, is of interest on this point. He questions that both the substantive principle of individualism and the formal principle of certainty are absolute in law.¹⁹⁵ It was said that the recognition of the *exceptio doli* in this sense would be a contravention of the freedom of contract and the principle that *pacta servanda sunt* is that it would lead to legal uncertainty. Freedom of contract, the principles of *pacta servanda sunt* and certainty are not however and can never be absolute values.¹⁹⁶

The attempt to rid our law of the *exceptio doli generalis* should then, given these observations understood to be part of the attempt to keep freedom of contract as the will theory and the maxim *pacta servanda sunt*, firmly in force.¹⁹⁷

2.8 Conclusion

The *exceptio doli* was retained to eliminate obvious unfairness. However, in 1988 this remedy was held not to be part of the South African common law. The apparent reason was that the rediscovery of *bona fides* had made the *exceptio* superfluous.¹⁹⁸ Thus, the challenge became to give content to the age-old formula *ex fide bona*. However, subsequent events show an inability from the side of courts and academia to give meaningful content to good faith, 'which turn of events may be explained by the disappearance of the moral values which have been swept away by the waves of economic liberalism'.¹⁹⁹

It is clear from the case law that courts had no hard and fast rules when it came to the application of the *exceptio* to the facts of the case before them. In most cases the judges, due to the uncertainty, exercised their discretion in making the determination on whether or not to apply the

¹⁹⁵ *Bank of Lisbon* case 613B.

¹⁹⁶ *Bank of Lisbon* case 592G.

¹⁹⁷ Barnard-Naude (2008) 179.

¹⁹⁸ *Bank of Lisbon* case 607B.

¹⁹⁹ Thomas 195.

exceptio. The judgment in *Bank of Lisbon case* was an unfortunate judgment and it lacked general policy considerations.²⁰⁰ The general opinion was that the judgment was not keeping with the spirit of justice and reasonableness which informed the Justinian Roman Law, the Roman Dutch Law and South African common law.²⁰¹

This missed opportunity to infuse the law of contract with equitable principles is all the more significant given that a large part of the population has viewed the legitimacy of the legal system and the judiciary with suspicion, as a result of the implementation and enforcement of apartheid. The avenue opened by the new constitutional dispensation to assume a jurisdiction to decide by equity should have been followed by a judiciary that had previously considered itself bound to enforce all laws. The obvious route is to develop the open norms of the South African common law, such as *bona fides*, public policy, and *boni mores* in accordance with the constitutional mandate.²⁰² It is suggested that there is a unity of purpose among the doctrines in their concern to police the pre-contractual conduct of the parties, to ensure that such conduct meets with the moral standards which society expects in the circumstances.²⁰³

²⁰⁰ Christie 12.

²⁰¹ Kerr AJ "The defence of unfair conduct on the part of the plaintiff at the time action is brought: the *exceptio doli generalis* and the *replication doli* in modern law" 245.

²⁰² Hawthorne L "The End of Bona Fides" *SAMerc LJ* 2003 271.

²⁰³ Kucher N. A "Pre-contractual liability: Protecting the rights of the parties engaged in negotiations" 2004 (www.NYU Hauser Global Law School) (accessed 20/7/2012).

CHAPTER 3

REGULATION OF CONSUMER AFFAIRS PRIOR TO THE CONSUMER PROTECTION ACT

3.1 Introduction

Prior to the implementation of the CPA, the courts used *inter alia* the principles of public policy and factors that influence consensus to resolve contractual disputes pertaining to enforcing contracts that offended one's sense of fairness.²⁰⁴ This was discussed in the preceding chapter.

3.2 A call for Consumer Protection in South Africa

The apartheid legacy of poverty, high levels of illiteracy, socio-economic inequalities, wide spread human rights abuses including consumer rights abuses posed a great challenge and has led the majority of people to view consumer contracts with scepticism.²⁰⁵

The CPA came into force as part of government's initiative to overcome the challenge to create an environment where a culture of consumer rights and responsibilities prevails. Such an environment is not only beneficial to consumers but to business as well. The intention is to rid the market of unethical traders and to contribute to the creation of a fair, competitive and equitable environment for all.²⁰⁶

²⁰⁴ Van der Merwe *et al* 'Contract General Principles' 319.

²⁰⁵ As confirmed in the Consumer Policy Framework 2004 Vol.471 GG No. 26774.

²⁰⁶ The Green Paper on Consumer Protection Bill "Foreword of the speech delivered by the Minister of Trade and Industry" 2004.

Before the implementation of the CPA common law as well as statutory protection measures were in force to assist the judiciary in their task to guarantee justice in consumer contracts.²⁰⁷

The system of consumer laws in South Africa preceding the CPA has been fragmented and predicated on principles contrary to the democratic system. Countries in regions such as the EU, Sub-Saharan Africa, the Caribbean, and Asia-Pacific have recently undertaken comprehensive consumer law reviews and have also adopted a rights based culture towards consumer protection.

Consumer transactions, such as purchases by individual consumers from suppliers, were characterised by imbalances in the provision of information and bargaining power between businesses and consumers. In order to promote consumer confidence, it was therefore necessary to develop guiding principles for market interaction, and some fundamental rules of conduct.²⁰⁸

The changes in the marketplace over the past few years, coupled with the fact that the common law was not protecting consumers adequately, prompted the Department of Trade and Industry to create a new Act that aimed to consolidate consumer laws in one piece of legislation.²⁰⁹ Legislative intervention was required to upgrade the principles to create a balance between the rights and duties of consumers, manufacturers, retailers and suppliers, conform to International Best Practice and allow ethical business to be sufficiently protected against unethical conduct, thereby fostering consumer confidence and reducing costs of business.²¹⁰

²⁰⁷ Ch 2; Sales & Services Matters Act 25 of 1964; Trade Practices Act 76 of 1976; Consumer Affairs Act (Unfair Business Practices Act, Act 71 of 1988); Price Control Act 25 of 1964; Business Names Act 27 of 1960 serve as some of the examples of this type of legislation.

²⁰⁸ The Green Paper on the Consumer Protection Bill GG 9 September 2004 No. 26774 11.

²⁰⁹ <http://thedti.gov.za/ccrdlawreview/forward.htm> (accessed 28/07/2010).

²¹⁰ *Ibid.*

3.3 Older Legislative Interventions for Consumer Protection

3.3.1 General

As stated above, numerous pieces of legislation relative to consumer protection were in force in South Africa.²¹¹ These consumer laws were out-dated, fragmented and predicated on principles contrary to the democratic system. Prior to the CPA, there was no substantial review of consumer protection legislation or practices.²¹² The various legislative provisions dealing with consumer rights were contained in approximately 60 different statutes, some of which dated back all the way to 65 years ago, and which were spread between different state departments. General consumer protection measures were contained in the following statutes which were all repealed by section 122 of the CPA:

3.3.2 The Consumer Affairs (Unfair Business Terms) Act²¹³

The Consumer Affairs (Unfair Business Terms) Act provided for the prohibition and control of unfair business practices. An unfair business practice was defined as any practice whether directly or indirectly has, or is likely to have the effect of harming relations between consumers and business, unreasonably prejudicing any consumer, deceiving any consumer, or unfairly affecting any consumer. It is clear that the concept of unreasonableness also found favour in consumer disputes through this legislation.

²¹¹ Sales and Services Matters Act 25 of 1964, Trade Practices Act 76 of 1976, Consumer Affairs Act (Unfair Business Practice Act 71 of 1988, Price Control Act 25 of 1964, Business Names Act 27 of 1960.

²¹² www.the dti.gov.za/docs 2009.

²¹³ Act 71 of 1988.

3.3.3 The Sales and Services Matters Act²¹⁴

The Sales and Services Matters Act regulated the display and marketing of goods and prohibited the sale of certain goods. The purpose of the Act was to establish national norms on sales and services offered by the retailers.

3.3.4 The Trade Practices Act²¹⁵

The Trade Practices Act as amended which intended to protect consumers against false and misleading conduct. The Act provided for remedies where there was misleading or deceptive conduct: In Section 52, it provides as follows:

s52. (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1).

The common law incorporates the cornerstone principle of freedom to contract, which provides that parties are free to decide on the terms of their agreement with the only exception that an agreement must be lawful or legally possible (which entails that it must not be contrary to the common law and the agreement must be legally executable). The CPA, however, contains provisions that restrict the parties' freedom to contract.²¹⁶

²¹⁴ Act 25 of 1964.

²¹⁵ Act 76 of 1976.

²¹⁶ s14;17;26;47;48;58 CPA.

3.3.5 The Price Control Act²¹⁷

The Price Control Act promoted and controlled competitive prices. The purpose of the Act was to provide for the control of prices, the sale of goods and the rendering of services and other incidental matters. To regulate the maximum price that can be charged for any class of goods The ambit of the CPA is wide enough to have an impact on the price of products²¹⁸ The CPA will bring about a complete turnaround from the position where the consumer typically assumed most of the risks in a transaction to the supplier now assuming these risks.

In terms of the common law principle *caveat subscriptor*, when an agreement is reduced to writing and signed by the parties, they are bound to its terms as signature signifies assent thereto. This places the burden on the consumer to protect himself by understanding the terms of the agreement before signing it, as he will be bound to their ordinary meaning.

The CPA has, however, shifted the burden of 'understanding' the agreement from the consumer to the supplier. Section 22 of the Act requires the supplier to ensure a consumer agreement is in 'plain and understandable language' and s 50 states that an agreement reduced to writing must contain a breakdown of the consumer's financial obligations (where a signature may not be required unless the parties agree to this or law prescribes otherwise). These sections place the burden on the supplier to ensure that the consumer understands the terms of the agreement, including financial obligations.

²¹⁷ Act 25 of 1964.

²¹⁸ The preamble to the CPA briefly summarises as follows: "To promote a fair, accessible and sustainable marketplace for products and services by setting national norms and standards relating to consumer protection".

3.3.6 The Business Names Act²¹⁹

This Act regulated the control of business names and for matters incidental thereto. Previously, some businesses would trade under one name (their trading name) but would fail to disclose the identity of the actual entity behind their transactions. This would frustrate attempts by consumers to seek redress against suppliers given that they weren't always sure who they were to pursue. The abovementioned consumer protection measures serve as examples of measures that provided insufficient protection in a general sense, and consumers were unaware of the redress they provided.

There are no formalities in terms of the common law for entering into any contract. However, where the parties agree to such formalities, or if the law prescribes these, the agreement needs to be in writing and signed. An agreement reduced to writing and signed by the parties has been affected by the CPA which has as its main objective the protection of consumers while establishing duties for suppliers in respect of a consumer agreement. The CPA has now radically overhauled the manner and form in which business is conducted in our country. This is primarily because the Act now formally entrenches the type of business conduct between consumer and business that is deemed acceptable or not. Previously, this was not the case and many types of conduct were often perceived to be unfair, yet due to a lack of legislation questionable practices were often a common occurrence. This was often to the detriment of consumers. The Act now formally entrenches the rights and obligations of both consumers and business.

²¹⁹ Act 27 of 1960.

3.4 Impact of the Decision in the *Bank of Lisbon* Case on legislative intervention

The decision in *Bank of Lisbon*²²⁰ which decided that the recognition of the *exceptio doli* in the form of a determined rule would lead to legal uncertainty, also gave rise to a further consequence. There were those who suggested that this decision made it necessary for the legislature to intervene.²²¹ This led to an enquiry by the South African Law Commission²²² into the question whether the courts should be able to remedy contracts or contractual terms that are unjust or unconscionable and thus to modify the application to a particular situations before the courts.²²³ The fundamental need for consumer protection related to South Africa's continued adherence to the freedom of contract principle, inequality of bargaining power combined with the lack of knowledge of consumer rights and inequality of resources between the contracting parties.²²⁴

It was therefore necessary to develop a simple, comprehensive and accessible consumer law which would serve as a single reference to consumers and to business, which would outline the fundamental rules of conduct and grant consumers basic rights in order to give them certainty in their interaction in the market place. The above circumstances lead to the final enactment of the CPA in 2011.

²²⁰ *Ibid.*

²²¹ Project 47 at 547.

²²² Project 47 at 33-49.

²²³ Brand 71.

²²⁴ Hawthorne L "The New Learning and Transformation of Contract Law" *SAPR* 2008 (23) 82.

3.5 Submissions made for and against consumer legislation

The Commission in its reports on unfair contractual terms recommended that courts should be afforded jurisdiction to amend or rescind a contract, or any of its terms, if it is of the view that the enforcement of the contract, or some of its provisions, would be unreasonable, unconscionable or oppressive.²²⁵

The project committee's proposals elicited objections from various quarters. For example, one such objection was succinctly formulated as follows: To give the courts full authority discretion to strike down contracts on the basis of 'unconscionability' would in all likelihood provoke much legal and commercial uncertainty: contractual litigation would mushroom, the expectations of contracting parties could be frustrated, and the courts would in all probability differ regarding the application of such wide principles.²²⁶

Irrespective of concerns, the government continued in promulgating the generalised consumer protection statute that is today the Consumer Protection Act 68 of 2008. This Act is analysed in greater detail in the following chapter.

²²⁵ Project 47 at 48.

²²⁶ Project 47 at 58; *Barkhuizen v Napier* CC 323.

3.6 Conclusion

Consumer protection is an integral part of a modern, efficient, effective and just market place. The need to put in place a framework for consumers was seen in this context, also as part of the overall strategy to improve the competitiveness of our country, rather than as an attempt by government to impose more onerous regulation on the private sector.²²⁷ Consumer protection measures were in the past fragmented and limited to only specific aspects and industries. The legislature has now reacted to the proposal of the Law Commission by enacting the CPA which has become a major influence on the general law of contract and has introduced greater consumer protection measures, as well as broad defences to the benefit of consumers against contractual liabilities ensuing from the unconscionable practices and conduct of suppliers and service providers. The provisions of the CPA, with specific focus on unconscionability are discussed in detail in the following chapter.

²²⁷ *Bank of Lisbon case 607B.*

CHAPTER 4

THE CONSUMER PROTECTION ACT AND THE *EXCEPTIO DOLI GENERALIS*

4. Introduction

South Africa has been lacking comprehensive legislation that seeks to protect consumers against unfair contractual terms.²²⁸ This is the result of the apartheid and discriminatory laws of the past that have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality.²²⁹ The Law Commission published a report recommending the introduction of a legislation dealing with unfair contract terms.²³⁰ The new Consumer Protection Act is set to change the face of business in South Africa. The Act has been commended as one of the best consumer protection acts on the African continent²³¹ and also one of the best of its kind in the world.²³² The aim of the Act is to promote and advance the social and economic welfare of consumers in South Africa.²³³ It also aims to address socio economic inequality, achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally and to promote fair business practices.²³⁴

²²⁸ Naudé T "The Consumer Right to Fair, Reasonable and Just Terms under the New Consumer Protection Act in Comparative Perspective" 2009 (126) *SALJ* 515-547.

²²⁹ Preamble to the CPA; s3(1).

²³⁰ Fn 1.

²³¹ Naudé T 512.

²³² Downing R "New Consumer Act could lead to USA-type of behaviour" (www.bdlive.co.za/articles/id=137862) (accessed 22/03/2011).

²³³ Kucher NA "Pre-contractual liability: Protecting the rights of the parties engaged in negotiations" 2004.

²³⁴ Preamble of the CPA.

The CPA offers wide protection to consumers, and regarding unconscionable clauses and conduct, sections that echo the general scope of the old defence known as the *exceptio doli*.²³⁵ This is evident from the clauses in the Act that are particularly focused on the protection of consumers against unconscionable, unjust and other deceptive and misleading trade practices. The Act repealed a number of fragmented and not so popular statutes dealing with consumer rights.²³⁶

4.1 Overview of the Consumer Protection Act

The purpose of the CPA is to regulate both market practices and transaction agreements.²³⁷ This is very important as it means that South African consumer law will not only be applicable to transactions between businesses and consumers, but also to transactions between businesses. This was an interesting choice by the legislature, given those entirely different and complex considerations that exist in business-to-business transactions. The parameters of consumer law are also informed by its sources.

The CPA is not the only source of consumer law. As stated previously, the CPA is not the only statute in this country which regulates the interaction between consumers and suppliers. All of the following operational acts contain measures for consumer protection: the National Credit Act 34 of 2005; the Competition Act 89 of 1998; the Financial Advisory and Intermediary Services Act 37 of 2002; the Short-Term Insurance Act 53 of 1998; the Pension Funds Act 24 of 1956; the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1974, and others. Few of these statutes deal with general issues pertaining to unconscionability and fairness of contractual clauses.

²³⁵ Veldsman L and Kuschke B “The *exceptio doli generalis* - back again?” *Without Prejudice* 2012 (12:4) 48.

²³⁶ s121(2) CPA.

²³⁷ s3(1) CPA.

The CPA provides that it must not be interpreted to exclude any right which the consumer may have under the common law.²³⁸ The CPA and the common law therefore apply in conjunction with each other and the common law cannot be disregarded when the rights of consumers (and the obligations of suppliers) are interpreted and applied. This means that applicable Roman law, Roman-Dutch Law, the general South African principles of contract law, particularly those dealing with pre-contractual representations and the law relating to product liability (the law of delict, in other words) also form part of this broader area of law. It must be mentioned that the CPA²³⁹ (amongst others) attempts to govern comprehensively what can and cannot appear in a consumer contract.

4.2 Scope of the CPA

The Act covers both goods and services delivered or rendered in the ordinary course of business. It applies to transactions (occurring within the Republic) between suppliers and consumers with regard to goods and services unless specifically exempted; the promotion of goods and services; goods and services themselves and goods which form the subject of an exempted transaction.²⁴⁰

The Act does not apply to the following transactions:-²⁴¹

- when goods or services are promoted or supplied to the State;
- when the consumer is a juristic person whose asset value or annual turnover equals or exceeds the threshold value determined by the Minister;
- a credit agreement under the National Credit Act, 2005;
- services to be supplied under an employment contract giving effect to a collective bargaining agreement; or
- a collective agreement as set out in the Labour Relations Act, 1995.

²³⁸ s2(10) Chap 1 & 2 CPA.

²³⁹ s51 CPA.

²⁴⁰ s5(1) CPA.

²⁴¹ s5(2) CPA.

Apart from the aforesaid exclusions, it is possible for a regulatory authority to apply to the relevant Minister for industry-wide exemption from one or more provisions of the Act on the grounds that those provisions overlap or duplicate an existing regulatory scheme.²⁴²

A 'transaction', has three components namely: The 'agreement' itself, the actual supply of goods and the performance of services. Once-off transactions that are not in the normal course of business are therefore excluded from the CPA. The Act lays down rules that restrict the freedom of consumers and suppliers to form agreements, and the content and form of agreements, and that subject the content of consumer agreements to administrative and judicial governance.

The Act imposes requirements regarding both procedural and substantive fairness. The concept of unconscionability was meant to counteract two generic forms of abuses, the first of which relates to procedural deficiencies in the contract formation process, and the second of which relates to substantive contract terms themselves.²⁴³

Substantive unconscionability is concerned with the substantive terms themselves, and asks 'whether they are unreasonably favourable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy, for example fine print terms or harsh terms having to do with price or other central aspects of transaction.'²⁴⁴

²⁴² s5(3); s5(4) CPA.

²⁴³ Barnard 387.

²⁴⁴ <http://definitions.uslegal.com/s/substantive-unconscionability/>(accessed 20/09/2013).

Procedural fairness refers to requirements that: suppliers must make specific information available to consumers; consumers must not make false or deceptive representations; provisions or notices with identified implications or consequences should be in writing, or in writing of a certain standard of transparency, and certain provisions, notices or risks should be brought to the consumer's attention in a prescribed way. Failure to comply could once again be interpreted as unconscionable conduct in terms of the broad wording found in the Act.

The CPA contains explicit indications regarding the interpretation thereof, which briefly entails the accountability to the spirit²⁴⁵, including the consideration of foreign and international law, conventions, declarations or protocols relating to consumer protection and applicable decisions of consumer courts, ombudsman or arbitrators.²⁴⁶ In view of this last important provision, this dissertation will also focus on a comparative study of the law in United Kingdom, United States of America, Australia and India that can inform our new consumer protection law and disputes pertaining to consumer rights regarding fair, just reasonable contract terms and unconscionable conduct.

Thus in keeping with the international trends of a stronger focus on consumer protection measures, the South African legislation introduced extensive statutory remedies for the consumer in the CPA as protective measures against the unconscionable conduct of suppliers and service providers.

²⁴⁵ s3;4(2)(b)(i) and 4(3).

²⁴⁶ s2 CPA.

4.3 Interrelations between Ethics and Duties Imposed by the CPA to Act Reasonably and Conscionably

Ethics is the science of morals in human conduct.²⁴⁷ The study of ethics was developed by the philosophers Socrates and Aristotle and means that one should moderate one's behaviour in such a way as not to cause harm to others. Socrates went further and held that behaving unethically in fact harmed the actor more than it did the victim. Ethics are inherent in human cultures and systems of belief. It is a subject more concerned with instinctive reaction, rather than rational analysis. Legal ethics is a vast subject touching on questions such as the relationship between law and morality. There is general agreement that while these are distinct concepts, they are related phenomena in that the development of law has clearly been influenced by morality.²⁴⁸

Some ways in which the law has been influenced by the need of the citizen to behave ethically are in the first place the development of the concept of good faith which is applied in many areas of commercial law.²⁴⁹ Also, the concept of *boni mores* concerns conduct offending a reasonable person's sense of fairness and justice, such as one-sided clauses in contracts which are illegal since they are contrary to public policy. The concept derived from the *exceptio doli generalis* in Roman law which confers the power on courts to strike down an unfair bargain. Furthermore, the principle of an acknowledgement of indebtedness against a threat of criminal prosecution for example constitutes undue influence.²⁵⁰

²⁴⁷ Oxford dictionary of ethics (www.thefreedictionary.com/ethics)(accessed 20/05/2013).

²⁴⁸ Pienaar A, "Ethical Behaviour for Corporate Counsel in the face of changing commercial realities International" *Business Lawyer* 1998 (June) 43.

²⁴⁹ Barnard 219.

²⁵⁰ *Ibid.*

In the last instance, the doctrine of fraud which stipulates that simulated, disguised or sham transactions will be set aside, and that a court will give effect to the true intention of the parties to a transaction.²⁵¹ Underpinning the field of professional ethics, for example, are the enduring values of integrity and honesty; the obligation to keep to agreements that have been made; not to mislead or deceive another and to make proper disclosure when necessary. The CPA lays down similar and general rules that restrict the freedom of consumers and suppliers to form agreements, and subjects the content of consumer agreements to administrative and judicial governance.²⁵²

The CPA has furthermore changed common law provisions on the duty of disclosure. In the older case of *Afrox Healthcare v Strydom*²⁵³ for example, in keeping with past and present case law, the court held that a person who signs a written agreement without reading it, does so at his own risk and is bound to the terms contained therein, as if he had been aware thereof and had expressly consented to such terms. Held also, there is no legal duty on a party to a contract to inform the other contracting party about the content of their proposed agreement.²⁵⁴

Writing is not a requirement for the conclusion of a valid consumer contract. Irrespective of this, the CPA requires suppliers to furnish consumers with specific information, and that certain notices to consumers or provisions of consumer agreements must be brought to their attention and must satisfy a set standard of transparency of language and in some cases writing is a formality requirement.²⁵⁵ Section 22(1) elevates the plain language requirement to fundamental consumer rights.

²⁵¹ Pienaar 43.

²⁵² Van Eeden E 'A Guide to the consumer Protection Act' 2009 170 par.1.

²⁵³ *Afrox Healthcare v Strydom* 2002 (6) 21 (SCA) 41.

²⁵⁴ Naudé T and Lubbe G at 441.

²⁵⁵ s22 CPA.

The Act provides that this plain language and understandable language applies to any notice, document or visual representation in a form prescribed the Act or plain language. The Act also prohibits certain specific contractual provisions and other contractual provisions that are unfair, unreasonable or unjust.²⁵⁶ Although a consumer has signed a document purporting to be a contract, such a document may not be enforceable if the requirements of certain sections²⁵⁷ have not been complied with or have been contravened. These provisions pertaining to consumer contracts deprive the consumer's signature of the finality which it until now provided for the conclusion of a binding agreement been endowed by the common law.²⁵⁸ There is no common law requirement that the wording of the agreement should satisfy any standard of readability or transparency, or that it should be in writing.

The CPA introduces new controls over fairness of contracts and proposes to regulate a wide variety of market practices. Prohibited under the CPA includes 'unconscionable conduct' and 'misleading' or 'deceptive' practices.²⁵⁹ In the context of agreements, 'unfair, unreasonable or unjust' contracts or terms are prohibited. The CPA furthermore allows the Minister to make regulations relating to 'unfair, unreasonable or unjust contract terms'.

If the court determines that a transaction or agreement was, in whole or part, unconscionable, unjust, unreasonable or unfair, the court may make certain orders in that regard which include: severing any part of the relevant agreement, provision or notice; or altering it to the extent required to render it lawful; or declaring the entire agreement, provision or notice void as from the date that it purportedly took effect.²⁶⁰

²⁵⁶ s40 CPA.

²⁵⁷ s22,48,49,51 and 58 CPA.

²⁵⁸ Domanski A "Mortgage Bondage" *SALJ* 1995 (159) 165.

²⁵⁹ s40 CPA.

²⁶⁰ s76 CPA.

4.4 Transformation of Consumer Contracts

It is a common knowledge that in most instances consumer agreements are not read and understood by the parties. When a contract is in writing, the presence of a signature there on is, in the common law, accepted as a virtually conclusive indication that the party (or parties) whose signature appears have not only read and understood the agreement, but have also consented to the terms above the signature(s) and agreed to be bound thereby.²⁶¹

Throughout the twentieth century, the courts stoutly defended the principle that, a person who signs a written agreement without reading it, does so at his own risk and is bound to the terms contained therein, as if he had been aware thereof and had expressly consented to such terms.²⁶² In *Afrox Healthcare Bpk v Strydom* also confirmed that, as a general rule, there is no legal duty on a party to a contract to inform the other contracting party about the content of their proposed agreement.²⁶³ In *Mercurius Motors v Lopez*, the Supreme Court of Appeal, in a clear and welcome change of direction, held that the contents of an agreement should be clearly and pertinently brought to the attention of a customer who signs a standard form contract, and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page.²⁶⁴

The Act requires suppliers to furnish consumers with specific information, and that certain notices to consumers or provisions of consumer agreements must be brought to their attention and must satisfy a set standard of transparency of language. The Act also prohibits certain specific contractual provisions that are unfair, unreasonable or unjust. Although a consumer has signed a document purporting to be a contract, such a document may not be enforceable if the requirements of sections 22,48,49,51 and 58 of the CPA have not been complied with or have been contravened.²⁶⁵

²⁶¹ Meiring I "Consequences of non-compliance with Consumer Protection Act" *Legal brief* (accessed 17/11/2010) 168.

²⁶² *Afrox Healthcare v Strydom* 2002 (6) 21 (SCA) 41; *Burger v Central South African Railways* 2002 (6) 21 (AD).

²⁶³ *Afrox Healthcare v Strydom* 48.

²⁶⁴ *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) 578.

²⁶⁵ Van Eeden 169.

The Act in consumer agreements deprives the consumer's signature of the air of conclusiveness and finality with which it has hitherto been endowed by the common law.²⁶⁶ The new Consumer Act is there to protecting a group of consumers who still suffer from the legacy from apartheid. It is there to protect them from adverse business practices where they are subject to exploitation because they are in rural areas or they lack formal education. From a consumer's perspective, it gives them the additional piece of mind. It's going to free up and create a more willing consumer because they know they have additional redress and recourse. Some hold the opinion, however, that this Act can turn South Africans into a litigious nation, because of the 'automatic' and built-in protection the consumer has been afforded'.²⁶⁷

The interpretation of certain documents, such as any standard form, contract or other document relating to suppliers, is also prescribed by the Act.²⁶⁸ Thus, in the event of any ambiguity or restriction, limitation, exclusion and deprivation of a consumer's legal rights, such document must be interpreted and resolved to the benefit of the consumer. This will entitle the consumer to defend himself successfully against claims of a supplier or service provider that is based on the latter's unconscionable conduct

²⁶⁶ *Ibid.*

²⁶⁷ Downing R "New Consumer Act could lead to USA-type of behaviour"
(www.bdlive.co.za/articles/id=137862) (accessed 22/03/2011).

²⁶⁸ s4(4) CPA.

4.5 The Consumer Protection Act and *the exceptio doli generalis*

The Act introduces broad concepts such as unfair, unreasonableness, unconscionable similar to the factors that were relevant in the application of the *exceptio doli generalis*. According to Naudé this legislation against unfair contract terms must be welcomed.²⁶⁹ This link can be found in the following clauses in the CPA: the right to disclosure of information;²⁷⁰ the right to fair and honest dealing;²⁷¹ and the right to fair, just and reasonable terms and conditions.²⁷² Taking into consideration the effects of Chapter 2 Part F and G, section 40 and section 48, nostalgic thoughts of the *exceptio doli* materialize. These sections seem to have a similar broad scope of application when compared with the scope of application of the *exceptio doli*

The provisions in the CPA on how one must deal with unfairness and unconscionability relate to the process of contract formation (the pre-contract situation), the subject matter or content (terms) of the contract, and the process of contractual enforcement.²⁷³ The Act imposes requirements regarding both procedural and substantive fairness. These aspects are discussed below.

²⁶⁹ Naudé (2009) 505.

²⁷⁰ Part D s22 CPA.

²⁷¹ Part F s40 CPA.

²⁷² Part G s48-52 CPA.

²⁷³ Van Eeden t 170 par. 1.

4.5.1 The right to fair and honest dealing: unconscionable conduct

The CPA defines an unconscionable conduct as a conduct which is unethical or improper to a degree that would shock the conscience of a reasonable person.²⁷⁴ This is similar to the concepts relating to the application of the common law defence of the *exceptio doli generalis*. The *exceptio* as a defence could be used where the enforcement of contract could amount to great inequity and amount to ‘unconscionable conduct’. The CPA affirms defences similar to *exceptio* yet defines the exact scope and application in the provisions of the Act.²⁷⁵

The Act also introduced section 40(2) that expands on the ambit of ‘unconscionable conduct’ by stating that it is also unconscionable for suppliers to knowingly take advantage because a consumer was not in a position to protect their own interests due to a physical or mental disability, illiteracy, ignorance, inability to understand the language or any similar factor. This has afforded consumer added rights and links with the right to understand language²⁷⁶ and right of equality in consumer markets.²⁷⁷ This provides a broad scope of factors against which the conduct of a person can be tested.

In contract law an unconscionable contract is one that is unjust or extremely one-sided in favour of the person who has the superior bargaining power. Courts find that unconscionable contracts usually result from the exploitation of consumers who are often poorly educated, impoverished, and unable to find the best price available in the competitive marketplace.²⁷⁸

²⁷⁴ s1 CPA.

²⁷⁵ s40(1) CPA.

²⁷⁶ s22 CPA.

²⁷⁷ s8 CPA.

²⁷⁸ *Williams v Walker-Thomas Furniture CO* 350 F.2d 445 (C.A. D.C.1965).

4.5.2 The right to fair, just and reasonable terms and conditions

Sections 48 to 52 of the CPA deal specifically with unfair contract terms and also make provision for a court to strike out unfair contract terms contrary to the principle of *pacta sunt servanda* (the principle of sanctity of contract). Though this principle forms the basis of South African contract law, it is not an absolute value in law.²⁷⁹ As a result of these provisions, the CPA now limits the terms and conditions that can be included in a consumer agreement and also requires consumers to be aware of the content of their agreement. The duty of disclosure already referred to above must now be performed with great care.

Section 48 contains general prohibition against unfair, unreasonable or unjust terms. It aims to provide for control of the content of contract terms, whether already incorporated into a specific transaction or merely put on offer for general use by the supplier. A supplier is not allowed to market any goods or services, or negotiate, or administer or enter into a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable.

²⁷⁹ See ch 2 CPA.

There is no closed list of what will constitute an unfair, unreasonable or unjust term, transaction or agreement. The Act itself contains a descriptive list in Part G section 48.²⁸⁰ The Regulations²⁸¹ contain a grey list of such terms.²⁸² The *exceptio doli generalis* provided a remedy against enforcement of unfair contracts. It did not allow the parties to rely on a term that was unjust, unfair and where the enforcement thereof would amount to and result in unconscionable conduct. The words that appear in the CPA echo in the term associated in describing the *exceptio*. In the *Barkhuizen* case²⁸³ the court specifically emphasised that the principles of reasonableness and fairness must be considered where terms of the contract are found to be contrary to public policy or not.

²⁸⁰ -s48 deals with unfair, unreasonable or unjust contract terms

(1) A supplier must not—(a) offer to supply, supply, or enter into an agreement to supply, any goods or services—(i) at a price that is unfair, unreasonable or unjust; or(ii) on terms that are unfair, unreasonable or unjust; (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—(i) to waive any rights;(ii) assume any obligation; or(iii) waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if

²⁸² List of contract terms which are presumed not to be fair and reasonable in terms of Regulation 44

(1) For purposes of section 120(d) of the Act, a term of a consumer agreement between a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her

business or profession is presumed to be unfair if it- a) has the purpose or effect of a term listed in subregulation (3), and

((b) does not fall within the ambit of subregulation (4). (2) (a) The list in subregulation (3) is indicative only, so that a term listed therein may be fair in view of the particular circumstances of the case. (b) The list in subregulation (3) is non-exhaustive, so that other terms may also be unfair for purposes of section 48 of the Act. (c) A term which falls within the ambit of subregulation (4) remains subject to sections 48 to 52 of the Act. (d) This regulation does not derogate from provisions in the Act or other law in terms of or in respect of which a term of an agreement is prohibited. (3) A term of a consumer agreement subject to the provisions of subregulation (1) is presumed to be unfair if it has the purpose or effect of- a) excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61 (1) of the Act.

²⁸³ *Barkhuizen v Napier* 21.

4.5.3 Enforcement of the CPA

Chapter 3 of the CPA provides for protection of consumer rights and for the consumer's voice. In terms of section 69 a consumer may refer the matter directly to the Tribunal,²⁸⁴ approach the applicable ombudsman who has jurisdiction,²⁸⁵ apply to the consumer court in a province where such a court has been established,²⁸⁶ refer the matter to an alternative dispute resolution agent,²⁸⁷ or file a complaint with the Commission.²⁸⁸ A consumer may also follow the traditional route and approach a court with jurisdiction over the matter.²⁸⁹ The consumer can therefore approach a wide range of forums to take legal recourse against suppliers and service providers.

Concerns raised about the Bill Act are that it could possibly create some overlap between the jurisdictions of the Ombudsman and the Tribunal.

All the fundamental consumer rights in the act have always been there in our common law, the problem is the enforcement. The dice has always been loaded against the consumer because an individual consumer has to go to court, look for a lawyer, they have to make a case and generally the supplier has the deeper pockets.²⁹⁰

²⁸⁴ The National Consumer Tribunal established by s26 of the National Credit Act 34 of 2005; CPA s1 and s69(a).

²⁸⁵ s69(b); 69(c)(i).

²⁸⁶ s69(c)(ii).

²⁸⁷ s69(c)(iii); s70.

²⁸⁸ National Consumer Commission established by s85 of the CPA; also s1 and s69(c)(iv).

²⁸⁹ s69(d).

²⁹⁰ Downing R "New Consumer Act could lead to USA behaviour"(www.bdlive.co.za/articles/id=137862)

(accessed 22/03/2011).

In terms of Section 78 of the CPA an accredited consumer group may engage, protect, and intervene on all consumer rights for the benefit and interest of consumers. Naudé points out that a preventative control paradigm is even more essential in developing countries such as ours with large numbers of poor, vulnerable consumers who cannot afford to seek redress from the courts at all, especially those who are less likely to be aware of their rights even if more affordable processes before special tribunals are created. In her view it is therefore essential that unfair contract terms legislation provides for procedural enforcement mechanisms, which focus on the achievement of preventative control which is not dependent on judicial control over a particular individual contract.²⁹¹

She queries whether the enforcement procedures and other parts of the CPA relevant to unfair contract terms reflect an effective, preventative or proactive control paradigm to operate in tandem with reactive or '*ex post facto*' judicial control over individual contracts.²⁹² Furthermore, section 52 regulates the powers of court to ensure fair, reasonable and just terms and conditions. It prescribes what orders a court may make in this regard and what factors must be considered when deciding whether a term or a contract is unfair.

The CPA bolsters the general prohibition of unfair terms by also enumerating certain terms which are prohibited outright.²⁹³ These include *inter alia* exemption clauses in respect of gross negligence, and false acknowledgments by the consumer that no representations were made by or on behalf of the supplier.²⁹⁴

²⁹¹ Naudé T "Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective" *SALJ* 2010 (127) 517.

²⁹² Naudé T (2010) 516.

²⁹³ s51 CPA.

²⁹⁴ Naudé T (2010) 515.

The court's powers to ensure fair and just conduct, terms and conditions strengthens the viewpoint that this Act has resuscitated the abolished *exceptio doli generalis* and has gone even further and codified it in the form of rights and obligations imposed on certain parties when entering into agreements.²⁹⁵ Not only does the Act codify the general defence against unfairness and unconscionability that for years has been applied in our law before the *Bank of Lisbon* case, but it also provides a clear process for courts to follow when faced with unconscionable conduct, unfair contract terms and unjust behaviour. The CPA in section 52 grants courts the general power to declare agreements, in whole or in part, unfair or unconscionable and therefore of no force and effect.

In addition to the above, a court may also make any further order it considers just and reasonable. It basically gives a court carte blanche to adjudicate as it sees fit in the facts and circumstances of each case. It is broadly empowered to, *inter alia*, make an order to restore money or property to the consumer, to compensate the consumer for losses or expenses and requiring the supplier to cease any practice or alter any practice, form or document to avoid repetition of the supplier's conduct. These orders may only be made if the Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability.

²⁹⁵ s48-52 CPA.

Specific remedies include for example that if an agreement, notice or terms are void in terms of the Act, or the requirement of written notice is in terms of section 49 was not satisfied,²⁹⁶ the court may declare the agreement, notice or terms void and sever the relevant part to render it lawful or declare the entire agreement, provision or notice void *ab initio*.²⁹⁷

4.6 Advantages of the CPA to consumers

As examined and explained above, courts do not need to overcome difficulties of identifying what constitutes unfair conduct in contracts. A contract may continue in a reasonably modified form instead of being terminated. The inadequate protection offered by previous consumer rights legislation has been repealed and is replaced by the Act, which contains a plethora of consumer rights aimed at protecting consumers from having to agree to unfair contract terms when purchasing goods and services. It provides a wide range of remedies and numerous forums which a consumer may approach for legal redress.

²⁹⁶ s49. (1) Any notice to consumers or provision of a consumer agreement that purports to—

(a) limit in any way the risk or liability of the supplier or any other person; (b) constitute an assumption of risk or liability by the consumer; (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5). (2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk—

(a) of an unusual character or nature; (b) the presence of which the consumer could not reasonably be expected to be

aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or (c) that could result in serious injury or death,

²⁹⁷ *Afrox Healthcare v Strydom* 4; *Burger v Central South African Railways* 1903 at 571 at 576.

4.7 Disadvantages of the new CPA

Courts may be required to re-define the common law where they deem fit under the pretext of the CPA. They will have to be equipped to interpret words such as ‘pressure’, ‘harassment’, ‘unfair tactics’ or the broadly defined ‘any similar conduct’, all new terminology introduced by section 40 of the CPA. Veldsman and Kuschke conclude that the resulting case-by-case interpretation of vague, foreign and open-ended concepts will at least for the near future, rob our law of legal certainty.²⁹⁸ It must be emphasised that exactly the same challenge was posed to the adjudicators in Roman a time that has to determine whether there was sufficient *dolus* to allow for the *exceptio doli generalis* as a valid defence.

Section 2(2)(a) of the CPA states that any person/court/tribunal may take appropriate foreign and international law into consideration when interpreting or applying the Act. This will prove to be a double-edged sword. It will assist in the interpretation of the open-ended and foreign terminology, but on the other hand, any party may go forum-shopping to find an interpretation from a foreign jurisdiction that supports his case and views. Courts will have to investigate and research foreign law which to date has not been analysed for purposes of application in our courts.

In meeting the obligations under the CPA, the courts will be confronted with a heavy additional demand on their already limited resources and manpower. Although decisions will not be published, the CPA states that decisions will enjoy legal precedent. Fragmentation of decisions between the different consumer dispute resolution bodies and the different levels of their involvement will complicate the effectiveness of our doctrine of legal precedent.

²⁹⁸ Veldsman L and Kuschke B 49.

4.8 Conclusion

Before the Act came into force, speculation was rife as to whether it could be enforced and whether the National Consumer Commission (NCC) will make any real inroads. It appears that the NCC has proven its detractors wrong. First the cell phone companies, who were earmarked for attention from the very beginning, became the target of enforcement. One of the first complaints targeted Vodacom who refused to compensate consumers for interruptions in coverage in June.

Once the NCC was made aware of these irregularities, it focused on cell phone contracts industry-wide and eventually issued compliance notices to Telkom, Vodacom, MTN, Cell C and 8ta demanding that they amend their unfair terms and conditions.²⁹⁹ The CPA is therefore an innovative piece of legislation that for the first time affords the South African consumer protection and extensive rights, putting an end to the previous laws that were inclined to favour the supplier or service provider and prejudice the consumer.

It is important to recognize that the Act is still relatively new and that it would be premature to undertake a thorough going assessment of the effectiveness of the Act from a practical perspective. What is clear, however, is that the broad defences on which a consumer can rely to have unconscionable contracts, or those that are unfair, unjust or unreasonable set aside, appear to revisit those factors that were in the distant past relevant to successfully raise the *exceptio doli generalis* to defend a claim.

²⁹⁹ www.NCC.co.za, (accessed 20/09/2012).

The freedom of contract is based on the assumption that the parties have a freedom to contract and in an ideal world a consumer will always have a choice. The implementation of the new Constitution and the new CPA introduced values which are more realistic in view of the socio-economic factors of the people of South Africa. The Constitution strives to achieve social justice and the spirit of collectivism and humanity. Van der Walt concedes that the freedom of contract principle does not always relate with the ideals of the new South Africa and must be addressed.³⁰⁰ One can hope that the new CPA will attempt to achieve this goal.³⁰¹

³⁰⁰ Van der Walt CFC "Enkele uitgangspunte vir 'n Suid-Afrikaanse ondersoek na beheer oor onbillike kontraktsbedinge" *THRHR* 1989 (52) 8.

³⁰¹ Van Eeden 169.

CHAPTER 5

SOME COMMENTS ON THE LEGISLATION IN OTHER COUNTRIES

5.1 Introduction

South Africa has been lagging behind other countries in introducing overarching legislation that seeks to protect consumers against unfair trade practices. The CPA legislation was finally enacted in South Africa in 2011 to give effect to the international law obligations of the Republic and to align our consumer protection measures with those of other countries.

Section 2(2) (a) of the CPA provides that any person/court/tribunal may take appropriate foreign and international law into consideration when interpreting or applying the Act. Because this is new legislation for which little jurisprudence exists in our law, few aspects of experience and jurisprudence of other countries will provide us with the necessary guidance where uncertainty might reign.

The 'unconscionable conduct' criteria has allowed courts in certain countries to void contracts that are unfair, oppressive, unconscionable, charging excessively high prices, lack a meaningful choice, involve fraud, use fine print, or go against public policy. The principle of 'freedom to contract' is clearly not absolute throughout the world. While common law courts were occupied in dealing with equity, the civil law legislators were the first to consider the effect of contracts going against 'public good' and those affected by a party's 'unconscionable conduct'.

The comparative study conducted in this part of this dissertation concentrates on the development of the unconscionability concept and also of aspects that link to the general defence of the *exceptio doli generalis*. This *exceptio* or corresponding principles were closely related to unconscionability both conceptually and practically in the common law and civil law systems chosen for this study.

5.2 Background

The principle of social control has steadily gained support and towards the early 19th century many countries, especially countries such as the Netherlands, the United States, Germany, France and England began to enact legislation to protect consumers and to regulate unfair contractual terms.³⁰² South African development in this regard has however been relatively slow, as up until the early 1990's the state was still controlled by the apartheid regime who did not keep abreast of the steady international move towards introducing greater consumer protection measures.³⁰³

The apartheid legacy included a disregard for consumer rights, and its policies were based on the belief that economic growth and development takes place solely through a path dictated by production factors such as investment in capital goods and cheap labour.³⁰⁴ This belief implicitly assumed that consumers in general played a minimal role in contributing to economic growth.³⁰⁵

This was not the case in other countries. This chapter will deal with a comparative study of international statutes, the application of the *exceptio doli generalis* or similar defences, and the principles of fairness, unconscionability and public policy. An overview of these aspects of law in the following countries: the United Kingdom; the United States of America, Australia, India are included in this dissertation. The UK was chosen because it implemented the EU Directive on consumer rights, and because its statutes and the jurisprudence on the interpretation of it could offer some valuable perspectives on the interpretation of our new CPA. The same applies for the US, which has unique statutes that have been in force for quite some time.

³⁰² Hawthorne L "The Principle of Equality in the Law of Contract" *THRHR* 1995 (58) 166.

³⁰³ GG 26774 Consumer Policy Framework 2004 Vol.47124.

³⁰⁴ Naudé T (2009) 505.

³⁰⁵ *Ibid.*

The Australian Consumer Law has been lauded worldwide as effective and could be examined for guidance. In the last instance, because South Africa is part of the BRICS developing nations, namely Brazil, Russia, China and India, a study of the position in another BRICS country such as India would provide an interesting perspective on the issues we will be confronted with. As language was a problem, the only country whose sources were accessible for purposes of this brief comparative study was India.

In order to ultimately address the application specifically of the *exceptio doli generalis* in consumer contracts, the focus will be on 'unconscionable' contracts. The objective will be to establish what the law in these countries states with regards to unconscionable contracts, and will contain a brief review of legislative interventions on consumer protection with some analysis thereof.

5.3 Implications of South African Consumer Legislation for other Countries

The South African Consumer Protection Act³⁰⁶ has worldwide implications. The Act applies to suppliers of goods and services to South African consumers, regardless of whether their head offices are within or outside South African borders. If a defective or incorrectly branded product, for example, was to cause harm or injury to a South African consumer, the foreign manufacturer of such a product could become a co-defendant together with the local retailer or supplier in litigation pertaining to product liability.³⁰⁷

This codification of South African consumer law had been drafted in line with internationally accepted and adopted consumer rights.³⁰⁸ It is common place in most contracts to have a governing law clause. This clause will state that the agreement or transaction must be interpreted and governed by the law of a particular country.

³⁰⁶ Act 68 of 2008.

³⁰⁷ See the summary in Melville N 'The Consumer protection made easy' 2010 42.

³⁰⁸ s2(2)(a) and (b) CPA.

Even if parties have elected to have their transaction governed by foreign law, certain parts of the transaction will still be subject of the CPA.³⁰⁹ Although there is an awareness of consumer rights, foreign exporters may find themselves unintentionally infringing the provisions of the CPA, if they are not aware of the provisions of the CPA and that they are subject to it.³¹⁰

The same holds true for the laws of foreign countries. South African citizens could participate in a transaction that may be regulated by the consumer laws of another country. One therefore has to be sensitised to the position in countries which are our regular trading partners.

5.4 Consumer Protection in the United Kingdom

UK has a solid reputation in providing consumer protection across the world. By means of comparison with this country, our country can learn, empower consumers and appreciate different systems and schools of legal thought. The United Kingdom, as member state of the European Union, is bound by the consumer protection directives of the EU.

The British experience with preventative control over unfair contract terms has been acclaimed by the European Commission as a success story in the fight against unfair terms.³¹¹ The UK introduced preventative control in 1995 upon implementing the 1993 EU Directive on Unfair Terms in Consumer Contracts (hereinafter referred to as the 'Directive'). The Directive requires adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers.³¹² On 1 July 1995 the Unfair Contract Terms Directive became part of UK law by way of enactment of a statutory instrument, namely the Unfair Terms in Consumer Contracts Regulations 1994.

The terms of the EU directive were reproduced with minor drafting amendments, and one change of substance, by the Unfair Terms in Consumer Contracts Regulations 1999. Whenever the office

³⁰⁹ Laher L "The-consumer-protection-act- and-cross-border-transactions"//www.nortonrose.com/news/45563" (accessed 28/11/2011).

³¹⁰ *Ibid.*

³¹¹ Tenreiro M 'The Unfair Terms Directive, five years on evaluation and future perspective note' 1999 note 20 at 217.

³¹² Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, See now art 38 of the Proposal for a Directive on Consumer Rights COM (2008) 614 (final).

of fair trading receives a complaint about a particular term it does not only considers that term, but also questions every other term in the contract that it thinks may potentially be unfair. In UK, a national enforcement authority is the chief player in negotiating undertakings with businesses bringing injunction proceedings where necessary. Other qualifying bodies may also consider complaints and apply for injunctions under the Regulations.³¹³

The Regulations break new ground by enabling a consumer to challenge certain clauses in a contract on the ground that they are 'unfair'. The Unfair Contract Terms Act (UCTA) is largely concerned with exemption clauses whereas the Regulations are not limited to this extent and cover unfair terms. The Regulations furthermore control a number of contracts such as insurance to which UCTA does not apply at all.

5.4.1 Unfair and unconscionable Contractual Terms in the UK

All member states of the European Union have implemented the abovementioned Directive on unfair terms in consumer contracts and have thus come to terms with the notion of good faith in their contract law.³¹⁴ Good faith is also embodied in article 1.106 of the principles of the European Contract Law.³¹⁵ British common law has also adopted the concept of unconscionability though it is not specifically mentioned as criteria in the United Kingdom Consumer Protection Act 1987.

5.4.1.1 U K Consumer Protection Act

Sections 20 - 26 of the United Kingdom Consumer Protection Act³¹⁶ have provisions against misleading and deceptive behaviour. In terms of these sections, it is an offence to give a misleading indication to the consumer. This is in line with our CPA,³¹⁷ the Roman law defence of

³¹³ Melville (2010) 26.

³¹⁴ Zimmermann R and Whittaker, S "Good faith in European contract law" 2000 13.

³¹⁵ The Principles of European Contract Law 1998, Part II.

³¹⁶ Consumer Protection Act 1987 (UK).

³¹⁷ s40,41 CPA (SA).

the *exceptio doli generalis*,³¹⁸ and the duty to act in good faith in consumer contracts. Zimmermann is of the opinion that the common law background is the same as ours in South Africa.³¹⁹

Attention must be drawn to subsections (1) and (2) of the United Kingdom Consumer Protection Act which read as follows:

‘Subject to the following provisions of this Part, a person shall be guilty of an offence if, in the course of any business of his, he gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available (whether generally or from particular persons).

(2) Subject as aforesaid, a person shall be guilty of an offence if—

- (a) in the course of any business of his, he has given an indication to any consumers which, after it was given, has become misleading as mentioned in subsection (1) above; and
- (b) some or all of those consumers might reasonably be expected to rely on the indication at a time after it has become misleading; and
- (c) he fails to take all such steps as are reasonable to prevent those consumers from relying on the indication.

5.4.1.2 The UK Unfair Contract Terms Act 1977

In addition to the more focussed UK Consumer Protection Act the general Unfair Contract Terms Act 1977, UCTA operates in five overlapping areas namely: negligence, contractual obligations,

³¹⁸ See chap 2 of this dissertation.

³¹⁹ Zimmermann 14.

terms of reasonableness implied in contracts for the sale of goods, hire-purchase and certain analogous contracts for the supply of goods guarantees and indemnities misrepresentation. This Act envisages a direct challenge to terms which are indisputably part of the contract between the parties and places the power to rule (some) terms unenforceable in the hands of the judiciary.³²⁰

The Act invalidates some clauses absolutely and subjects others to a judiciary applied test of reasonableness. The substantive content of the *exceptio doli generalis* was absorbed into the requirements of good faith according to which the dispute had to be decided.³²¹ The judge had an equitable discretion to decide the case before him based on what is fair and reasonable. What is deemed to be 'reasonable' is regulated by statute as indicated below.

Section 11 of the above UCTA provides for the 'reasonableness' test as follows:

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. The provisions of UCTA are similar to those of sections 48-52 of the South African CPA³²² regarding the 'right to fair, just and reasonable terms and conditions'.

At first, commentators concentrated on the unequal bargaining power and the inability of consumers to bargain over the terms. However, it was later shown that, all things being equal, sellers prefer to extract their bargaining advantages by increasing the price rather than reducing

³²⁰ Howells G and Weatherill S 'Consumer Protection Law' 2005 267.

³²¹ Zimmermann R and Whittaker, S "Good faith in European contract law" 2000 17.

³²² s48-62 CPA.

the value of the contract to the consumers.³²³ A statement made during negotiations may sometimes be classified as a contractual term and will be judged according to the relevant statutory provisions. Freedom of contract has been considerably eroded by both the common law and this statute. The Act catches some contracts which are not consumer contracts. The Act's extension into commercial contracts may readily be explained if one accepts that the primary motivation for control is the fact of economic imbalance.³²⁴ The UCT Act catches some contracts which are not consumer contracts. The Act's extension into commercial contracts may readily be explained if one accepts that the primary motivation for control is the fact of economic imbalance.³²⁵

5.4.1.3 Unfair Terms in Consumer Contracts Regulations

Another source set of guidelines can be found in the Unfair Terms in Consumer Contracts Regulations 1999. The Unfair Terms in Consumer Contracts Regulations 1999 were passed in response to a European Directive, giving consumers much broader protection from unfair terms in standard form contracts.³²⁶

A term covered by the Regulations shall be regarded as unfair if it is a term which is contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.³²⁷

The Regulations catch all terms in consumer contracts that have not been individually negotiated. The sole exception is found Regulation 6(2). This provides that: In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate:

³²³ Oren G "Economic analysis of standard form contracts: the monopoly case" *European Journal of Law & Economics* 2007 23.

³²⁴ Howells G 'Consumer Protection Law' 2005 238.

³²⁵ Ibid.

³²⁶ Howells 270.

³²⁷ Howells 272.

- (a) to the definition of the main subject matter of the contract,
- (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange

The Regulations do not validate any clauses automatically as there is no black list of clauses. A question of critical importance is how closely aligned the tests of reasonableness under the Act and unfairness under the Regulations will prove to be. They are certainly not far apart. In *Director-General of Fair Trading v First National Bank*³²⁸ the control test invite consideration of similar aspects of the bargain, such as imbalance in knowledge between parties. However, the role of good faith under regulation 5(1) 'looks to good standards of commercial morality and practice' that may steer the control originating in the Directive away from the notion of reasonableness. It was held that the UK Regulations cannot be divorced from the Directive.

The principle of bad faith in this statute means that a party who cites a good legal principle in bad faith should not be allowed to do so.³²⁹ According to Zimmermann R statements that the English contract law does not recognise the general concept of good faith are legion'.³³⁰ He is of the opinion that it tolerates a certain immoral insensitivity for it weights the interest of economic efficiency and the value predictable of the legal outcome of a case more highly than absolute justice.

³²⁸ *Director-General of Fair Trading v First National Bank* 2002 (1) ALL ER 97.

³²⁹ McKendrick E "Commentary on the UK Unfair Contract Terms Act" 2005 196.

³³⁰ Zimmermann R and Whittaker 147.

Common law lawyers have traditionally tended to regard good faith as an invitation to judges to abandon the duty of legally reasoned decisions and to produce an un-analytical incantation of personal values. It is pointed out that it could work well practically if ruthlessly applied into our systems of laws.³³¹

5.4.2 Adjudication of Unfair Contracts terms in the UK under Directive

The Office of Fair Trading in the UK has given some guidance in the form of guidelines, an explanatory memorandum and examples of what constitutes an unfair term under the UK consumer protection legislation, which is similar to that in South Africa. Even if a term is not on the prohibited list, a party alleging that a term is unfair may approach the court if there is no sufficient alternative remedy in the act. Under the CPA, the courts are given the broad power to review contracts and to order them to be amended depending on what is equitable. Where there is ambiguity, the courts must interpret standard form contracts and other documents to the benefit of the consumer. If the provision is unfair, the clause or the entire contract is unenforceable and may lead to certain sanctions or remedies.

The underlying rationale for these criteria is that they impair the consumer's ability to freely choose. In the absence of any certainty and foreseeability as to expenditure and as to the conditions that apply to the goods or services provided, an informed choice, based on an actual comparison among different options, is preferred.³³²

There is no suggestion that an English court would be willing to rely on the general concept of unconscionability in order to stop a party from exercising its contractual rights in a harsh or oppressive manner. The doctrine will continue to operate only in its traditional areas, such as in consumer credit contracts or the granting of relief against penalty clauses. Some writers are of the

³³¹ Bridge M "Does Anglo Canadian law need a doctrine of good faith" *Canadian Business Law Journal* 1984 (9) 385.

³³² s32.

opinion that as the position currently stands, it is unlikely that the legislature will initiate the introduction of a general unconscionability doctrine.³³³

As is the case with the South African CPA, most countries have enacted statutes that list clauses that should not appear in consumer contracts. Such a 'grey list' mechanism is widely used in the rest of the EU and in the UK to promote effective proactive and reactive control of unfair terms in consumer contracts. Such lists increase the chance of legislation in unfair contract terms having an effective, fast and proactive effect to act as a deterrent. Suppliers and service providers are more likely to remove unfair terms on their own if they are given more detailed guidance as to which terms will always or often be unfair, than if they are merely told in vague terms to remove generalised 'unfair terms' which are 'excessively one-sided' as described in our CPA.³³⁴

Some debate in the UK remains as to whether courts can affirmatively replace the offending term with a completely different one not drafted by the parties, or whether they are restricted to merely crossing out existing terms and letting the legal gap fillers set in. Many courts believe that they have discretion and sufficient authority to reduce an excessive term to any level deemed appropriate.³³⁵ Under the principles of European contract law, on the other hand, a court may adapt the contract in order to bring it into accordance with what might have been agreed to, had the requirements of good faith and fair dealing been followed.

However, these concerns must be balanced against other legitimate interests, such as the interest of a purchaser of a going concern or business in precluding the seller from establishing a competing enterprise in the same locality, or, similarly, the interest of an employer, tradesman or professional who trains an apprentice in a highly skilled trade.³³⁶

³³³ Angelo AH and Ellinger P "A comparative study of the approaches in England, France, Germany and the US". *LA International and Comparative Law Review* 1992 463.

³³⁴ Naudé (2009) 505.

³³⁵ Shahar BO "Fixing Unfair Contracts" *Stanford Law Review* 2011 Vol 63 869.

³³⁶ Van der Walt CFC "Enkele uitgangspunte vir 'n Suid-Afrikaanse ondersoek na Beheer oor Onbillike Kontraksbedinge" *THRHR* 1989 (52) 8.

In determining the validity of specific clauses, UK courts have applied two tests: whether the restrictive covenant was compatible with the public interest; and whether it was reasonable as between the parties.³³⁷ From a practical standpoint one can conclude that the second test is derived from a basic unconscionability concept: whether a specific covenant is reasonable as between the parties depends on whether it involves a restriction that is no broader than necessary for the covenanter's protection.

The similarity between this test and the general unconscionability concept was recognized by the *House of Lords in Schroeder Music Publishing Co. v Macaulay*.³³⁸ Similarly in the South African case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*³³⁹ the court held a restraint is valid and binding, unless that it is contrary to public policy for being unreasonable and consequently unenforceable.

References to either fairness or equitability appear in numerous cases concerning estoppel and waiver. These cases typically involve a situation where one party's conduct has led the other party to believe that he need not perform a contractual duty on time or in the manner agreed, and the first party then changes his mind and insists on performance of that duty. According to Angelo and Ellinger the general doctrine of unconscionability need not be used in stealth and should be applied directly. Where courts use it openly, unconscionability can be just as effective as other devices used to attain equity.³⁴⁰

³³⁷ Angelo and Ellinger 464.

³³⁸ (1974)1 W.L.R. 1308, 1315 (Eng. H.L.)

³³⁹ 1984(4) SA 874 (A).

³⁴⁰ Angelo and Ellinger 465.

5.5 Consumer Protection in the United States of America

5.5.1 General Outline

Unconscionability entered American contract law through the adoption of English law in the former colonies. The concept received its greatest impetus from the promulgation of the Uniform Commercial Code (hereinafter the 'UCC') as discussed below. In 1962, President John F Kennedy, in his consumer message, paved the way for organized consumerism in the USA and all over the world.

The laws in the US are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors; they may also provide additional protection for the weak and those unable to take care of themselves. The Consumer Credit Protection Act (15 U.S.C.A. § 1601 et seq. [1972]) is federal statute designed to protect borrowers of money by mandating complete disclosure of the terms and conditions of finance charges in transactions; by limiting the Garnishment of wages; and by regulating the use of charge accounts.

The Consumer Credit Protection Act was the first general federal Consumer Protection legislation also known as the Truth in lending Act(15 U.S.C.A. § 1601 et seq. [1968]), requires that the terms in Consumer Credit transactions be fully explained to the prospective debtors. Title VI of the Consumer Credit Protection Act, known as the Fair Credit Reporting Act (15 U.S.C.A. § 1601 et seq. [1978]), applies to businesses that regularly obtain consumer credit information for other businesses. Its purpose is to ensure that consumer reporting activities are conducted in a manner that is fair and equitable to the affected consumer.

Whereas the Consumer Credit Protection Act is federal law, states have also passed many statutes regulating consumer credit. For example, the Uniform Consumer Credit Code (UCCC) is an initiative that was drafted by the National Conference of Commissioners on Uniform State

Laws in 1968 to help provide consistency among the variety of consumer credit laws that exist throughout state jurisdictions. The purpose of the UCCC is threefold: to protect consumers obtaining credit to finance transactions; to ensure that adequate credit is provided; and to generally govern the credit industry. As of 2003, the UCCC had been adopted in only seven states and Guam. Many states, however, continue to enact legislation that would provide consumer debtors similar protections contained in the provisions of the UCCC.

The Uniform Commercial Code (UCC or the Code), first published in 1952, is one of a number of uniform acts that have been promulgated in conjunction with efforts to harmonize the law of sales and other commercial transactions in all 50 states within the United States of America. The UCC therefore achieved the goal of substantial uniformity in commercial laws and, at the same time, allowed the states the flexibility to meet local circumstances by modifying the UCC's text as enacted in each state.

In the United States a variety of laws at both the federal and state levels regulate consumer affairs. There are various Federal Acts that address different aspects of consumer protection. The Consumer Credit Protection Act (hereinafter the 'CCPA') of 1968, has a part that regulates the credit industry with respect to consumer rights, which includes credit card companies and credit reporting agencies, as well as loan sharks and wage garnishment which is referred as Federal Truth in Lending Act (hereinafter the 'TLA').

The Fair Credit Reporting Act (FCRA) of 1970 regulates credit reporting agencies and those who use them. The Fair Debt Collection Practices Act was added to the CCPA in 1978 to abolish abusive collection practices and give consumers a means to dispute inaccurate debt information. The Fair Credit Billing Act was added to the CCPA in 1975 to deal with billing practices in credit accounts.

5.5.2 The Uniform Commercial Code (UCC) Section 2-302

The Uniform Commercial Code contains a provision against ‘unconscionable’ contracts.³⁴¹ Section 2-302 of the Uniform Commercial Code (UCC) codified the unconscionability doctrine specifically for credit sales of goods, which doctrine is part of the general contract law as follows:

2-302. Unconscionable Contract or Clause

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The UCC only describes unconscionability as an unconscionable term or contract.³⁴² The section then focuses on the power of the courts to deal with an unconscionable clause. It has been suggested that the lack of a definition serves a purpose in that the doctrine cannot be avoided simply by drafting a contract in a certain way or using particular words. In the end, the primary source for finding out what unconscionability actually means is case law. In a comment to UCC section 2-302, it is said that the principle is one of ‘the prevention of oppression and unfair surprise’. Oppression has been interpreted to mean substantive factors, namely contract clauses per se, even though such a meaning hardly can be derived from the word alone. Unfair surprise has in turn become a symbol for any procedural factors, though what can rightly be understood from the word are questions of deception possibly combined with ignorance or carelessness.

³⁴¹ Par 2-302.

³⁴² UCC 208.

This section allows courts to explicitly police entire contracts or clauses which they find to be unconscionable. In the past, such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to dominant purpose of the contract.³⁴³ The Uniform Commercial Code allows courts to limit the application of any unconscionability term as to avoid any unconscionable result.³⁴⁴

An unconscionable clause in the US is furthermore one whose purpose is contrary to public policy, or is overly harsh or has one-sided results that shock the conscience of the court. The U.S. Supreme Court established this 'shock-the-conscience test' in *Rochin v People of California* case³⁴⁵ only in 1952. It was decided by the Supreme Court of the United States that added behaviour that 'shocks the conscience' into tests of what violates due process. This balancing test is often criticized as having subsequently been used in a particularly subjective manner.

Justice Frankfurter, writing for the Court, held that violent conduct by state agents for example although not specifically prohibited by explicit language in the Constitution, 'shocks the conscience' in that it offends those canons of decency and fairness which express the notions of justice of English-speaking peoples. Due process of law requires the state to observe those principles that are so rooted in the traditions and conscience of our people as to be ranked as fundamental. The same could apply to parties in a contractual relationship. This concept has also been taken over into the South African CPA that incorporates the shock the conscience test in section 1 in the definition of the term 'unconscionable'.

³⁴³ *Williams v. Walker-Thomas Furniture Co* 350 F.2d 445.

³⁴⁴ s2-302.

³⁴⁵ 342 U.S Supreme court 165 (1952).

5.5.3 The Application of the Unconscionability doctrine in the US

The American law originated from common law, therefore defences against contractual unfairness are found in all types of contracts.³⁴⁶ The doctrine of unconscionability has theoretical roots that extend deep into the English common law. Unconscionability is a contract defence typically advanced in cases in which there is a combination of unfair contract terms and deficient bargaining. Its origin is primarily in equity as practiced in England, where the doctrine can be traced back to at least the fifteenth century.³⁴⁷

Unconscionability entered American contract law through the adoption of English law in the former colonies. As stated in the general outline above, the concept received its greatest impetus from the promulgation of the Uniform Commercial Code (UCC).³⁴⁸ In *Henningsen v Bloomfield Motors Inc.* the court solidified unconscionability into two distinct categories: (1) unfair surprise, where something short of actual assent existed; and (2) oppression, where the relative positions of the bargaining parties indicate the possibility of gross overreaching on the part of the stronger party. The court went to great lengths to describe the size, shape, noticeability and readability of a disputed purchase order.

³⁴⁶ Gustaffson P “The unconscionability doctrine in US contract law” 2010 7.

³⁴⁷ *Ibid.*

³⁴⁸ s2-302.

The question of unconscionability is one for the court to decide and not the jury. The better view, and one which has been adopted by many courts, seems to be the idea of a descending measure, where there have been extensive procedural fairness. To determine whether a contract is procedurally unconscionable court examine factors related to how the contract came to be. In particular, the courts look to the bargaining process and to the parties; it is essentially an assessment of whether one party went too far in his effort to secure a favourable deal.

The merger of equity and common law as well as the codification led to the general recognition of unconscionability in contract law.³⁴⁹ There are differing opinions on whether both procedural and substantive unconscionability is required for an unconscionability defence to be successful. The leading case in the application of the unconscionability doctrine is *Williams v Walker-Thomas Furniture CO*,³⁵⁰ which was one of the first cases to hold that courts had the power not to enforce contracts that were so one-sided as to be unconscionable. The court held that the consumer can also point to both the bargain's substantive unfairness and the 'bargaining naughtiness' that occurred when the merchant took advantage of the consumer's inability to understand the English language contract, at least when the merchant knew or had reason to know of that inability.

³⁴⁹ *James v Morgan* (1663)83 Eng Rep.323.

³⁵⁰ *Williams v Walker-Thomas Furniture CO* 350 F.2d 445 (C.A. D.C.1965). See also *Buchwald v. Paramount* (1990) 1990 Cal. App. LEXIS 634; *Harris v. Blockbuster, Inc.*, 622 F.Supp.2d 396 (N.D. Tex. Apr. 15, 2009).

The decision's detractors saw the unconscionable doctrine as a destabilizing infringement on the historical right of freedom to contract, but then quietly predicted that it would be overshadowed by the movement towards statutory and regulatory protection for consumers - the real workhorses of consumer protection.

In response to the confusion, the National Conference of Commissioners of Uniform State Laws overreacted and, for example, drafted UCITA and incorporated the doctrine of unconscionability in it as it appears in the Uniform Commercial Code. UCITA proposes to govern transactions for computer information, including software, databases and online information which figures to be area of explosive growth. In this way it therefore fully adopted the unconscionability doctrine for this specific industry.

Lack of education is a factor which many courts consider. Illiteracy or an inability to understand the language of the contract is also often taken into account. The fact that one party is impoverished may work as a proxy for lack of commercial sophistication: it is generally harder for poor people (lacking education and experience) to negotiate and understand a contract.³⁵¹ Poverty by itself does not appear to be a factor which affects a finding of procedural unconscionability, though some courts have noted one party's knowledge of the other's lack of money, which perhaps implies that poverty is not completely irrelevant.³⁵² The relevance of this is that the issue of language is similar to the rationale for the provision of the plain language requirement in the South African CPA.³⁵³ The CPA also does not include the word 'poverty' in its description of what unconscionable conduct entails.

³⁵¹ *Williams* case 350F.

³⁵² Ellinghaus M. P. "In Defense of Unconscionability" 78 *Yale Law Journal* 1969 770-771.

³⁵³ s22.

The physical appearance of the contract as well as the language used plays a role in determining whether it is procedurally unconscionable. It is often a question of the appearance of principal terms, for example whether an important term been hidden in a maze of fine print. Some agreements appear to be designed to suppress attempts to read them by using fine print and other tactics that discourage reading, practices which courts universally tend to shun.

There are also attempts to deceive using unnecessarily complex or confusing language as well as misleading headings. Courts usually consider what the reasonable expectations of a party are. If an unusual and tough clause has been effectively hidden, there will be a good case for procedural unconscionability.³⁵⁴ The South African CPA has now given the powers to the courts to void unconscionable contracts³⁵⁵ similar to the position in the United States as examined below.

5.5.4 Adjudication of Unconscionable contracts - US courts

Courts may talk of consent and freedom to contract, but rarely describes the situation; they are increasingly likely to enforce consumer contracts as written. Consumers are typically given form contracts with boilerplate terms, often after agreeing to be contractually bound. When courts refused to enforce some of these boilerplate terms, they are often categorized as unconscionable, as something that shakes the conscience of the court.³⁵⁶ In *Rory v Continental Co*³⁵⁷ the court held that unless a contract provision violates law or one of the traditional defences to the enforceability of a contract applies, a court must construe and apply unambiguous contract provision as written.

³⁵⁴ *Henningsen v. Bloomfield Motors.*

³⁵⁵ s40 CPA.

³⁵⁶ Ard J "Beyond Consent and Unconscionability" *Michigan Bar Journal on Consumer Law* 2006 38.

³⁵⁷ *Rory v Continental Co* 2005 No.126747.

After *Rory's* case in the judgment in *Clark v Daimler Chrysler*³⁵⁸, the court held that a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience.

In American courts unconscionability is taken more literally and few contracts are seen as sufficiently shocking. Though American courts have long defended the freedom to contract, unconscionable contract are not enforceable in circumstances as mentioned above.³⁵⁹ Courts have identified three main factors that must be considered in consumer unfairness cases: (1) whether the practice injures consumers; (2) whether the practice violates established public policy; and (3) whether it is unethical or unscrupulous.³⁶⁰

The court in *Walker Furniture Co* case noted the adoption of the UCC and considered its section 2-302 on unconscionability to be 'persuasive authority for following the rationale of the cases from which the section is explicitly derived'.³⁶¹ Judge Wright described unconscionability with the following words: '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'. In holding a contract or contractual term unconscionable, these courts usually require some showing of both procedural and substantive unfairness.³⁶²

³⁵⁸ *Clark v Daimler Chrysler* 2005 No.252765.

³⁵⁹ UCC 2-302.

³⁶⁰ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (C.A. D.C. 1965); *Henningsen v. Bloomfield Motors* 32 N.J. 358, 161 A.2d 69 (N.J. 1960), *Campbell Soup Co. v. Wentz* 172 F.2d 80 (3d Cir. 1948), *Weaver v. American Oil Co* 257 Ind. 458, 276 N.E.2d 144 (1971).

³⁶¹ 350 F.2d 445 ;www.wcl.american.edu/journal/lawrev/15/case_notes/264.pdf. (accessed 26/06/2013).

³⁶² 'Substantive unfairness' is unfairness in the contractual provisions themselves, the fundamental inquiry being whether the provisions are unreasonably favourable or adverse to one party. 'Procedural unfairness' is unfairness in the process by which the contract is formed. It is caused by, inter alia, misrepresentation, duress, improper marketing practices and a refusal to bargain over contract terms. See also Lord RA "Williston on Contracts" (1990) Vol 8 at sec18.10.

The unconscionability doctrine is not the only way to limit unfair terms in contracts. In some specific areas, terms may be struck without reference to the unconscionability standard. For example, liquidated damages that are clearly over compensatory are considered punitive and unenforceable.³⁶³

Although the standard used to determine what constitutes unreasonably large liquidated damages can at times be identical to the 'shock the conscience' standard of unconscionability, it is generally less strict.³⁶⁴ This then means that unconscionability is tested according to the criteria of fairness similar to the position in the South African CPA pertaining to what is 'fair just and reasonable'.³⁶⁵

In the US many consumer contracts, such as bank agreements contain 'guerrilla terms' of hidden charges there is no motivation whatsoever for sophisticated consumers or business to educate the unsophisticated.³⁶⁶ The unconscionability defence is concerned with the fairness of both the process of contract formation and the substantive terms of the contract. When the terms of a contract are oppressive or when the bargaining process or resulting terms shock the conscience of the court, the court may strike down the contract or term as unconscionable or limit its application for a more conscionable result.

The unconscionability defence applies to a wide variety of types of conduct, so a court will look at a number of factors in determining if a contract is unconscionable. If there is a gross inequality of bargaining power, so the weaker party to the contract has no meaningful choice as to the terms, and the resulting contract is unreasonably favourable to the stronger party, there may be a valid claim of unconscionability.³⁶⁷

³⁶³ Shahr OB "Fixing Unfair Contracts" 2011 *Stanford Law Review* (4) 869.

³⁶⁴ Ibid.

³⁶⁵ s40 CPA.

³⁶⁶ Alces P "Guerilla terms" 2007 *Emory Law Journal* (56) 512 at 1548.

³⁶⁷ <http://smallbusiness.findlaw.com/business-contracts-forms/will-your-contract-be-enforced-under-the-law>.
(date accessed 15/07/2011).

The interpretation of unconscionable conduct in US suggests that the purpose is to prevent oppression and unfair surprise. This has been interpreted to entail procedural as well as substantive factors. Procedural unconscionability involves deficiencies in how the contract came to be, especially exploitation of discrepancies in status and sophistication of the parties, deceptive appearance or language of the contract and questionable bargaining. Substantive unconscionability refers to the contract terms per se; it is often a matter of an excessively one side contract or a particularly offensive term.

There are differing opinions on whether both procedural and substantive unconscionability is required for an unconscionability ruling; a commonly adopted approach is the idea of a descending scale: where there have been extensive procedural, mischiefs less is required in terms of contractual imbalance. Scholars within law and economics argue that the current or expanded use of unconscionability hurts both parties, although behavioural economics seems to suggest that this may not always be true.

5.6 Consumer Protection in Australia

5.6.1 Outline

The Australian consumer laws cover general standards of business conduct, prohibits harmful practices, regulates specific types of business-to-consumer transactions, provides basic consumer rights for goods and services and regulates the safety of consumer products and has extensive sections against 'unfair' and 'unconscionable conduct' similar to the position in South Africa. The Australian common law legal system contains protection designed to counter contractual injustice found in any type of contract.³⁶⁸ In Australia when a contract contains a term that is excessive or unfair, the law might consider it unenforceable, but it also has to set a substitute provision.

Unconscionability (known as unconscientious dealings in Australia) is a doctrine in contract law that describes terms that are so extremely unjust, or overwhelmingly one-sided in favor of the party who has the superior bargaining power, that they are contrary to good conscience. Typically, an unconscionable contract is held to be unenforceable because no reasonable or informed person would otherwise agree to it. The perpetrator of the conduct is not allowed to benefit, because the consideration offered is lacking, or is so obviously inadequate, that to enforce the contract would be unfair to the party seeking to escape the contract.³⁶⁹

³⁶⁸ 'Ending abusive clauses in consumer contracts' Final Report of the project presented to the Canada industry office of consumer affairs 2011 at 58.

³⁶⁹ <http://en.wikipedia.org/wiki/Unconscionability>(accessed 08/11/2012).

Unconscionability is determined by examining the circumstances of the parties when the contract was made, such as their bargaining power, age, and mental capacity. Other issues might include lack of choice, superior knowledge, and other obligations or circumstances surrounding the bargaining process. Unconscionable conduct is also found in acts of fraud and deceit, where the deliberate misrepresentation of fact deprives someone of a valuable possession. When a party takes unconscionable advantage of another, the action may be treated as criminal fraud or the civil action of deceit.

The Federal Trade Commission Act of 1914 created the Federal Trade Commission (FTC) to prevent unfair competition, deceptive acts, regulate trade, etc. The Australian common law legal system contains protection designed to counter contractual injustice found in any type of contract. The Trade Practices Act (TPA) was renamed the Competition and Consumer Act 2010 and took effect as part of the Australian consumer law.

The Australian Consumer Law³⁷⁰ is uniform legislation for consumer protection, applying as a law of the Commonwealth of Australia. The law replaced 20 different consumer laws across the Commonwealth and the different states and territories. Other dedicated statutory measures however still apply. The Australian Consumer Law (hereinafter the 'ACL') is set out in Schedule 2 of the Competition and Consumer Act 2010 which is the new name of the Trade Practices Act 1974 (TPA). The Trade Practices Act³⁷¹ (TPA) was renamed the Competition and Consumer Act 2010 and took effect as part of the Australian consumer law.

³⁷⁰ Australian Consumer Law Act of 2011.

³⁷¹ Trade Practices Act of 1974.

This included the repeal of Part IVA of the TPA dealing with statutory unconscionable conduct, including section 52 dealing with misleading and deceptive conduct. Equivalent provisions are now contained in sections 20 - 22 of the ACL.³⁷² The provisions of the ACL broadly reflect the provisions previously afforded by the Trade Practices Act 1974, although some additional protections have been added. The Australian Consumer Law also generally reflects most of the consumer protection provisions of the fair trading legislation in each state and territory.

5.6.2 Australian Consumer Law Act (ACL)

The Australian Consumer Law introduced nationally consistent prohibitions on unconscionable conduct.³⁷³ The first of these prohibitions entrenches into statute the equitable doctrine of unconscionable conduct, thereby extending the range of remedies available to parties affected by unconscionable conduct. The second prohibition extends the concept of unconscionability beyond that recognised in equity and can be relied upon by all persons, other than listed corporations, who acquire or supply goods or services in trade or commerce.³⁷⁴

³⁷² Schedule 2 of the Competition and Consumer Act 2011.

³⁷³ Part 2-2 of the ACL.

³⁷⁴ s18 ACL; Clarke J 'Australian Contract Law ebook-unconscionable conduct' 2012 58.

Section 22 sets out a range of factors a court may consider when determining whether conduct is unconscionable for purposes of section 21:

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the supplier) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the consumer), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the supplier and the customer; and
- (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and
- (f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers
- (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and
- (i) the extent to which the supplier unreasonably failed to disclose to the customer: any intended conduct of the supplier that might affect the interests of the customer; and any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and
- (j) if there is a contract between the supplier and the customer for the supply of the goods or services:

- (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
- (ii) the terms and conditions of the contract; and
- (iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
- (iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
- (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
- (l) the extent to which the supplier and the customer acted in good faith.

In Chapter 2 part 2– 1 deal with misleading or deceptive conduct and general protections, which create standards of business conduct in the market including:

- a general ban on misleading and deceptive conduct in trade or commerce;
- a general ban on unconscionable conduct in trade or commerce and specific bans on unconscionable conduct in consumer and some business transactions; and
- a provision that makes unfair contract terms in consumer contracts void.³⁷⁵

The ACL incorporates a statutory national unfair terms regime. The two key provisions are sections 23 and 24.

Section 23 of this Act deals with unfair terms of consumer contracts as follows:

- (1) A term of a consumer contract is void if: (a) the term is unfair; and (b) the contract is a standard form contract.

³⁷⁵ s8 (1)-(2).

In terms of section 24 the term of a consumer contract is an 'unfair term' if it would 'cause significant imbalance in the parties' rights and obligations under the contract and 'it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term' and it would cause detriment to a party if it were to be applied or relied on.

There is a legal presumption that a term of a consumer contract is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.³⁷⁶ Both procedural and substantive unfairness will be relevant.

The Australian Consumer Law does not apply to a contract unless it is a standard form contract. Once a claimant asserts that a contract is a standard form contract, the onus will be on the respondent to show, on the balance of probabilities that it is not. The term 'standard form contract' is not defined in the Australian consumer law, but there is a list of minimum matters which a court must take into account in making a determination on the issue.

It should be noted, though, that courts have not always been ready to fill gaps that arise from invalidated illegal terms and historically elected not to do so. Instead, when a contract contained an unconscionable element, or was unfair due to coercion, the entire contract was rendered unenforceable. It was not considered the role of the courts to write the contract over in a more reasonable fashion.

³⁷⁶ s24(4) ACL.

Even today, when the unconscionability of some terms is linked to flawed assent, as in the case of duress or fraud, courts may refuse to reform the term and instead vacate the entire agreement. Whether one of the parties has all or most of the bargaining power relating to the transaction; Whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties; Whether another party was, in effect, required either to accept or to reject the terms of the contract (other than terms relating to the main subject matter of the contract, the upfront price payable by the contractor a term required or permitted or a Commonwealth/State/Territory law in the form in which they were presented; Whether another party was given an effective opportunity to negotiate the terms of the contract.³⁷⁷

5.6.3 Unconscionable Contracts

Section 20 of the ACL (which is in identical terms as its predecessor, section 51AA of the Trade Practices Act) prohibits unconscionability engaged in by a corporation 'within the meaning of the unwritten law' (meaning the equitable doctrine of unconscionable conduct). To prevent overlap, section 20 will not apply where section 21 applies. Both sections are examined below.

Section 20(1) provides that a person must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time. A pecuniary penalty may be imposed for a contravention of this subsection.

³⁷⁷ Morandin N 'Australian consumer and competition' 2011 201.
(books.google.co.za/booksisbn=1921593814) (accessed 15/07/2013).

Sections 21 prohibit unconscionable conduct in connection with the supply or acquisition of goods or services by or from a person (other than a listed public company). It is not intended to be 'limited by the unwritten law relating to unconscionable conduct' and relevant factors extend beyond consideration of the circumstances relating to formation of the contract to the terms of the contract themselves (substantive unconscionable conduct).

The government of Australia has adopted a general provision on unconscionability dealings.³⁷⁸ The prohibition of unconscionability in generic legislation represents a general prohibition of unfairness, but usually only for unfairness that crosses a high threshold of severity.³⁷⁹ Unconscionable conduct also deals with transactions between dominant and weaker parties.

There is an overlap with both common law factors of duress and undue influence. Unconscionable conduct is prohibited both in equity and, more recently, by statute.³⁸⁰ The Australian Consumer Law (ACL) sets out principles to assist business and consumers in understanding unconscionable conduct.³⁸¹

³⁷⁹ *Union des consommateurs* 'Protection against abusive(unfair)clauses internationally' (http://uniondesconsommateurs.ca/docu/protec_conso/EndAbusive_Clauses.pdf) (accessed 14/09/2012) 46.

³⁸⁰ For a discussion on the principles of equity and the effect of statutory law, see Julie C "Australian Contract Law ebook unconscionable conduct" 345. 2012 (<http://www.australiancontractlaw.com/law/unconscionable.html>, (accessed 20/11/2012).

³⁸¹ Part 2-2 of the ACL in Australian law explains that: 'Certain conduct may be unconscionable if it is particularly harsh or oppressive'. It may also be unconscionable where one party knowingly exploits the special disadvantage of another. It needs to be more than just hard commercial bargaining; it means doing what should not be done in good.

These principles may also assist the courts in deciding whether conduct was unconscionable. The principles include the important issues that: Unconscionable conduct under the ACL is not limited by historical judge-made law. Importantly, it is not necessary to show that the weaker party suffered from a special disadvantage or disability that the stronger party. A system of conduct or pattern of behaviour may be unconscionable even if the party complaining of it suffered no loss or damage or where no individual 'victim' is identified.

Unconscionable conduct is not limited to situations where there is a contract in play. However, where there is a contract, the courts can consider not only how the contract was entered into (for example, whether excessive pressure was used in negotiations) but its terms and how – and to what extent – the contract was carried out. In the leading Australian case of *Commercial Bank of Australia Ltd v Amadio*,³⁸² it was held that the doctrine of unconscionability may be appealed to whenever one party by reason of some condition or circumstance is placed at a special disadvantage viz-a-viz another and unfair or unconscientious advantage is then taken of the opportunity thereby created.

From this definition a number of important characteristics about the doctrine of unconscionability can be identified. These are first, the existence of some circumstance that places the one party at a disadvantage, and secondly an unconscionable exploitation of that advantage by the other party in the contract. The dual nature of the test is implicit in the analytical model of the doctrine of unconscionability and which remains the leading analysis of the doctrine despite his scepticism about the utility thereof. There are two main requirements to a finding of unconscionability: procedural unconscionability and substantive unconscionability. Procedural unconscionability refers to a problem during the negotiations leading up to the conclusion of the contract.

³⁸² *Commercial Bank of Australia Ltd v Amadio* (1983)151CLR 447.

5.6.4 Fairness in Australian Context

Another focus of the Australian Consumer Law is the fairness of terms in standard contracts. To be 'unfair', the following three elements or criteria are referenced:

- (a) the term would cause significant imbalance in the parties' rights and obligations under the contract.
- (b) that the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by them; and
- (c) that it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on. The onus will be on the respondent to establish otherwise.

In determining whether a term of a standard form contract is unfair a court may take into account such matters as it thinks relevant but must take into account the following: The extent to which the term is transparent; and the contract as a whole.³⁸³

A term is transparent if the term is: (a) expressed in reasonably plain language; and (b) legible; and (c) presented clearly; and (d) readily available to any party affected by the term. Equity furthermore intervenes where one party has taken advantage of a 'special disability' (most commonly age, illiteracy, lack of education or a combination of factors) held by the other. The resulting transaction must normally also be harsh and oppressive to the weaker party. Where established the weaker party may choose to avoid the transaction.³⁸⁴

³⁸³ Sharpe A "Australian Consumer Law on Unfair Contract Terms Legislative comment" Computer and Telecommunications Law Review 2010 130.

³⁸⁴ Clarke J 'Australian Contract Law ebook-unconscionable' *conduct*" 2012 (<http://www.australiancontractlaw.com/law/unconscionable>)(accessed 20/11/2012).

The inclusion of unconscionable conduct in the Trade Practices Act is a codification and extension of the equitable principle of 'unconscionability' which was clarified as a cause of action in the case of *Commercial Bank of Australia v Amadio*.³⁸⁵ The High Court of Australia held that an act was unconscionable if a party to a transaction is under a 'special disability', the other party is or ought be aware of that disability, and that other party acts in a way that makes it unfair or unconscionable to accept the offer of the weaker party.

The court held in *Louth v Diprose High Court of Australia*³⁸⁶ that although the concept of unconscionability is wide, there is no 'general power to set aside bargains simply because they appear to be unfair, harsh or unconscionable'. The 'equitable jurisdiction exists when one of the parties 'suffers from some special disability or is placed in some special situation of disadvantage'.

A recent case that illustrates this point of taking advantage of a person's disability, is *Kakavas v Crown Melbourne Ltd*.³⁸⁷ On the issue of unconscionable conduct based on problem gambling, the trial judge did not accept the argument that Crown was seeking to exploit Kakavas' addiction. He stated (at para 11) 'he was not a person so helplessly entrapped by his love of cards that he found it impossible to resist Crown's attentions'.

³⁸⁵ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

³⁸⁶ *Louth v Diprose High Court of Australia* (1992) 175 CLR 621; [1992] HCA 61(para 37).

³⁸⁷ *Kakavas v Crown Melbourne Ltd* (2013) HCA 25 (5 June 2013) (High Court of Australia).see also *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; [1983] HCA 14.

His Honour observed that Kakavas was fully aware of his right to self-exclude and used his bargaining power to threaten withdrawal of patronage. There was no inequality of bargaining power 'which is the essence of a claim that a person with a special disadvantage or disability has been unconscientiously exploited'³⁸⁸. At the time of Kakavas return to Crown, Crown had no conception of Mr Kakavas as suffering from any kind of relevant disadvantage. There was, indeed, no inequality of bargaining power, and no exploitation of, or any plan to exploit, any special disability from which Mr Kakavas might have been suffering.³⁸⁹

The trial judge observed that, in the absence of knowledge of the interstate exclusion order, Crown could not be guilty of taking unconscientious advantage of any disability Kakavas might be suffering by virtue of his own ignorance of the effect of that order.³⁹⁰

Some specific areas terms may be struck without reference to the unconscionability standard. For example, liquidated damages that are clearly over-compensatory are considered punitive and unenforceable penalties and are dealt with under legal provisions specifically relating thereto.

³⁸⁸ par 16.

³⁸⁹ par 21.

³⁹⁰ par 27.

5.7 Consumer Protection in India

5.7.1 Outline

Consumer awareness has increased due to the growth of industrialisation and urbanization. Along with the rapid growth of industrialisation, new market techniques were developed which influenced the economic and social culture.³⁹¹ The Constitution imposes a duty on the State 'to promote the welfare of the people' by securing and protecting a social order in which justice, social, economic and political shall inform all the institutions of the national life.³⁹²

Over the past 20 years, India has experienced rapid economic growth which has transformed its positions in the world and their impact on the planet.³⁹³ In India, Consumer Protection Act of 1986 (hereinafter the 'Indian CPA') is the statute specifically governing consumer protection. It is interesting to note that the Act doesn't seek to protect every consumer within the literal meaning of the term. The protection is meant only for the person who fits in the definition of 'consumer' given by the Act.³⁹⁴

³⁹¹ Kumar, N 'Consumer protection in India' 1999 3.

³⁹² Article 38 (1) Indian CPA 1986.

³⁹³ India is part of the BRICS developing nations: Brazil, Russia, India, China and South Africa.

³⁹⁴ s2(d) of the Indian Consumer Protection Act says that consumer means any person who—

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

Under this law, Separate Consumer tribunals have been set up throughout India in each and every district in which a consumer can seek redress. The procedures in these tribunals are relatively less formal and more people friendly and they also take less time to decide upon a consumer dispute when compared to the long times taken by the traditional litigation procedures.³⁹⁵

The Indian Consumer Protection Act³⁹⁶ is a milestone in the history of socio-economic legislation in the country. It is one of the most progressive and comprehensive pieces of legislations enacted for the protection of consumers. It was enacted after an in-depth study of consumer protection laws in a number of countries and in consultation with representatives of consumers, trade and industry and extensive discussions within the Government. The main objective of the Act is to provide for the better protection of consumers.³⁹⁷ Unlike other laws, which were punitive or preventive in nature, the provisions of this Act are compensatory in nature. This means that the courts can set aside contracts or amend where they are unconscionable or unfair.

The principle of unfairness in contracts has, however, been embodied for more than a century into Indian contract law by the Indian Contract Law Act of 1872.³⁹⁸ These are referred as separate set of general provisions to deal with unfair terms of contracts. While a law to deal with unfairness in contracts is necessary, the more important aspect is the division of unfairness into 'procedural' and 'substantive' unfairness. Such a division has not been done in any country so far, but there are several articles by jurists that such a division is necessary.³⁹⁹

³⁹⁵ *Lucknow Development Authority v M.K Gupta*, AIR 1994 (1) CPR 569.

³⁹⁶ Act of 1986.

³⁹⁷ Agrawal M 'Consumer behavior and consumer protection in India' 2009 51.

³⁹⁸ S14, s16 and s19A Indian Contract Law Act of 1872.

³⁹⁹ Law Commission of India 199th report on unfair (procedural and substantive terms in Contracts 2006 3.

The common law maxim '*caveat emptor*' (let the buyer be aware) which was placed on the buyer to protect his own interest, protected the seller against any action for damages sustained due to defects in goods. With the increase in the volume of production and distribution, the problems suffered by consumers became prominent and consumer groups started asserting their claims.

5.7.2 Consumer Protection Act of 1986

The protection provided for under this statute is available for anything done in good faith.⁴⁰⁰ The term good faith has not been defined in the present Act. Good faith is defined in General Clauses Act, as follows a thing shall be deemed to be done in 'good faith' where it is done honestly.⁴⁰¹ Being aware of possible harm to others, and acting in spite thereof, is acting with reckless disregard of consequences. This legal presumption is drawn through the well-known hypothetical reasonable man. Reckless disregard of consequences and *mala fides* stand equal, where the actual state of mind of the actor is relevant.⁴⁰²

The importance of the Consumer Protection Act lies in promoting welfare of the society by enabling the consumers to participate directly in the market economy. It attempts to remove the helplessness of a consumer against powerful business establishments described as 'a network of rackets or a society in which, producers have secured power to rob the rest and the influence of the public bodies which are degenerating into store house of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous considerations leaving the common man helpless, bewildered and shocked'.⁴⁰³

⁴⁰⁰ Aggarwal M 'Commentary on the Consumer Protection Act 198' Delhi: Law house, 2003 33.

⁴⁰¹ s3(22) of the General Clauses Act, 1897.

⁴⁰² *Ibid.*

⁴⁰³ Aggarwal 169.

5.7.3 The Role of Good Faith in India

When a question exists as to the good faith of a transaction between the parties, the party who is in the position of active confidence has the burden of proving good faith⁴⁰⁴. A party who is induced by undue influence to enter into a contract may avoid the contract.⁴⁰⁵ The concept of undue influence is broader than this concept in South Africa. It actually refers to what other countries would classify as unconscionable conduct.

The party asserting unconscionability need not produce direct evidence of actual undue influence rather, the court presumes undue influence under the assumption that the stronger, more influential party used his or her superior bargaining position to obtain an advantage over the weaker party.

5.7.4 Unconscionable Contracts in India

To fully understand the concept of unconscionability in Indian contract law, one must examine specific provisions of three different statutes. These include sections 14, 16 and 19A of the Indian Contract Act of 1872; section 20 of the Specific Relief Act of 1963; and section 111 of the Indian Evidence Act of 1872.⁴⁰⁶

5.7.4.1 Indian Contract Law

In interpreting the Act, it is usually not permissible to import the principles of English common law, unless the Indian statute cannot be understood without applying English common law principles. Although the Act is not considered a complete code it nevertheless constitutes exhaustive legislation applicable to all Indian provinces.

⁴⁰⁴ The burden of proving unconscionability under Section 111 of the Indian Evidence Act of 1872.

⁴⁰⁵ s19A of the Indian Contract Act of 1872.

⁴⁰⁶ s 202-203.

Consequently, a number of attempts were made to improve the law of contract. For example, after the passage of the Sale of Goods Act of 1930 and the Indian Partnership Act of 1932, the corresponding chapters of the Act were repealed. The Act does not cover all aspects of contract law, but, rather, has been supplemented by a number of other statutes.⁴⁰⁷

Section 14 Indian Contract Law-Consent is said to be free when it is not caused by -
(1) coercion, as defined in section 15, or (2) undue influence, as defined in section 16, or(3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or(5) mistake, subject to the provisions of section 20,21, and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

Section 16 of the Act defines undue influence in the following manner:

- (1) A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to obtain an unfair advantage over the other.
- (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another: Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

⁴⁰⁷ Sarin ML "Contract conscionability in India" *Loyola of Los LA International Comparative Law Review* 1992 570.

- (3) Where a person who is in position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in opposition to dominate the will of the other.

Indian is a better country because of its extended terminology on what constitute 'unfair trade practices' and conferred express additional right.

s2 1.4-1 *What is an Unfair Trade Practice*⁴⁰⁸- The Act says that, 'unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely—

- (1) The practice of making any statement, whether orally or in writing or by visible representation which—
- (i) falsely represents that the goods are of particular standard, quality, quantity, grade, composition, style or model;
 - (ii) falsely represents that the services are of a particular standard, quality or grade;
 - (iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
 - (iv) represents that the goods or services have sponsorship, approval performance, characteristics, accessories, uses or benefits which such goods or services do not have;
 - (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
 - (vi) makes false or misleading statement concerning the need for, or the usefulness of, any goods or services;
 - (vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;

⁴⁰⁸ Indian Contract Act 1872.

- (viii) makes to the public a representation in a form that purports to be a warranty or guarantee of a product or of any goods or services; or a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;
- (ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf other representation is made;
- (x) gives false or misleading facts disparaging the goods, services or trade of another person.

The courts argument was that unlike fraud, unconscionable conduct involves unfairness.⁴⁰⁹ The Supreme Court in India has concluded that the doctrine is based substantially on the principles of English law. In the leading case of *Tate v Williamson*,⁴¹⁰ Lord Chelmsford explained the doctrine of undue influence: whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which necessarily grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation existed.

⁴⁰⁹ Luis R; Garcia F "The autonomy principle of the letters of credit" *Mexican Law Review* 2007 (3) 4.

⁴¹⁰ *Tate v Williamson* (1886) LR 2.

5.7.5 Adjudication of unfair contractual terms in India

The Consumer Protection Act, 1986 is a social legislation to achieve the goal of economic justice by relieving the consumer from exploitation. And for this purpose there is provision in the Act that no court fee is payable for making complaints before the Consumer Disputes Redress Agencies⁴¹¹. Some legal experts have, however criticized non-payment of court fees on the complaints being filed under the Act by stating that it has led and will further lead to false and frivolous litigation thereby causing unnecessary harassment to the opposite parties.

Section 19 A of the Act empowers Indian courts to void a contract induced by undue influence. Yet, even before this Act, the equitable doctrine of undue influence grew out of a perceived necessity to grapple 'with insidious forms of spiritual tyranny and with the infinite varieties of fraud'.⁴¹²

Because of general lack of information on the part of consumers, many trade practices may result in causing loss or damage to the consumers. It is well known that many of the traders having advance information, or on speculation regarding rise in price of different articles, in order to avail the increase in the price, withhold the supply of goods or articles to the consumer. The object and purpose of the Consumer Protection Act is to save the consumers from unfair conduct and practice of the traders.⁴¹³

Traditionally, Indian courts have scrutinized cases involving one party's spiritual dominance over another, and cases involving unscrupulous persons enriching themselves at the expense of expectant heirs. In such cases, even a trace of undue influence suffices to invalidate the transaction as unconscionable.⁴¹⁴ The idea of free consent in contracts triggers the possibility that undue influence may arise⁴¹⁵. A contract is rendered void whenever a confidence is betrayed and influence is abused.

⁴¹¹ Aggarwal 918-919.

⁴¹² *Allcard v Skinner* (1887) 36 Ch D 145.

⁴¹³ Aggarwal M318.

⁴¹⁴ Manmohan LS "Contract Unconscionability in India" 1992 *Loyola of Los Angeles International and Comparative Law Review* at 574-575.

⁴¹⁵ s16 of the Indian Contract Act of 1872.

5.8 Conclusion

Many countries have adopted legislation that provides consumer protection. In UK, USA, Australia and India the courts may take judicial action against unfair terms, in addition to which preventative control may also be used against unfair terms. South African legislation is generally an underlying principle of an explanatory and legitimating rather than an active or creative nature.

In neither of these comparative law countries nor South African contract law is there an active general principle of good faith and in all systems the role of good faith is to inform and explain the rules of the law of contract and, when necessary, to provide the basis for amending these rules. However, good faith is recognised as an independent or free-floating basis for the setting aside or amendment of a contract.

CHAPTER 6

CONCLUSION

Contracts that comply with legal requirements are interpreted based on the reasonable reliance upon the consensus of the parties. Fairness and reasonableness is already incorporated in the principles that agreement must be obtained properly. All these factors cannot ensure justice in every instance where a contract is put into operation. The question remains as how the law can ensure fair operation of a particular contract.

The one route that may have enabled the courts to effectively guard against unfair terms, the *exceptio doli generalis* was unceremoniously expelled from South African law in the much criticised judgement in *Bank of Lisbon* case. In his dissenting judgment Jansen JA argued for the retention of the *exceptio doli*. He expressly pointed to unequal bargaining power of the parties to a contract. This inequality can be caused not only by the status of the parties, but also by the unconscionable conduct of the one, and the unfairness of the proposed contract clause. The removal of the *exceptio doli generalis* left a void in South African law that could have accommodated a wide variety of scenarios and have been applied to a diverse range of circumstances for which equity would require awarding the innocent party the right to justice and redress.

Notwithstanding the elimination of the *exceptio doli* in *Bank of Lisbon Case*⁴¹⁶, the courts can still apply principles of good faith, public policy and recently the statutory provisions of the new Consumer Protection Act 68 of 2008, to correct unfair contracts according to criteria that appear to be similar to the underlying values of the *exceptio doli*.

The minimum requirement for the application of the *exceptio doli generalis* was 'unconscionable conduct'. Relying on this type of conduct entails a defence of bad faith in the general form and constitutes a substantive defence based on sense of justice of the community and public policy.

⁴¹⁶ *Bank of Lisbon case*.

Though this defence was abolished in the *Bank of Lisbon* case⁴¹⁷ its spirit still lived on in other common law factors such as undue influence, duress and the broad requirement of public interest to support an equitable outcome. A statutory defence similar to the *exceptio doli generalis* could now, after the introduction of the CPA, be invoked as a defence to prevent the enforcement of unfair or unconscionable terms in contracts as clearly outlined the parameters of this defence by the legislature in Section 40 of the CPA. The CPA extends this to ensure fair, just and reasonable consumer agreements.

Shortly after the *Bank of Lisbon* case⁴¹⁸, in the case of *Sasfin (Pty) Ltd v Beukes*⁴¹⁹ the court invoked public policy to declare a contract unenforceable. This principle of using public policy to evaluate the validity of a contract does not have an unlimited scope of operation. Van der Merwe correctly contends that 'simple justice between man and man' in the parties' individual capacities cannot alone determine the public interest.⁴²⁰ More guidance is required due to this uncertainty, statutory descriptions could assist in providing guidelines and boundaries to assist in the determination of what public policy specifically entails.

Section 2 of the CPA⁴²¹ provides that when interpreting the Act, courts may consider foreign and international law. Furthermore, no provision must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.⁴²² In many jurisdictions across the world, the defence of 'unconscionability' and criteria of 'fairness' and 'good faith' are contained in statutes and are being used by courts in many jurisdictions across the world to ensure equitable decision. In other jurisdictions the descriptions of, and tests on what would constitute 'unconscionable conduct' have been developed and their meanings extended by the statutes and courts. Due to a lack of jurisprudence in our immature South African consumer law, we would be

⁴¹⁷ Supra fn 17.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 347(A).

⁴²⁰ Van der Merwe 'Contract General Principles' 219.

⁴²¹ s2(2)(a); s2(2)(b).

⁴²² s10 CPA.

well-advised to investigate other jurisdictions that could offer us some guidance where uncertainty arises.

The Act states that in any matter brought before the National Consumer Tribunal, or a court, must⁴²³ develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally.⁴²⁴ These provisions are specifically addressed to the courts, and refer not to a mere power to develop the common law, but expressly call on the courts to develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and particular by persons contemplated in section 3(1)(b) of the CPA.

The extent to which legal systems accept responsibility to ensure justice by means of the principles and rules which apply to specific areas of the law as well as through more general concepts may vary considerably. It is clear that in most jurisdictions, contracts of adhesion⁴²⁵ are enforceable except to the extent that the contract or a term in the contract is found to be unconscionable. Contracts of adhesion were known in Roman law, and the first form of consumer contracts were mostly standard form contracts of adhesion. Concepts such as 'unconscionable', 'fair' and 'reasonable' are used internationally to determine the validity of these contracts. The problem of legal indistinctness that this creates has no simple answer. The law of contract navigates between clauses that have the advantage of predictability and the imprecise principles that have the advantage of flexibility.

Hoffman's view of the *exceptio doli generalis* can be summarised as follows: The principle that contractual obligations are to be complied with is strongest when there was actual agreement on the obligations sought to be enforced; it has some force when the conduct of one of the parties leads the other to rely on a particular interpretation of the words used (i.e. when there is apparent agreement); it has no force (apart from a generalised sense in which all legal institutions should

⁴²³ Own emphasis.

⁴²⁴ s4(2)(a) CPA.

⁴²⁵ Contracts of adhesion are contracts that are so imbalanced, that the one party can write the contracts and prescribe the terms and conditions to his advantage, and present it to the other on a 'take it or leave it' basis: (<http://www.legal-dictionary.com/Adhesion+Contract>) (accessed 23/05/2013).

be respected) when the contract is a construction of a person or body other than the parties, such as a court.⁴²⁶

According to Kerr, this means that it is a necessary prerequisite for the primary application of the maxim that what the parties understanding of the contract is and what the parties actually intended, and that evidence of this be admissible. Another angle of approach is to focus on specific remedies, the grounds and requirements for which can be developed in accordance with changing convictions of what is just and fair as Roman law afforded one such remedy, namely the *exceptio doli generalis*.⁴²⁷

Good faith has always been a fundamental principle of our law, though its role is limited. In *Brisley v Drotsky*,⁴²⁸ the Supreme Court of Appeal held that good faith could not be used as an independent ground for setting aside or refusing to enforce contractual provisions. While the abstract idea of *bona fides* was a foundation and justification for legal rules, it could 'perform creative, informative and controlling functions through established rules of contract law'.⁴²⁹ Some hold the opinion that courts should refer instead to rules of hard law. In this way, legal certainty could be preserved. In terms of the latter view, the courts would be justified, even obliged, to develop the technical rules of the common law.⁴³⁰

From the above it may be concluded that while the parties' autonomy and the freedom to contract should be wide, it is nevertheless not absolute and may be limited by the common law, statutes and international conventions. But since the very quintessence of the freedom of choice is an expression of individual autonomy, any attempt to limit party autonomy should be exercised with considerable restraint whether by a court of law or by a law of general application.⁴³¹

⁴²⁶ "Project 47" at 258.

⁴²⁷ Van der Merwe 'Contract General Principles' 4th edition 279.

⁴²⁸ *Brisley v Drotsky* 2002 (4) SA 1; see also Chapter 2; *Barkhuizen v Napier* 2007 (5) SA 323 (SCA) 333E.

⁴²⁹ Bennett 286.

⁴³⁰ Par 73.

⁴³¹ Van der Bank C. M. "Ventures into the minefield: Equity and fairness no defence for restraint of trade" *Journal of Law and Conflict Resolution* Vol. 3(3) at 50-57.

Despite recent case law, contracts have proven resistant to Ubuntu,⁴³² although a possible general reception of the concept in this area is a more complex matter. It could well be argued that contract law already has specific mechanisms to deal with the type of problems which Ubuntu addresses. Public policy is being used in order to seek support for an equitable approach. At first sight, public policy would seem to embrace the ideas of Ubuntu and justice, for it stands for the general sense of justice of the community, the *boni mores*, manifested in public opinion.⁴³³ Thus it has been suggested in this work; good faith could set an objective standard for evaluating the conduct of negotiating parties, and so create adequate certainty in law. Good faith, as it expresses the notion of ordinary business, respect and social justice, accords with the broader concept of Ubuntu, and as such is doubly entitled to a place in the array of constitutional values.⁴³⁴

The notion of party autonomy and its application therefore may still be subject to constitutional scrutiny, irrespective of attempts to regulate contractual relationships by statute. The judicial power to modify unconscionable contracts may be based on the norm of good faith and may be exercised through the process of contractual interpretation.⁴³⁵ The wide terminology and descriptions on the Consumer Protection Act appears to be nothing less than a statutory restoration of the *exceptio doli generalis* and a codification of its extent.⁴³⁶

The Consumer Protection Act introduces a single, comprehensive legal framework for consumer protection which outlines the entitlements of consumers and the responsibilities of suppliers. The Act is far-reaching, ambitious and the first legislation of its kind in South Africa. Whilst the Act

⁴³² Fn 54.

⁴³³ Bennett 261.

⁴³⁴ *Everfresh* case par71.

⁴³⁵ Aggarwal 405.

⁴³⁶ See chapter 2.

aims to protect all consumers, the focus in many instances is on vulnerable consumers, being the previously disadvantaged, uneducated, illiterate, etc.

Some may argue that the balance has shifted to the consumer, my belief is that properly embraced the Consumer Protection Act will allow actually empower the corporate alongside the consumer. This will ultimately lead to a better experience for all. The danger is that the principles may not adequately cater for every business eventuality and that the uncertainty created through the removal of established common law principles will result in increased litigation and a lack of confidence in the South African economy. Despite the plain and understandable language requirement included in the Act, the Act itself is not user friendly and will probably be very difficult for the average legally inexperienced South African consumer or supplier to make sense of.

As a final concluding remark, one may say that the rules of the law of contract reflect the attempts in the legal system to achieve a balance between relevant principles and policies so as to satisfy prevailing perceptions of justice and fairness. For this reason, the law of contract by necessity has a dynamic and changing nature.⁴³⁷ Providing a statute such as the Consumer Protection Act with open-ended terms will allow the courts a wide-ranging discretion to interpret and apply these principles to attain equity and provide effective justice for the 'little brother'⁴³⁸ in a contractual relationship. This pushes us right back to the times when the *exceptio doli generalis* could be invoked to attain the goals we still strive for today. The protection of the weak and innocent against the unconscionable conduct and unfairness brought upon by the strong.

WORD TOTAL: 40 094

⁴³⁷ Van der Bank CM "Ventures into the minefield: Equity and fairness no defence for restraint of trade" *Journal of Law and Conflict Resolution* 2011 (March 3(3) 50-57.

⁴³⁸ Own emphasis.

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